

AN ANALYSIS OF INTERNATIONAL LAW, NATIONAL LEGISLATION, JUDGEMENTS, AND INSTITUTIONS AS THEY INTERRELATE WITH TERRITORIES AND AREAS CONSERVED BY INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

REPORT NO. 4

NAMIBIA



Stockholm Resilience Centre
Research for Governance of Social-Ecological Systems



Stockholm
University

KALPAVRIKSH



Environmental
Action Group

NATURAL JUSTICE

The ICCA
Consortium

“Land is the foundation of the lives and cultures of Indigenous peoples all over the world... Without access to and respect for their rights over their lands, territories and natural resources, the survival of Indigenous peoples’ particular distinct cultures is threatened.”

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Cover Photo: Khwe community representatives from Namibia and Botswana participate in a workshop in the Bwabwata National Park, Namibia. © Natural Justice

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ACRONYMS

ABS	Access and Benefit Sharing
CBD	Convention on Biodiversity
CBNRM	Community-based Natural Resource Management
CLB	Communal Land Board
DoF	Directorate of Forestry
FMC	Forest Management Committee
IRDNC	Integrated Rural Development and Nature Conservation
IUCN	International Union for the Conservation of Nature
HWC	Human Wildlife Conflict
KA	Kyaramacan Association
LWUA	Local Water User Association
MAWF	Ministry of Agriculture, Water and Forestry
MET	Ministry of Environment and Tourism
MLR	Ministry of Lands and Resettlement
MME	Ministry of Mines and Energy
MWCT	Ministry of Wildlife Conservation and Tourism
NACSO	Namibian Association of CBNRM Support Organisations
NGO	Non-governmental Organisation
NP	National Park
PA	Protected Area
TA	Traditional Authority
WPC	Water Point Committee
WUA	Water User Association

INTRODUCTION

Across the world, areas with high or important biodiversity are often located within Indigenous peoples' and local communities' conserved territories and areas (ICCAs). Traditional and contemporary systems of stewardship embedded within cultural practices enable the conservation, restoration and connectivity of ecosystems, habitats, and specific species in accordance with indigenous and local worldviews. In spite of the benefits ICCAs have for maintaining the integrity of ecosystems, cultures and human wellbeing, they are under increasing threat. These threats are compounded because very few states adequately and appropriately value, support or recognize ICCAs and the crucial contribution of Indigenous peoples and local communities to their stewardship, governance and maintenance.

In this context, the ICCA Consortium conducted two studies from 2011-2012. The first (the *Legal Review*) analyses the interaction between ICCAs and international and national laws, judgements, and institutional frameworks. The second (the *Recognition Study*) considers various legal, administrative, social, and other ways of recognizing and supporting ICCAs. Both also explored the ways in which Indigenous peoples and local communities are working within international and national legal frameworks to secure their rights and maintain the resilience of their ICCAs. The box below sets out the full body of work.

1. Legal Review

- An analysis of international law and jurisprudence relevant to ICCAs
- Regional overviews and 15 country level reports:
 - *Africa*: Kenya, Namibia and Senegal
 - *Americas*: Bolivia, Canada, Chile, Panama, and Suriname
 - *Asia*: India, Iran, Malaysia, the Philippines, and Taiwan
 - *Pacific*: Australia and Fiji

2. Recognition Study

- An analysis of the legal and non-legal forms of recognizing and supporting ICCAs
- 19 country level reports:
 - *Africa*: Kenya, Namibia and Senegal
 - *Americas*: Bolivia, Canada, Chile, Costa Rica, Panama, and Suriname
 - *Asia*: India, Iran, the Philippines, and Russia
 - *Europe*: Croatia, Italy, Spain, and United Kingdom (England)
 - *Pacific*: Australia and Fiji

The *Legal Review* and *Recognition Study*, including research methodology, international analysis, and regional and country reports, are available at: www.iccaconsortium.org.

This report is part of the legal review and focuses on Namibia. It is authored by Brian T. B. Jones.¹

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1. COUNTRY BACKGROUND COMMUNITIES & ICCAS

1.1 Country

Namibia has a total land area of approximately 825 000 sq. km and a population estimated at 2 million. Namibia is the driest country south of the Sahara, with average rainfall varying from above 600 mm in the north-east to less than 25 mm in the Namib desert to the west. Rainfall is erratic both temporally and spatially leading to large localised differences in precipitation and large fluctuations from one year to the next. Drought is a regular occurrence.

Prior to Independence in 1990, Namibia was administered by South Africa which applied its own *apartheid* policies particularly in terms of land ownership and allocation. At Independence, 40.8% of the land had been allocated to the black homelands, which supported a population of about 1.2 million, while 43% had been allocated as freehold land to white commercial farmers. 13.6% was allocated to conservation in state protected areas and a small percentage was unallocated land.

Communal land is held in trust by the State for the benefit of traditional communities, members of which have usufruct rights over the land and its resources such as grazing. Communities therefore do not have strong tenure rights over the land as a group. Traditional authorities are officially recognized by the State and allocate customary land rights for residential and crop growing purposes. Traditional Authorities also have the legal right to allow or refuse persons permission to use common grazing lands and to limit numbers of livestock that may use the common grazing. The lack of group land tenure is a major constraint for communities trying to manage their land and its natural resources sustainably because it is difficult for them to exclude others from using the land and resources.

While Namibia is ranked as a low-middle income country, it has a highly skewed distribution of income and an official unemployment figure of 51%. According to the Central Bureau of Statistics 41.5% of Namibian households are poor (i.e. they have monthly expenditures of less than N\$ 262.45 or approx. US\$37 per adult equivalent) with the incidence of poverty in rural areas at 38.2 per cent (CBS, 2008). The majority of the population lives in the rural areas and is dependent on natural resources for supporting day-to-day livelihoods.

1.2 Communities & Environmental Change

1.2.1 Indigenous people and local communities

There are several major ethnic groups in Namibia: The Owambo, Herero, Damara, Nama, Kavango, German, Afrikaans, English, San, Fwe and Subia. However, most main groups have their own sub-groups often with their own dialects and own land territories. While to some extent these land territories represent areas originally occupied by a particular group, this is not always the case. Many people were removed from the land they occupied as part of the creation of an *apartheid* homeland system under South African colonial rule. For example the Damara "homeland" was created in the semi-arid north-west of the country although Damara groups had occupied land in eastern Namibia and parts of what is now the capital, Windhoek.

The term “indigenous people” is not widely used in Namibia. Most black or Bantu groups consider themselves “indigenous” particularly compared to whites. Although Bantu groups are indigenous to Africa they were not the original inhabitants of southern Africa and arrived in Namibia around 500 years ago (Suzman 2001). The San groups are thought to have occupied large parts of southern Africa for thousands of years before the arrival of Bantu people (Fisch 2008). The Nama or Khoekhoe are closely related to the San and have occupied areas of southern Africa for around 30 000 years (<http://www.khoisanpeoples.org/peoples/index.htm>). Nama groups lived north and south of the Orange River, which is now the southern border between Namibia and South Africa. From this perspective, the San (of which there are several different groups) and the Nama can be considered as the indigenous peoples of Namibia, although generally the Nama are not given the same status or attention as “indigenous people” as the San.

The World Bank Safeguard Policy OP 4.10 on Indigenous People recognises some of the problems in identifying specific groups of indigenous people and notes that there is no universally accepted definition (World Bank 2005). In Namibia for example, the Himba are a small group of semi-nomadic pastoralist people living in the semi-arid north-west of Namibia. They meet many of the criteria provided by the World Bank i.e they are a distinct vulnerable, social and cultural group which identifies as a distinct cultural group and is recognised as such by others; they have a collective attachment to geographically distinct ancestral territories and their natural resources; they have customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture. However the Himba are descendants of Bantu people who were part of the migration into southern Africa about 500 years ago and are related to the Herero. Many Himba still wear traditional dress and have few material possessions because of their semi-nomadic lifestyle. They are considered primitive by other Namibian groups and in need of “development”.

Most rural communities in Namibia are pastoralists but those in the wetter areas of the north and north east combine livestock farming with cropping. In Kavango and Caprivi people living near major rivers also depend on fishing to a large extent. Although Namibia is bordered in the west by the Atlantic Ocean, due to the aridity of the Namib Desert people did not settle permanently along the coast in pre-colonial times and no communal marine fishing has taken place on any significant scale.

1.2.2 Drivers of biodiversity loss and threats to cultural and linguistic diversity

The main driver of biodiversity loss is habitat conversion (deforestation) in areas suitable for cropping. While livestock farming need not lead to habitat conversion, in some areas of the country overgrazing has led to severe bush encroachment, reducing plant diversity and, it is assumed, reducing the diversity of smaller animals and insects. In many livestock farming areas large mammal diversity was reduced, but this trend has been reversed over the past 40 years as freehold and communal farmers have gained legal use rights over wildlife, leading to wildlife population increases on many freehold farms and in certain communal areas (see below).

The San and Himba are the groups which face the foremost threats to their language and culture. These threats come mostly from intermarriage with people from other groups and because their numbers are small compared to other ethnic groups.

1.2.3 Ongoing conservation of biodiversity by communities

Prior to the era of colonial domination in Namibia (which began in 1883) wildlife was regarded as a resource used as part of rural people's livelihood strategies. Control over use was regulated by traditional authorities, religious taboos and low technology methods of hunting. Smaller human populations meant that hunting had a lower impact. In some areas, such as the Caprivi Region of Namibia, only certain game species could be hunted while species such as hippopotamus could only be hunted by royalty. Chiefs set specific times when large scale hunting could take place, and these times were when game animals had already produced their young (Hinz 1999). Generally in Namibia, territorial conservation practices have not endured partly due to historic dislocations of people and the rural governance context described above. In addition, Hinz (1999:23) suggests that "the relatively efficient implementation of the modern hunting law rendered many customs and rituals useless or deprived them of their basis. In other words, it cut the lifeline to nature." Sacred sites of any significant size for biodiversity conservation are therefore not common.

However some facets of pre-colonial conservation resource management practice have survived. In some parts of the country chiefs maintained exclusive hunting areas which laid the foundation in some cases for modern day protected areas and in other cases for the core wildlife areas within communal area conservancies (see below). Customary law in Namibia is recognised under the country's constitution as having the same status as statutory law as long as it does not conflict with the constitution and statutory laws. Although the use and enforcement of customary law has been disrupted by various colonial administrations, Hinz and Ruppel (2008) show how self-stated customary laws directly or indirectly contribute to the conservation of biodiversity on communal land. They demonstrate that customary laws exist for the protection of fish, water, grazing and forest products in several northern communal areas, although their enforcement can be problematic (see Box 1 for examples). Where these laws are enforced and where they lead to the maintenance of natural habitat, they help to enhance biodiversity conservation. Enforcement depends very much on the individual interest of headmen and chiefs in enforcing these laws as well as the extent to which customary institutions are held to be legitimate.

In north-west Namibia semi-nomadic Himba and Herero pastoralists in the past maintained plant and animal biodiversity and largely undisturbed landscapes through their range management systems. However, the provision of artificial water points considerably disrupted the pastoralists' traditional rotational grazing systems and led to widespread degradation of the palatable shrub and perennial grass cover in the vicinity of natural springs and artificial water points (Owen-Smith and Jacobsohn, 1991). There have also been considerable social changes among the Himba with young people looking to a formal "western" education and wage labour in the towns as the way ahead in life. Many younger men have no desire to work as herders and this also affects the ability of people to maintain appropriate grazing management regimes.

In some areas of Kunene however, pastoralist systems still appear to be sustainable. Behnke (1997) concluded that grazing systems in the Etanga area were finely tuned to local environmental conditions and it was difficult to see how the project he was working for could technically improve on existing grazing management. According to Behnke the local grazing management had been based on the seasonal use, resting and rotation of grazing areas as far as possible adjusting stocking pressure to annual rainfall and forage production in a semi-arid environment.

Box 1. Examples of Provisions in Namibian Customary Law that promote biodiversity conservation

The Uukwaluudhi Traditional Authority (TA) in northern Namibia, especially under the current Chief, King Taapopi, has a long history of involvement with the management of natural resources (Aribeb and Mosimane 2010). The TA has passed several decrees under customary law in order to ensure sustainable harvesting of natural resources such as devils claw and mopani worms as well as the use of wells and seasonal water pans. These decrees represented an effort to address loopholes that existed in national laws relating to these resources (Aribeb and Mosimane 2010).

Other examples are as follows (Hinz and Ruppel 2008:58):

- The Laws of Oukwanyama provide for the protection of trees (fruit trees in particular), plants and water. It is an offence to cut fruit trees, and all water has to be kept clean.
- The Laws of Ondonga provide for the protection of trees with specific reference to fruit trees, palm trees and the marula tree (section 8), and the use of fishing nets in the river is prohibited without permission from the traditional authority (section 19).
- The Laws of Uukwambi provide for the protection of water (section 13), the protection of trees (section 14A), wild animals (section 14B), and grass (section 14C).
- The Laws of Sambyu provide for the protection of water: anyone who pollutes or contaminates water commits an offence (section 16).
- In the Caprivi Region, the Laws of Masubiya prohibit the cutting of fruit trees (section 37), causing veld fires (section 36), and the use of fishing nets to catch small fish (section 39).

Community-based conservation as a more formal approach in Namibia emerged as a response to the drought and poaching in north-west Namibia in the early 1980s. Garth Owen-Smith of the NGO, the Namibia Wildlife Trust and conservation official Chris Eyre worked with local traditional leaders and other community members who were concerned by the decline in wildlife numbers (Owen-Smith 2010). They helped local communities establish a network of community game guards and Owen-Smith with researcher Margaret Jacobsohn established a pilot project to bring tourism revenue to the Puros community as an incentive for conservation of local wildlife. Significantly, community leaders and many residents agreed to take on some responsibility for conserving wildlife before there was any prospect of economic benefit (Jones 2001). The exercise of responsibility and regaining some control over a resource from which people had been alienated by the State, appear to

have provided sufficient incentive to conserve wildlife, and wildlife numbers (including black rhino) began to recover (Durbin et al 1997). Owen-Smith and Jacobsohn formed an NGO called Integrated Rural Development and Nature Conservation (IRDNC) and also began working with local communities in the Caprivi Region.

From 1990-92 the Ministry of Wildlife Conservation and Tourism (MWCT), created after independence by the new government, carried out with IRDNC and other NGOs a series of participatory "socio-ecological surveys" in various communal areas (see e.g. Brown and Jones 1994). These identified key issues and problems from a community perspective concerning wildlife, conservation and the MWCT. Significantly all the communities involved in these surveys indicated that they did not want to see wildlife disappear from their areas. The communities also said they wanted the same rights over wildlife as the white freehold farmers. Government officials then began developing policy and legislation that would provide people with these rights.

A new policy on wildlife management and tourism on communal land was developed and approved by Cabinet in 1995. One of the main objectives of the policy was to reverse the discrimination under South Africa's *apartheid* legislation in Namibia by ensuring that black communal farmers had the same rights over wildlife and tourism as white freehold farmers.

In 1996, the National Assembly approved the Nature Conservation Amendment Act, which provided for rural communities to form conservancies and gain use rights over wildlife and tourism within the conservancies (see below). The first four conservancies were registered by government in 1998. Following the community-based approach in the wildlife sector, the government also later developed policy and legislation that provided for the establishment of community forests, 13 of which have been registered by government.

1.3 Indigenous Peoples' and Local Communities' Conserved Territories and Areas (ICCAs)

1.3.1 Range, diversity and extent of ICCAs in Namibia

Two types of ICCA can be distinguished in Namibia: Informal and formal. Informal ICCAs are those that have been established as a result of community norms and practices while formal ICCAs have been established since Namibia's Independence in 1990 under new legislation that promotes a modern form of community-based natural resource management.

As noted above informal ICCAs have largely been incorporated into protected areas or communal area conservancies and community forests. For example, the Nkasa-Lupala National Park in Caprivi Region was proclaimed around an area used for hunting by the Mafwe Chief, while the Mudumu National Park in Caprivi was proclaimed in an area that had remained unsettled by people and which was also used as a traditional hunting ground. Also noted as noted above, sacred sites large enough to be important for biodiversity conservation are not common and there is no communal marine fishing.

Many of the areas managed by Himba and Herero pastoralists in the north west of Namibia have been incorporated into conservancies.

The two types of formally recognised ICCAs in Namibia are communal area conservancies and community forests, both of which are formed under national legislation. Both are common property resource management institutions which communities form themselves in order to manage natural resources. Conservancies receive rights over wildlife and tourism while community forests receive rights over forest products and grazing. Both are considered in more detail below.

In early 2012 there were 71 conservancies managing 149 829 km² of communal land while 13 community forests covered 4,652 km² although this includes some overlap with conservancies. Conservancies and community forests cover about 18% of Namibia's land surface compared to 16.6% covered by national parks and game reserves. A number of communities are combining forest management with wildlife management and seven registered and 31 emerging community forests overlap in some way with conservancies. Figure 1 below provides the location and area of the 71 registered conservancies, 13 community forests and Namibia's state-run protected areas.

Conservancies and community forests are the main components of Namibia's Community-based Natural Resource Management (CBNRM) Programme, which is led by the Ministry of Environment and Tourism (MET) for conservancies and the Ministry of Agriculture, Water and Forestry(MAWF) for community forests and supported by a variety of NGOs and international donors.

1.3.2 Governance and management of ICCAs

i. Conservancies

Institutional arrangements within conservancies are to some extent prescribed by legislation which requires a committee to be formed to represent conservancy members and requires the conservancy to have a constitution that provides it with a legal *persona*. The regulations accompanying the legislation prescribe that certain things must be covered by the constitution, but these are mostly standard constitutional provisions such as providing for election, annual general meetings, etc. In addition, the legislation prescribes that the sustainable use of wildlife must be one of the objectives of the conservancy. However, conservancies are able to decide for themselves on any other objectives they wish to pursue, and can decide how they wish to structure the conservancy. Some therefore have executive committees as well as management committees and others have devolved structures within the conservancy in an attempt to promote more local level involvement.

Importantly, the legislation enables communities to define themselves and conservancies are not based on government political or administrative delimitations. Communities have to agree on their borders with neighbours in order for a conservancy to be registered. This approach enables people who want to work together to cooperate to manage wildlife.

Another important feature is that conservancies directly earn income from wildlife management and tourism - they do not receive revenue that is shared with the State as in several other countries within southern Africa. Conservancies retain 100% of the income they earn.

In areas such as the Caprivi Region conservancies have strong links to traditional authorities (TAs) which in several cases led the process of conservancy formation. In areas where traditional leadership is less strong, such as in the north-western Kunene Region, conflicts arose between traditional authorities and conservancies. The process of conservancy formation was led by local community leaders rather than the TAs which then saw conservancies as competing for control over resources. Usually the solution was for TA representatives to be co-opted onto conservancy committees and for conservancies to provide cash or some other form of benefit such as game meat to the TAs.

Conservancy membership is defined by each conservancy's constitution. Usually all residents over the age of 18 are eligible for membership and many conservancies require members to have been resident in the area for more than five years.

All members are able to vote in elections for committee members, who are expected to manage the conservancy's finances and report on the use of income to the membership. Committee members are expected to ensure that income is used in a way that benefits conservancy members. Legislation requires that the conservancy must have an established procedure for deciding how benefits will be distributed before it can be registered by MET.

Encouraged by NGOs, most conservancies have developed management plan frameworks, which incorporate various plans for specific activities such as tourism, human-wildlife conflict management, land use zoning, etc. The management plan frameworks also usually include policies for staff management, vehicle use, employment, etc.

Conservancies carry out a number of wildlife management activities. Many conservancies have appointed their own community game guards and some have appointed female community resource monitors. These game guards and resource monitors are either paid for directly by conservancies from their own income, or where new conservancies are only starting to generate income, the salaries are paid by external grants to the conservancies. The game guards and resource monitors remain in their local areas and report to the conservancy committee. They are responsible for ensuring the sustainable harvesting of natural resources, preventing poaching, and monitoring wildlife. Game guards and resource monitors use an approach called the "Event Book" system for monitoring game animals, human wildlife conflict and other natural resources, based on the priorities for monitoring established by each conservancy (Stuart-Hill *et al* 2005). Data that game guards and resource monitors collect in simple records of "events" are collated on a monthly basis throughout the year and then at the end of the year to show an annual trend in population numbers, human-wildlife conflict incidents, etc.

In addition, most conservancies carry out annual game counts in conjunction with MET and NGOs. In parts of Caprivi, conservancy game guards carry out joint anti-poaching patrols with MET staff within conservancies and National Parks. Game guards from several conservancies in eastern Caprivi along the Kwando River combine to form a joint unit for monitoring wildlife reintroduced to conservancies by MET. In Kunene Region game guards monitor black rhino re-introduced into conservancies by MET.

Conservancies also develop simple game management plans in order to meet government requirements, but supported by NGOs also develop broader wildlife and natural resource management plans that include:

- a. Zoning of land for different land uses
- b. Types of wildlife use (e.g. trophy hunting, hunting for meat, live sale of game animals, and photographic tourism).
- c. Strategies for dealing with Human-Wildlife Conflict (HWC) which include:
 - i. Self-insurance schemes
 - ii. Prevention of conflict (e.g. protection of water points against elephants, alternative water points for elephants away from people and livestock, various uses of chilli to keep elephants out of crop fields, construction of anti-crocodile fencing to facilitate safe use of rivers).
 - iii. Development of HWC management plans

There are a number of governance challenges within conservancies that have been documented (NACSO 2010):

- a) In some conservancies, committees have taken all the major decisions themselves without involving members;
- b) Especially in the case of finances, members did not have the opportunity to approve conservancy budgets drawn up by the committees;
- c) In a few cases large sums of money were unaccounted for;
- d) Some committee members voted themselves large loans;
- e) Many conservancies were spending all their income on operational costs (including allowances for committee members) leaving little for community benefit;
- f) In many conservancies there was little involvement of members in developing constitutions.

Lubilo (2009) reported on the results of a governance monitoring programme (the Dashboard Survey) conducted among five conservancies in Caprivi Region between May and June 2009. The survey found that while some conservancies were doing better than others, generally the following problems were being encountered:

- a. Lines of accountability were extremely weak.
- b. Serious concern among conservancy members about the lack of benefit and projects was creating apathy towards the conservancy concept, and even causing resentment towards it.
- c. Constitutions were outdated, were often internally contradictory and unclear regarding procedures, and were consequently almost never being used.
- d. The flow of information from committees to members was weak.

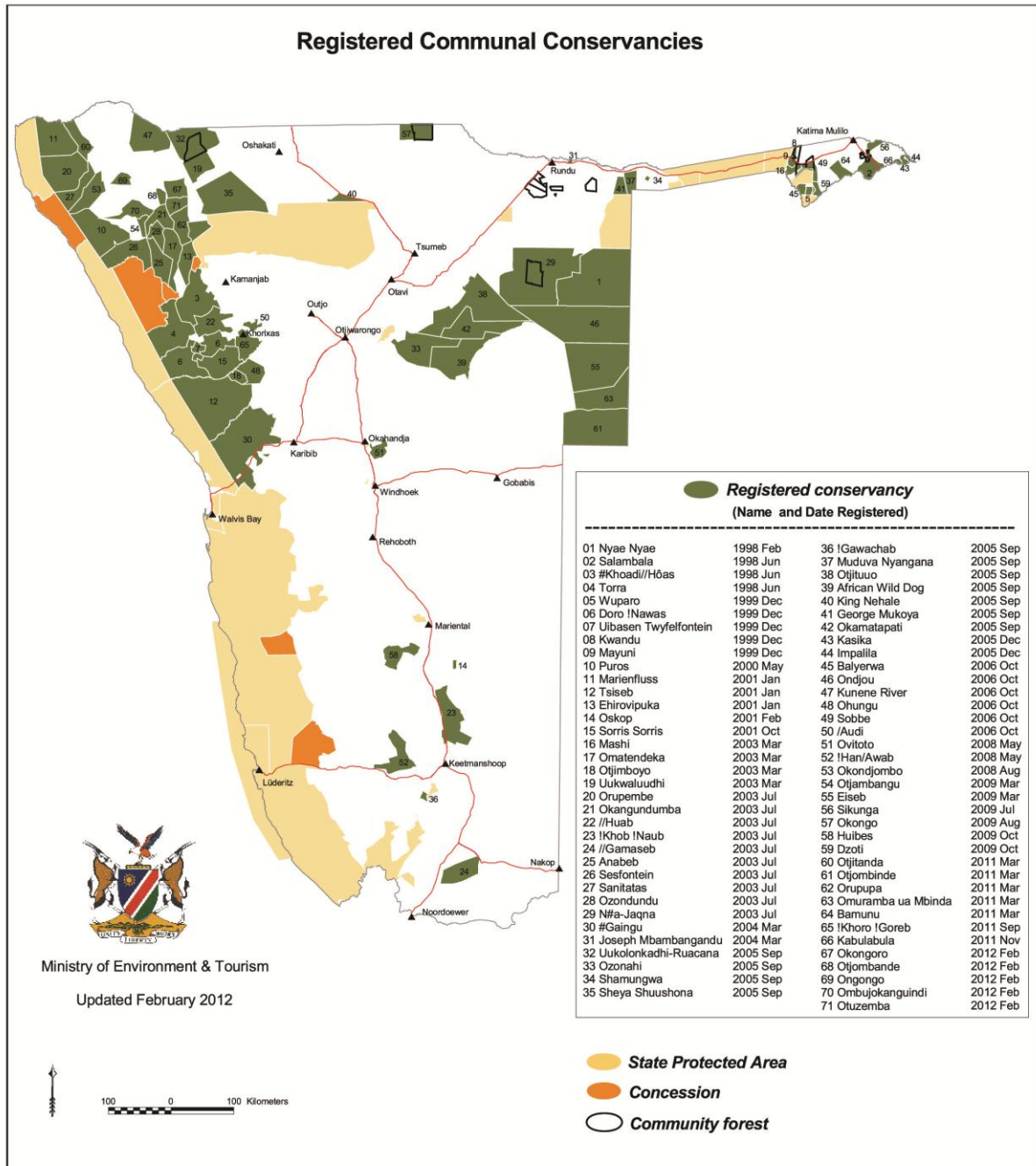


Figure 1. Conservation areas in Namibia.

In addition, conservancy membership can be a somewhat complicated and controversial issue. The legislation requires a list of conservancy members to be established before the conservancy can be registered by MET. This was so that MET could be satisfied that there was a substantial number of residents in favour of forming the conservancy rather than a small clique. Further, some NGOs have encouraged conservancies to continue to keep membership lists arguing that residents need to show willingness to be a member and commitment to the objectives of a conservancy if it is to be a successful common property resource management institution. The NGOs further argued that a list of members would be useful when conservancies distributed cash dividends to households or individual members. However, in practice many conservancies seem to view all residents as members and argue

that they cannot leave a resident out from benefits just because they were not on a membership list. This situation has led to confusion among conservancies and support agencies as to who is or is not a member of a conservancy. By contrast, all residents with a traditional land right in a community forests are recognized legally as members.

The Namibian CBNRM programme has embarked on several initiatives to address the governance issues identified above (NACSO 2009). Many conservancies have revised their constitutions in participatory processes that have engaged members who were not involved in the development of the original constitutions. Conservancies have received considerable training and follow up technical support in financial management. They have been encouraged to include community benefits in budgets which are approved at Annual General Meetings instead of being developed and implemented by conservancy committees without community approval.

The conservancy system of ICCAs represents a formalized approach provided for in legislation that establishes incentives for wildlife management based around income generation. This then requires formal structures and mechanisms for managing and accounting for income and its expenditure. This in turn drives institutional arrangements and struggles for control of power and decision-making. However, the system is not fully top down. As described above, MET and NGOs carried out socio-ecological surveys in local communities and the development of policy and legislation was a direct response to community demands for rights over wildlife and tourism.

ii. Community Forests

The institutional arrangements for community forests are also to some extent determined by legislation. Under the Forestry Act, No. 12 of 2001 (GRN 2001 Section 15):

“The Minister may, with the consent of the chief or traditional authority for an area which is part of communal land or such other authority which is authorized to grant rights over that communal land enter into a written agreement with any body which the Minister reasonably believes represents the interests of the persons who have rights over that communal land and is willing to and able to manage that communal land as a community forest”

This paragraph effectively defines the members of the community forest as the persons who have rights over the communal land where the community forest is being established. This could include people resident in the area as well as people living elsewhere who have traditional rights to the land. The legislation is vague though, concerning the type of body or institution that would take decisions and act on behalf of the members. For example there is no legal requirement for a community forest to acquire a legal *persona* through adopting a constitution, although the non-binding Community Forestry Guidelines published by the Ministry of Agriculture, Water and Forestry state that the development of a constitution for the community forestry management body is one of the steps to be followed in the formation of the community forest. However, the Guidelines do not provide a model constitution or any indication of what should be included in a constitution.

The written agreement with the Minister is the main mechanism by which rights to use forest resources are afforded to the community forest. However, these rights are further defined by a management plan which must be included in the agreement. Community forests, like conservancies retain 100% of the income they derive from forest management including timber harvesting.

Kojwang (2011) identifies the following challenges to community forest governance and management:

- A number of Forest Management Committees (FMCs) fail to submit the necessary monthly reports, despite the reports being a necessary requirement for continued financial support by government and its donor partners.
- In some community forests management plans are still weakly developed and are not realistic on what the communities can and should expect. Hence there is often a mismatch between reality and expectations; a serious issue which tends to demotivate FMC and other members
- Lack of or inadequate incentives for FMCs, particularly in emerging community forests is causing already trained FMC members to move to other activities,
- The limitations on income generation other than timber, are a threat to the timber resources and de-motivating to those that cannot derive any income due to non-availability of marketable timber resources in their areas.
- Business development partnerships are scarce and trustworthy ones are even more scarce.
- Some community forests have been affected by boundary problems, particularly in the Caprivi Region where new traditional chieftanships have been gazetted by government but without clearly defined territorial boundaries. This has caused problems in the signing of the necessary consent documents for emerging community forests.
- The integration of resource management plans and management committees where community forests and wildlife conservancies have spatial overlaps.

1.3.3 Main threats to communities' governance of territories, areas and natural resources

i. Lack of group land tenure

Perhaps the most important threat to Namibian conservancies and community forests and all community land and resource management is the lack of secure and exclusive group *land* tenure to underpin the rights that are legally provided with regard to use and management of natural resources. If communities cannot prevent other people from using the land they wish to set aside for wildlife and tourism, then there remains little incentive to maintain wild habitats. There is little likelihood that management inputs and investments will be rewarded and the land might as well be converted to grazing for livestock or crop lands. Further, a lack of secure land tenure means that communities cannot easily raise capital loans themselves based on their land as security. It is also more difficult for communities to attract investors as partners in tourism joint ventures where rights to the land are not secure and the investment risk is therefore higher. Under communal land legislation, conservancies need to work closely with traditional leaders in order to limit access to land as

these leaders allocate access to livestock grazing. Community forests are given stronger rights than conservancies in the sense that they are able to control access to grazing, a right specifically referred to in the Forest Act.

However, the lack of group tenure affects community forests as well as conservancies. Government views communal land as “State Land” over which it can take decisions about how the land is used. For example, the Ministry of Lands and Resettlement has developed plans for the establishment of small-scale commercial livestock farms to be leased by individuals on communal land. Several of these blocks of farms are in conservancies, but there was no consultation either with MET or the conservancies when the farms were planned. One of the blocks of farms is in a conservancy adjacent to the Etosha National Park and if developed, these farms will suffer high losses to predators. Another example is from the Caprivi Region where government has also approved the development of small scale commercial livestock farms as well as a large crop farming scheme, on the same area of land that is already partially incorporated into conservancies and community forests.

ii. Human wildlife conflict

As indicated above, management of wildlife by ICCAs in Namibia has contributed to a decline in poaching and a considerable increase in wildlife numbers. However, an increase in wildlife numbers has brought an increase in human-wildlife conflict (HWC). In the dry Kunene Region predators kill livestock and elephants damage water installations at settlements and cattle posts. In Caprivi, although livestock are killed by predators close to National Parks, damage to crops by elephants is the biggest problem. Crocodiles also threaten livestock and people along the rivers. One of the main principles of the Namibian CBNRM approach is that for local communities to manage wildlife sustainably the benefits from management need to outweigh the costs. However, most benefits from conservancies are at the community level rather than the household level, where the impacts of HWC are most felt. The current high level of support for conservancies among rural people could start to wane if they perceive that the costs of HWC outweigh the benefits they receive through conservancies.

iii. Overlapping sectorally-based institutions

Another important issue is the extent to which sectoral policy and legislation have created potentially competing and overlapping community institutions for natural resource management. Although the community forest legislation to some extent built on the conservancy legislation there are some important differences. Community forests, as indicated above, have rights over a wider range of resources and their membership is inclusive rather than exclusive. The community forest rights are linked to a management plan and agreement with the Minister, while conservancy rights are defined in the legislation itself. In addition water points committees are provided for under water legislation and are given wide powers of control over land in the immediate vicinity of water points. Fisheries legislation provides for the establishment of inland fisheries committees.

Clearly there is a need for some consolidation and harmonization of approaches. There are already moves to explore how conservancies and community forests can be integrated and some communities have already achieved this. The MET and the MAWF have agreed that

integration is desirable and NGOs are supporting conservancies and community forests to find ways of meeting the conditions of both sets of legislation. One of the main requirements for harmonization is that conservancies align their membership definition with the more inclusive language of the Forest Act (see below). This often requires the revision of conservancy constitutions. It would be useful though to have an overall policy for community management of natural resources that promotes integrated approaches within a territorially based ICCA that also has secure land rights.

1.3.4 Key initiatives to address the threats to ICCAs

The Ministry of Lands and Resettlement is currently carrying out a review of communal land tenure. The consultants carrying out the review have made proposals that would build on existing policy in order to strengthen group land rights. If these proposals are accepted by government they would go a long way towards addressing many of the governance and resource management problems on communal land. The proposals would enable local communities to identify their land and exclude others from using the land and its resources without their permission. The proposals would also go some way towards integrating land and resource management rights, which are currently separated under sectoral legislation (see below).

The Namibian national CBNRM programme is working with conservancies in particular to address HWC and to increase the benefits from wildlife and tourism that reach individual households most affected by HWC. The Ministry of Environment and Tourism and the Ministry of Agriculture, Water and Forestry are cooperating with NGOs to support the integration of conservancies and community forests where appropriate and to develop strategies that promote the integration of resource management at local level.

2. LAND, FRESHWATER AND MARINE LAWS & POLICIES

2.1 Policy and Legislation

2.1.1 Land

i. Policy

The National Land Policy of 1998 provides that tenure rights allocated according to the policy and consequent legislation will include all renewable natural resources on the land, subject to sustainable utilisation and the details of sectoral policy and legislation. These resources include wildlife, tourist attractions, fish, water, forest resources and vegetation for grazing.

Provision is made for various forms of land rights: Customary grants; leasehold; freehold; licences, certificates or permits; and State ownership. Tenure rights will be exclusive, enforcement of which will be supported by law. Among the categories of land rights holder provided for are "legally constituted bodies and institutions to exercise joint ownership rights (and) duly constituted co-operatives". This definition could include such bodies as wildlife conservancies and community forest management bodies.

The policy provides for the administration of communal land to be vested in Land Boards and Traditional Authorities. It makes provision for long term leases (up to 99 years) for the use of communal land primarily for business purposes including tourism activities such as the establishment of lodges.

ii. Legislation

The Communal Land Reform Act (No. 5 of 2002) provides for the establishment of Communal Land Boards (CLBs), places communal land under the administration of the CLBs and Traditional Authorities (TAs) and defines the rights and duties of the land boards, their composition and functions.

Customary land rights for crop land and residential land will be allocated by a chief or Traditional Authority (TA), but must be ratified by the land board, which will then register the grant. Provision is made for residents to have access to common grazing lands subject to conditions made by a Chief or TA including limits on stock numbers or limits on where grazing may take place. The Chief or Traditional Authority may also grant grazing rights to non-residents for a specified or indefinite period. These rights may be withdrawn by the Chief or TA.

The land boards and TAs control the allocation of leases for land (e.g. for agricultural schemes or for tourism activities) and the Act makes provision for certain prescribed maximum sizes of land for a particular form of land use. An application for a lease for an area of land more than 50ha has to be referred to the Minister of Lands and Resettlement.

The Act makes provision for the membership of a CLB to include one person representing the conservancies in the area covered by the CLB and also for MET to be represented. The Act also requires Land Boards, when granting leases to take into account any management or utilisation plans developed by conservancies [Section 31.(4)]:

“Before granting a right of leasehold in terms of subsection (1) in respect of land which is wholly or partly situated in an area which has been declared a conservancy in terms of section 24A of the Nature conservation Ordinance , 1975 (Ordinance No.4 of 1975), a board must have due regard to any management and utilisation plan framed by the conservancy committee concerned in relation to that conservancy, and such board may not grant the right of leasehold if the purpose for which the land in question is proposed to be used under such right would defeat the objects of such management and utilisation plan”

2.1.2 Wildlife

i. Policy

The Policy on Wildlife Management, Utilisation and Tourism in Communal Areas (1995) made provision for communal area residents to form common property resource management institutions called “conservancies”. According to the policy, a conservancy would then gain use rights over wildlife and tourism within its boundaries. Approval of the policy by Cabinet also included approval for the then Ministry of Wildlife Conservation and Tourism to begin drafting legislation to put the new policy into effect.

The MET Policy on the Promotion of Community Based Tourism of 1995 provides a framework for ensuring that local communities have access to opportunities in tourism development and are able to share in the benefits of tourism activities that take place on their land. The policy recognises that where tourism is linked to wildlife and wild landscapes, the benefits to local communities can provide important incentives for conservation of these resources. The policy document states that MET will give recognised communal area conservancies the concessionary rights to lodge development within the conservancy boundaries. Based on the above, government has recognised the right of conservancies to develop tourism on their land and enter into joint venture contracts for lodge development with private tourism companies. This approach is strengthened in the new National Tourism Policy of 2008 which recognises conservancies as the mechanism by which benefits from tourism should reach rural communities. However, there is as yet no tourism legislation to put this policy approach fully into effect and the Nature Conservation Amendment Act, of 1996 does not really provide strong rights over tourism. It provides conservancies with rights to “non-consumptive use” of wildlife which is further defined as use for recreational purposes, but no further details are given. Along with the policy provisions described above, this is used by government to ensure that conservancies can develop tourism activities within their boundaries and to promote the approach that a conservancy in effect has a concession right for tourism lodge development on its land.

The Policy on Tourism and Wildlife Concessions on State Land (2007) enables the Minister of Environment and Tourism to allocate concessions in Protected Areas directly to local communities. It states that in awarding concessions to communities, the MET will:

- Award concessions directly to communities with representative, accountable and stable community institutions that are legal entities with the right to enter into contracts on behalf of a defined community ;
- Give priority to communities that are resident inside protected areas or are immediate neighbours, as these are the people who suffer most costs caused by wildlife as well as loss of access to land and resources;
- Use concessions to mitigate the costs that such communities suffer, to provide incentives for them to support the objectives of the protected area, and to stimulate local economic growth;
- Provide assistance and guidance in the negotiation of beneficial agreements with joint venture partners or investors, and technical assistance to access business management skills and resources;
- Ensure that the communities are not exploited in any sub-agreement or joint venture with other partners; and
- Ensure that community organizations or representative bodies entering into concession agreements with the State act in accordance with their mandate from their members.

The policy provides key principles and guidelines for the awarding of concessions to communities living adjacent to or in protected areas, guidelines for the management of the concessioning process and an environmental and development checklist for concessions.

ii. Legislation

The Nature Conservation Amendment Act, of 1996 enables the Minister to register a conservancy if it has the following:

- a representative committee
- a legal constitution, which provides for the sustainable management and utilisation of game in the conservancy
- the ability to manage funds
- an approved method for the equitable distribution of benefits to members of the community
- defined boundaries

Once the registration of a conservancy is published in the Government Gazette, the conservancy gains the “ownership” of huntable game (see below) which means the conservancy can hunt these species for its own use without permit or quota from government. The conservancy also qualifies for use rights through permitting and quota systems to capture and sell game, and carry out trophy hunting. The conservancy approach can be viewed as rights-based in the sense that the rights and obligations of local communities with regard to wildlife and tourism are entrenched in legislation. The area of land delimited by the conservancy boundaries is officially declared and the boundaries recorded in the Government Gazette. In summary conservancies gain the following use rights:

- ✓ The conservancy can use huntable game (oryx, springbok, kudu, warthog, buffalo and bushpig), as it wishes for its own use.
- ✓ The conservancy can enter into a contract for a trophy hunting company to buy the conservancy’s trophy hunting quota.
- ✓ The conservancy can enter into a contract for a tourism company to develop a lodge or lodges and other tourism facilities.
- ✓ The conservancy can suggest trophy hunting and other quotas to MET, but MET must approve the quota. In order to make quota proposals, the conservancy needs to monitor its wildlife and be aware of numbers and population trends.
- ✓ The conservancy (or at least individuals within the conservancy) can shoot most problem animals if necessary without a permit, except for elephants and hippo.
- ✓ If a conservancy wants to reduce wildlife numbers in order to reduce competition with livestock in time of drought it can reduce the numbers of huntable game if the meat, hides etc. are for own use. It can also apply to MET for a permit for removal of other species because of drought.
- ✓ The conservancy can apply to MET for a permit to carry out other forms of game utilisation, such as live capture and sale of wildlife or the use of protected species.
- ✓ The conservancy receives all income directly from its tourism and wildlife activities and does not receive this income from the state or have to share it with the state. Conservancies decide how to use their income with no interference from the state.

There are other management activities that conservancies can take that are not provided for in the legislation:

- They can undertake land use planning and zoning of areas for wildlife and tourism (but land legislation does not adequately provide for enforcement of such zoning)

- They can develop tourism plans and regulations (but again there is no legislation to enable enforcement by the conservancies)
- They can use water and salt licks as management tools to maintain wildlife in the conservancy or in specific areas
- They can employ game guards to deter poaching and to monitor wildlife

It should be noted that conservancies do not receive land rights. This means that they do not have the power to enforce land use planning and zoning decisions, particularly with regard to people moving in from outside the conservancy. This is one of the main gaps in the conservancy legislation.

2.1.3 Forestry

The Forest Act (No. 12 of 2001) makes provision for the establishment of various types of "classified forest". These are: State Forest Reserves, Regional Forest Reserves and Community Forests. According to the Act, the Minister may enter into a written agreement for the establishment of a community forest covering a specific area of communal land. The agreement may be with any body that the Minister believes represents the interests of the persons who have rights over that area of communal land. The agreement may only be entered into if the relevant chief or traditional authority which is authorised to grant rights over the land gives their consent.

The agreement shall (GRN 2001 Section 15):

- i. Identify the geographical boundaries of the proposed community forest
- ii. Include a management plan for the proposed community forest
- iii. Confer rights, subject to the management plan, to manage and use forest produce and other natural resources of the forest, to graze animals and to authorize others to exercise those rights and to collect and retain fees and impose conditions for the use of forest produce or natural resources.
- iv. Appoint the body which is party to the written agreement to be the management authority to manage the community forest in accordance with the management plan
- v. Provide for equal use of the forest and equal access to the forest produce by members of the communal land where the forest is situated
- vi. Provide for adequate reinvestment of the revenues of the forest and for the equitable use or distribution of the surplus

The rights provided under point iii above afford communities with control over a broader suite of resources than is provided for by the conservancy legislation.

Residents of community forests may harvest forest produce and dispose of it as they wish without a licence, but in accordance with the management plan, in which harvest quotas will be set. Wood can be harvested for household fuel or for building purposes subject to the management plan. Subject to the relevant management plan, the Director of Forestry determines the quantity of forest produce for which a licence may be issued in any forest reserve or a community forest and the maximum quantity of produce that may be harvested. The elected management authority of a community forest may dispose of forest

produce from the community forest or permit the grazing of animals, the carrying out of agricultural activity or the carrying out of any other lawful activity.

The hunting of wild animals in a classified forest (including community forests) may take place only in accordance with the management plan for the area, regardless of any authorisation that may have been issued under the Nature Conservation Ordinance (4 of 1975). The Act also provides for fire management and makes the setting of fires an offence in certain circumstances.

2.1.4 Inland Fisheries

The Inland Fisheries Resources Act (No. 1 of 2003) provides for the conservation and protection of aquatic ecosystems and the sustainable development of inland fisheries resources and the control and regulation of inland fishing (GRN 2003). The Act enables the Minister to determine the general policy for the conservation and utilisation of the inland fisheries resource. It provides for the flexibility to determine the policy for a particular area. This must be done in consultation with the relevant regional council, local authorities and traditional authorities.

Provisions regarding licences and registration of nets for commercial fishing do not apply to subsistence fisheries by means of traditional fishing gear.

The Minister may declare any area of inland water to be a fisheries reserve on his/her own initiative or in response to an initiative of a regional council, local authority or traditional authority if the Minister believes that this will promote the conservation of the fisheries resource and related ecosystem. No fishing may take place in a fisheries reserve without the written permission of the Minister.

The Act does not provide explicitly for community-based fisheries. It does however enable the Minister to delegate powers to regional councils, local authorities or a person nominated by a traditional authority. The Act makes provision for regulations to be made establishing inland fisheries committees and determining their powers and functions. However, at present no such regulations have been promulgated.

2.1.5 Water

The Water Act (No. 24 of 2004) provides for the establishment of Water Point User Associations (WPUA) comprising all rural community members or households using a particular water point on a permanent basis. Each Association will be represented by a Water Point Committee (WPC) of between 5 and 10 members elected by members of the Association. The WPC carries out the daily management of water points including maintenance and management of finances.

The Act also provides for the establishment of a Local Water User Association (LWUA) constituted by any number of WPUA's sharing a single rural water supply scheme. The WPUA's and LWUA's are established for the purpose of managing communal area water supplies "on a cost recovery basis in order to foster a sense of ownership among the users, to promote economic development and to ensure sustainability of such services". They can register with the Minister as a body corporate subject to having a 'satisfactory' constitution.

WPUA's and LWUA's have the right to allow other non-member water users to use their scheme or water point, determine rules for the use of the water point by members and non-members, exclude any person from the water point and prevent wastage of water by any person.

2.1.6 Marine

Marine legislation is not relevant for ICCAs in Namibia. There are no marine ICCAs as there are no in-shore coastal communal fisheries. According to Nichols (cited in Mapaire 2008) no indigenous marine fishery communities exist in Namibia, and there is no artisanal marine fishing. According to Mapaire (2008) only the Topnaar are known to have practiced marine fishing in a traditional fashion regulated by customary law. Their traditional system broke down under colonial rule which was established over their territory (now Walvis Bay) from 1878.

2.2 Tenure and Recognition Issues

Namibian legislation provides for formal community-based management of natural resources through legally established institutions for the management of water, forests, and wildlife. The wildlife and forestry legislation in particular provide for territory based institutions which can be described as formal ICCAs with legal recognition and implementation support from government.

However, as indicated above, there is no provision for group land tenure, which undermines the ability of communities to manage their land and resources sustainably. Government tends to view all communal land as State-owned land and assumes the right to take decisions regarding land use – for instance the development and allocation of small-scale individual farms on communal land or large agricultural schemes discussed above. This position is based on Article 100 of the Namibian constitution which states that “Land, water and natural resources below the surface of the land... shall belong to the State if they are not otherwise lawfully owned”. However, some legal opinions argue that communal land is indeed lawfully owned by the various traditional communities (Harring and Odendaal 2002).

In addition, according to Section 17(1) of the Communal Land Reform Act of 2002: “all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities”. It can be argued that holding land “in trust for the benefit of traditional communities” is not the same as State ownership. However, the government position on State ownership of communal land has never been tested in court.

Government policies generally do not recognise land rights of marginalised groups. A resolution taken at the National Conference on Land Reform and the Land Question just after independence in 1991 states that the land rights of disadvantaged communities should receive special protection and the San and disabled people are specifically mentioned in this regard (PTT 2005). However, the only policy document that follows up on this statement is

the National Resettlement Policy of 2001 that singles out the San as a specific target group for resettlement (PTT 2005).

The Traditional Authorities Act of 2000 recognises TAs as legal entities. It provides for the establishment of such authorities and their designations, elections, appointments and recognition of traditional leaders, to define their powers, duties and functions. The Act stipulates that Traditional Authorities should ensure that natural resources are used on a sustainable basis and in a manner that conserves the environment and maintains the ecosystem.

One of the primary functions of the TAs is to ensure the observance of the customary law of the specific community. Customary law in Namibia is recognised under the Constitution as having the same status as statutory law as long as it does not conflict with the constitution or statutory laws. As indicated above, Hinz and Ruppel (2008) suggest that self-stated customary laws can directly or indirectly contribute to the conservation of biodiversity on communal land. They demonstrate that customary laws exist for the protection of fish, water, grazing and forest products in several northern communal areas, although their enforcement can be problematic.

Observations from several northern communal areas suggests that customary law is supported less by younger people, but works relatively well within a cohesive community. It is less effective in preventing outsiders from appropriating communal resources.

There are several threats to community land and resource rights which need addressing. One of these is the illegal fencing of communal land by wealthy elites to create large cattle ranches for themselves. There are more than 1 000 such farms on communal land, some of which have been allocated through TAs but many of which have been grabbed for free (Mendelsohn 2006). Such enclosures of land mean less communal grazing is available for poor farmers, which then places more pressure on smaller areas of land. In addition enclosures sometimes take place within conservancies or community forests. Sometimes they might take place with the permission of the TA, sometimes individuals simply go ahead and fence off land with no authority. Government has tried to take action on the fencing issue but so far has been ineffective.

So far Namibia has not been subject to large-scale land grabs by large foreign agricultural companies, largely because most of the country is unsuitable for crop farming. However, one such scheme has been given approval by government in Caprivi Region in the north east which takes up a large area of communal land.

Mining activities have the potential to affect community land and resource rights. All minerals below the soil belong to the State according to the constitution. The Ministry of Mines and Energy (MME) allocates prospecting and mining licences. Applications for such allocations are made through an inter-ministerial committee chaired by the MME. It is the role of the Ministry of Environment and Tourism to raise concerns or objections where applications affect conservancies or tourism concessions on communal land. However, recently prospecting has been allowed in two tourism concession areas in Kunene Region that have been awarded to conservancies, causing delays to tourism development.

Conservancies would like to see MET being more effective on the inter-ministerial committee that deals with mining applications.

3. PROTECTED AREAS, ICCAS AND SACRED NATURAL SITES

3.1 Protected Areas

3.1.1 Policy and legal framework

The Nature Conservation Ordinance of 1975 provides for the establishment of game parks and nature reserves by the state.

3.1.2 Consistency with international definitions

The Ordinance does not provide specific definitions of game parks or nature reserves and does not distinguish between them. The Ordinance states in Section 14 (1), that game parks or nature reserves may be established “for the propagation, protection, study and preservation therein of the wild animal life, fisheries, wild plant life and objects of geological, ethnological, archaeological, historical and other scientific interest and for the benefit and enjoyment of the inhabitants of the Namibia and other persons”. Broadly speaking this is consistent with the CBD and IUCN definitions of protected areas, however, the ordinance does not in any way follow the IUCN typology of protected areas. Currently most of the large protected areas are called National Parks although this does not give them any more protection than when they were simply called game parks. Only the Etosha National Park has any higher status than other game parks – its boundaries can only be changed by legislation, whereas the boundaries of other game parks can be amended by the Minister.

The MET provides recognition of conservancies as part of the national Protected Area (PA) network. The MET map of the network includes state-run PAs, communal area conservancies, freehold land conservancies and private reserves (MET 2010). Neither freehold conservancies nor private reserves are provided for in legislation however.

3.1.3 Institutional framework and dynamics

MET is mandated to develop and implement laws and policies regarding protected areas. Where people reside within a state-run protected area, other ministries also have jurisdiction. These ministries include, Lands, Agriculture/Water, Rural Development, Health and Education. In the case of the Bwabwata National Park, other ministries often undertake activities or make new developments without reference to MET. These activities include development of agricultural schemes, development of resettlement areas or provision of infrastructure at settlements.

3.1.4 Implementation of POWPA Element 2

With regard to state-run protected areas in two cases, the Bwabwata National Park and the Namib Naukluft Park, people continue to live inside the protected area. However, people were removed from their land in other cases. Hai||om San hunter-gatherers occupied parts of the area of present day Etosha NP for centuries before Game Reserve No. 2 was first

established. Remnant groups of Hai||om continued to live within the park but most families were removed in 1954. According to Hoole (2008a) Herero people occupied and used the western part of present day Etosha from around 1908 until the park was fenced in the early 1970s. The Bwabwata National Park has around 4 000 people living within its boundaries, most of whom are Khwe San. Mbukushu people also lived within the park but were removed by 1970. The Nkasa Lupala National Park (formerly Mamili NP) and the Mudumu National Park were both proclaimed in 1989 as one of the last acts of the South African colonial administration and without final consent from the relevant traditional authority. The Namib-Naukluft Park was proclaimed with the Topnaar Khoi-san people living inside the park, where they mostly still live.

MET has taken some steps to address benefit sharing between parks and residents or neighbours, but has not addressed key governance issues or the rights of park residents. The following assesses implementation of Element 2 of the CBD POWPA:

Goal 2.1: To promote equity and benefit-sharing

Target: Establish by 2008 mechanisms for the equitable sharing of both costs and benefits arising from the establishment and management of protected areas.

Although not specifically provided for in legislation, Namibia has established mechanisms for sharing costs and benefits of protected area management. Communities may be awarded trophy hunting and photographic tourism concessions within parks and thus share the potential financial benefits that can be derived from protected areas as part of poverty reduction and to promote support for protected areas. Several such concessions already exist. The Kwando and Mayuni Conservancies operate camp sites in the Bwabwata National Park under government concessions and these are expected to be upgraded to lodges in the future. The Kyaramacan Association (KA), representing mainly the Khwe San living in the park, have been granted a camp site and lodge concession along the Okavango River inside the park. The KA also shares a hunting concession in the park with the MET. The Ehirovipuka Conservancy in Kunene Region has been awarded a concession in the Etosha National Park. The concession rights allow tourists to be taken into part of the park closed to the general public from a lodge to be built on a former government tourism concession neighbouring the park that was also awarded to the conservancy. Two other former government tourism concessions on communal land have also been awarded to conservancies in Kunene Region.

Despite these policy approaches, no provision is made for recognition of different governance types of protected area under sections of legislation related to the establishment of protected areas. However, as indicated above, conservancies and community forests are forms of ICCA established under different sections of the same legislation (as amended in 1996). No recognition at all is given to private (i.e. on freehold land) nature reserves/game parks.

There is limited formal engagement of indigenous and local communities and relevant stakeholders in participatory planning and governance. In the Bwabwata National Park, residents and other stakeholders are included in an advisory committee established by the MET. However, the MET rangers and community game guards carry out joint anti-poaching patrols and cooperate in game monitoring and game counts within the park.

Goal 2.2: To enhance and secure involvement of indigenous and local communities and relevant stakeholders

Target: Full and effective participation by 2008, of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, consistent with national law and applicable international obligations, and the participation of relevant stakeholders, in the management of existing, and the establishment and management of new, protected areas

Currently neither policy nor legislation recognises the land rights or basic human rights of residents of protected areas. There are no legal provisions for involving park residents or neighbours in park planning, governance or management. Policies focus on provision of benefits, but avoid issues of rights and governance.

3.2 ICCAs Within Protected Areas Systems

Namibia has taken differing approaches to acceptance of ICCAs within state-run protected areas.

The territory of the Khwe San in the West Caprivi Strip has been proclaimed as the Bwabwata NP. The Khwe have lived in the area since the late 19th Century living from hunting, gathering, small-scale cultivation and some livestock. Wildlife was abundant in the area, which was first proclaimed as a Game Park in 1963. The Khwe view the land and its natural resources as theirs despite it being proclaimed as a National Park in 2007. They still hunt and gather for food and as part of their culture. MET accepts their presence in the park and has allocated hunting and tourism concessions to the association that represents the residents. Park staff and residents carry out a number of joint management activities together (see case study below for more details).

A different situation exists with the Etosha NP. It was first established in 1907 as Game Reserve No. 2, but for many years people lived within the park boundaries. According to Hoole (2008a) Hai||om San hunter-gatherers occupied parts of the area of present day Etosha for centuries before Game Reserve No. 2 was first established. Remnant groups of Hai||om continued to live within the park and were permitted to remain and hunt with bow and arrow, so long as they did not poison water and trespass on surrounding farmlands. A Commission for the Preservation of the Bushmen appointed in 1949 recommended the expulsion of the Hai||om from Etosha and most families were removed in 1954. The remaining Hai||om were given jobs in the park and were no longer able to hunt traditionally.

Hoole (2008a) suggests that the Hai||om social system was strongly “coupled” to the ecological system within Etosha because they had well established institutions for the sustainable use of the land around the Etosha Pan, and their society was integrally part of, and interdependent with the water holes, wildlife and plants of this area. The forced removal of the Hai||om meant the people were “decoupled” from the ecological system they depended on and from the cultural associations they had with the land and its resources.

A number of Hai||om continue to live in the park although they are not employed there, particularly those who have retired from government service and have nowhere else to go to. MET has agreed to award a tourism concession in Etosha to the Hai||om based around visits to a waterhole that has cultural and spiritual significance to many of the Hai||om people. This gesture has been welcomed by the Hai||om as providing them with a link back to their traditional land. However, there are several challenges to its successful implementation because the concession is being linked to the resettlement of the Hai||om on freehold farms purchased by the government adjacent to the park. It is not yet clear who among the Hai||om will benefit from the concession, particularly whether the people still living in the park and the descendants of those removed will be significant beneficiaries.

Herero people occupied the western part of Etosha until they were also denied access to the park in the early 1970s. There is considerable evidence that the Herero living on the western boundary of Etosha still have strong links to the land and its resources within the park. Interviews conducted by Hoole (2008a) show how residents want to be buried at their birthplaces in the park, there are many place names inside the park that indicate how people used the area for grazing in the past and which are linked to specific families. They have formed the Ehi-rovipuka Conservancy on their land adjacent to the park and are seeking community forest status in order to manage their own land and resources. Hoole (2008a:164) concludes of their relationship with Etosha: "There is a strong sense of a need for the community to re-couple with its ancestral territory and cultural heritage inside the park". This is because of "a profound and deep loss felt by the Herero of Ehi-rovipuka Conservancy that epitomizes their decoupling from Etosha National Park. They lost not only a special place with water and graze for their cattle, an abundance of wildlife to hunt and field foods to gather. They also lost social memory for the traditional institutions that governed their use of resources such as the wildlife." (Hoole 2008a:218).

As indicated above, the Ehi-rovipuka Conservancy has now been awarded a tourism concession within the park. The concession potentially provides a mechanism for the start of the "re-coupling" with the park that the people desire.

The situation of the Topnaar Khoe Khoe (Khoi-san) still living along the Kuiseb River in the Namib-Naukluft Park is different again. Although they have been allowed to stay in the park there is no formal recognition of their right to be there. Their presence is illegal, although in practice tolerated. They do not have tourism concessions or other means of benefiting from the park apart from grazing their own livestock and the use of local natural resources.

3.3 Sacred Natural Sites as a Specific Type of ICCA

There is no legislation that contains specific provision for governance of sacred sites by indigenous or local communities. What might be viewed by some communities as sacred sites (such as rock art sites) have been designated as National Monuments (without provision for local governance), or in the case of one such site, incorporated in the entrance way to a tourism lodge.

3.4 Other Protected Area-related Designations

Namibia has one World Heritage Site at Twyfelfontein in Kunene Region, which is a site of significant rock art. The site falls within the boundaries of the !Uibasen Twyfelfontein Conservancy, although the actual site is excluded from the conservancy and is administered by the National Heritage Council. The nomination dossier for the site prepared by consultants for the National Heritage Council does not indicate that any formal consultation of the community or the conservancy management took place as part of the nomination process, although the conservancy is acknowledged as assisting in the research that went into compiling the dossier. Yet the World Heritage Site as approved contains a buffer zone that does fall within the jurisdiction of the conservancy. The dossier contained a management plan and stated that the conservancy would need to commit itself to this plan, implying that it had not been part of the process of developing the plan. Citing the poor management capacity of the conservancy as a reason, the dossier recommends that the buffer zone be declared a Conservation Area under the National Heritage Act, which would remove conservancy jurisdiction over the area.

According to ARD (2010) the conservancy committee reported that World Heritage Site planning and zoning was carried out without consultation with the conservancy. The conservancy felt that it was undermined by the National Heritage Act and the declaration of the World Heritage Site which had taken over management of conservancy resources such as the heritage sites.

3.5 Trends and Recommendations

3.5.1 Current trends

The Namibian Government has so far refused to formally recognise the basic rights of the inhabitants of the Bwabwata and Namib-Naukluft protected areas. Although the MET allows people to stay in the parks and use resources there, legislation remains in place which renders the residents' presence in the parks and their everyday activities illegal. Attempts were made in the past by government officials (1998) and consultants (2008) to develop policies regarding park residents and neighbours which would recognise the land rights and basic human rights of residents of these two parks. However, the provisions for recognising rights were watered down and ultimately removed from these policy documents by politicians (Jones 2009).

In 2006 the MET embarked on a process of consultation and *negotiation* regarding the establishment of a People's Park in the Kunene Region, led by the Permanent Secretary and Minister at the time (Jones 2009). The establishment of the park was based on the prior informed consent of the communities concerned after initial resistance to the proposed proclamation of a state-run National Park. Cabinet resolved in 2004 that the three government tourism concession areas in Kunene Region, Hobatere, Etendeka and Palmwag and an area of communal land linking Hobatere and Palmwag should be proclaimed as a national park. The aim was to create a link between the Etosha National Park and the Skeleton Coast Park. The Cabinet called on MET to initiate an intensive consultative management and development planning process for the park.

This process began with a meeting at Hobatere between the MET and local stakeholders on 29 June, 2006. However, community leaders, conservancy representatives and traditional leaders made it clear that they did not accept the idea of a national park that would change the status of the land from communal land. In the face of this resistance by local communities, the then Minister established a technical committee consisting of members of traditional authorities, conservancy representatives, MET staff, a representative of the Regional Council, NGO representatives and the private sector concession holders. The task of the committee was to make recommendations to the Minister about the proclamation of the park. A contract between the communities and the government was drafted for the establishment of the park, which would have been taken to the communities for approval. The contract made provision for the park to be managed by a Joint Management Board with a majority of community representatives. A management plan was developed with the full involvement of community representatives. However, a new Minister and Permanent Secretary refused to allow any type of co-management or contract and the People's park concept has died.

The government position is that communities may benefit from parks but should not be involved in management. This was made clear in September 2009 when the Minister of Environment and Tourism provided new policy guidelines regarding co-management in the context of the negotiations for the establishment of the Kunene People's Park. The Minister made it clear to the Kunene Park Technical Committee that joint management was not possible. In addition the Minister explained that the government's policy was as follows (Jones 2009):

- Cabinet must have the ultimate say in the management of protected areas
- Communities must benefit from protected areas through revenue sharing which must be covered by a contract between the government and the communities
- Communities must be consulted in the management of parks through the establishment of advisory committees.

At the same time as the People's Park negotiations were taking place, the MET was developing new parks and wildlife legislation that would have recognised community conserved areas and private nature reserves. These provisions were removed from the latest drafts of the proposed new legislation. The draft legislation is still under review, however, and there are indications that there could be opportunities for some of the deleted provisions to be re-instated.

3.5.2 Recommendations (based on Jones 2009)

In order to meet the expectations of Namibian communities affected by protected areas; in order to meet the targets and resolutions of the CBD and IUCN; and in order to improve conservation of biodiversity in Namibia it is recommended that MET adopt policies that are implemented in legislation and provide for:

- 1) Recognition of the rights and development opportunities of people living within protected areas
- 2) The conclusion of *negotiated* contractual agreements with people living in protected areas that define the rights and responsibilities of the MET and the residents and

which provide for the joint management of protected areas between MET and resident communities

- 3) The conclusion of contractual arrangements between MET and communities removed from protected areas, including joint management between MET and these communities where appropriate
- 4) Legal recognition of protected areas established by entities other than the state, including ICCAs, and provision for co-management of such areas by the state and the land holders through negotiated agreements where appropriate
- 5) The establishment of contractual parks which recognise the rights of land holders and provide for joint management with government where appropriate
- 6) Provision for protected landscape conservation which promotes the collaboration for biodiversity conservation between state-run parks and land held by other entities such as ICCAs.

4. CULTURAL LAWS & POLICIES

The National Heritage Act of 2004 provides for the declaration of places and objects as National Monuments, Heritage sites or Places or Conservation Areas. Procedures for declaration include provision for advertisement of the intention to declare a site and for submissions by the owner of the site or the public within a specified period of time. The presumption of the Act is that government will declare and be responsible for Heritage Sites of national importance. There are no provisions for communities whose heritage might be affected to be involved in the process apart from the general provision for making submissions by the owner of the land or the site. However, as indicated above, the government views communal land as being owned by the State. In addition, the publication of the intention to declare a site has to be made in newspapers that circulate in the region where the site is located. This form of “consultation” is likely to bypass most rural community members.

Namibia is currently developing legislation on Access and Benefit Sharing (ABS) for Sustainable Utilization of Cultural and Natural Assets in Namibia, which will be aimed at protecting intellectual property rights to genetic resources. Natural Justice has been advising the Namibian government on the development of the legislation. In the absence of specific ABS legislation Namibia has promoted ABS through bilateral agreements, existing laws, and the engagement of government departments, research institutions and NGOs in a high level Bioprospecting Committee (Wynberg *et al* 2009).

5. HUMAN RIGHTS

Chapter 3 of the Constitution of Namibia provides strong recognition of human rights which ensures general but not specific support for ICCAs².

² The rights mentioned here are not the full list from the constitution, but those most relevant for ICCAs.

Article 5 of the constitution stipulates that the fundamental rights and freedoms enshrined in the Constitution shall be respected by all State institutions and government agencies and shall be enforceable by the Courts.

Article 10 states that all persons are equal before the law and no person may be discriminated against on the grounds of sex, race, colour, ethnic origin, creed or social or economic status.

Article 19 states that every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of the Constitution and as long as this does not infringe on the rights of others or the national interest.

Article 21 states that all persons shall have fundamental freedoms (subject to the laws of Namibia) including:

- Freedom of speech and expression
- Freedom of association
- To move freely throughout Namibia
- Reside and settle anywhere in Namibia

The constitution makes provision for the appointment of an Ombudsman with the following powers:

- To investigate complaints concerning alleged violations of fundamental rights of freedoms or abuses of power or corruption by government officials
- The duty to investigate complaints regarding discrimination in recruitment to government agencies
- The duty to investigate complaints concerning the over-utilisation of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia
- The duty to investigate complaints of violation of fundamental rights by individuals or private organisations
- The duty to take action to remedy any violations of the constitution including through bringing proceedings to Court.

The constitution also contains some principles of State Policy. According to Article 95 the State shall actively promote and maintain the welfare of the people by adopting *inter alia* policies aimed at the following³:

(e) ensurance that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law;

(g) enactment of legislation to ensure that the unemployed, the incapacitated, the indigent and the disadvantaged are accorded such social benefits and amenities as are determined by Parliament to be just and affordable with due regard to the resources of the State;

³ I have selected those points most relevant for the general support of ICCAs.

(h) a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State;

(k) encouragement of the mass of the population through education and other activities and through their organisations to influence Government policy by debating its decisions;

(l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.

Thus the constitution lays the foundation for recognition of basic human rights, protection of citizens in law and by the courts, the freedom of cultural expression and maintenance and the mechanisms to address abuses. In addition the constitution promotes ecosystem and biodiversity conservation as well as the sustainable use of living natural resources for the benefit of Namibians.

The constitution focuses on individual and citizen rights and does not give attention to groups of people such as indigenous or other disadvantaged or marginalized groups. This is largely because of the history of South African *apartheid* rule which was based on each major ethnic group managing many of its own affairs such as education, health and agriculture through its own ethnic administration within its own territory. The constitution was designed to eliminate discrimination based on ethnicity and to eliminate restrictions on where people may live. Hence the emphasis on the right of citizens to move freely throughout the country and settle wherever they wish to.

Despite the emphasis in the Constitution on individual rights, the Communal Land Reform Act of 2002 somewhat surprisingly does provide recognition of ethnic groups in a manner that seems to accept the former *apartheid* establishment of homelands. According to Section 15 of the Act communal land consists of the areas of land contained in a schedule of the Act which uses the colonial names (e.g. Owamboland, Damaraland) and colonial boundaries of the homelands. This approach supports the idea that a group of people with a common cultural and ethnic identity is attached to specific territories or areas of land.

6. JUDGMENTS

A public interest law firm, the Legal Assistance Centre (LAC), was approached for information regarding case law that supports or hinders ICCAs. The LAC keeps a record of all judgments and was not aware of any relevant judgments since Independence in 1990.

7. IMPLEMENTATION

As indicated above, implementation of policies and laws in regard to ICCAs has been mixed and in some respects contradictory. Government has introduced legislation that promotes and enables the establishment of new community institutions for management of wildlife,

forest and water resources on communal land. Generally speaking government through the responsible line ministries provides support to the establishment and operation of these institutions. There are however, anomalies. For example, while the legislation clearly provides for conservancies to use huntable game for own use without government imposed quotas or permits, the MET insists that conservancies must have quotas and permits for monitoring and control purposes. The Directorate of Forestry (DoF) in the MAWF had several community forest applications pending for a number of years, without approving them. It is not clear why this delay took place.

In addition, the activities of other line ministries can conflict with the support to conservancies and community forests provided by MET and DoF. For example, the establishment of small-scale commercial farms for individuals on communal land by the Ministry of Lands and Resettlement (MLR) has in some cases ignored the prior establishment of conservancies and community forests. It has taken several years for the MLR to acknowledge the land use conflicts involved and that the individual farms are often being established on land that other people lay claim to. In some cases MLR has agreed that such farms will not be established in certain conservancies and community forests while it is still negotiating the issue in others.

Also as noted above the implementation response by government where people reside inside protected areas has been mixed. The presence of people has been accepted in Bwabwata National Park *de facto* but *de jure* many of their fundamental rights and freedoms under the Namibian constitution are curtailed. While government does not formally acknowledge their land rights, their presence on the land and rights to live there are implicitly acknowledged through forms of co-management between park residents and park officials, and through government awarding hunting and photographic tourism concessions to the San residents. At the same time though, government has not prevented the migration of Hambukushu people into the park and on to land the San believe is theirs (see case study below for more details).

As noted above, people live within the Namib-Naukluft Park but do not have the same income generation opportunities as the San in Bwabwata and are not involved in co-management activities with park staff. And in the Etosha National Park MET is trying to complete the eviction of the Hai||om San begun in the 1950s.

The factors affecting implementation are varied and sometimes complex. Government ambivalence towards the Khwe San in Bwabwata can be explained by the fact that many of the Khwe men were absorbed into the South African Defence Force when it occupied the park before independence and fought against the current ruling party, SWAPO, in Namibia's war for independence. In addition, some Khwe leaders were involved in a Caprivi secessionist group that tried to launch an armed insurrection about 10 years ago.

However, in the case of the Etosha Hai||om, retired or unemployed San live inside the staff housing areas and MET is trying to move staff quarters to the periphery of the park. Government has purchased freehold farms bordering Etosha for resettlement of the Etosha Hai||om and others. However, the Etosha Hai||om say the process is not transparent and they have nothing in writing from government which guarantees them land and housing if they leave the park. The irony is that most of the Etosha Hai||om would probably leave the

park if MET simply carried out a clear and transparent process of engaging with them⁴. In the case of the Topnaar Namas of the Namib-Naukluft Park the government response seems to be driven by inertia. Nobody is protesting or causing major problems so just continue with the *status quo* (and to be fair, divided leadership among the Topnaar has not made it easy for the MET to engage with the community).

With regard to conservancies, Jones (2010) suggests that an important reason for gaps between policy intent and implementation is an inherent distrust by officials that communities will use wildlife wisely. In addition, officials wish to hold on to control and are reluctant to give up power. However, at the same time, in another apparent contradiction, MET is willing to re-introduce wildlife into conservancies, including the endangered black rhino. Why do these contradictions exist? Jones (2010:118) notes that “government agencies are not monolithic organisations with a consistent and unified set of interests pursued by all officials”. In the same way that local communities consist of different interest groups often competing for control over natural resources, so government agencies consist of individuals and factions with different political and personal agendas. Governance outcomes often depend on the ascendancy of individuals or factions within government agencies. This is evident in the MET where several implementation approaches taken by the former Minister and Permanent Secretary were reversed or dropped by the new incumbents from the same political party, particularly with regard to co-management in protected areas and the negotiations for the establishment of the Kunene People’s Park.

From a more practical perspective government support for conservancies and community forests is limited by lack of government resources. While government does commit human and financial resources to supporting these institutions, the bulk of support to conservancies is carried out by NGOs with donor funding, and a large part of the support to community forests has been carried out by development volunteers and consultants through donor funding.

Recommendations:

Government needs to be more supportive of ICCAs through better cooperation and coordination of ministries. MET needs to take stronger ownership of the conservancy programme and provide better leadership and support. With the departure of the previous Permanent Secretary MET had a vacuum in leadership and surrendered leadership of the CBNRM Programme to NGOs. MET needs to take the lead and engage with the MLR on a number of key issues affecting conservancy land use and rights. MET needs to allocate more human and financial resources to its own CBNRM support provision and needs to raise the status of CBNRM in MET so it is represented in senior management forums, which is currently not the case.

DoF also needs to strengthen its support to community forests through the provision of dedicated and well-trained staff that can support community forests once they have been approved by government. DoF needs to strengthen its leadership and ownership of the

⁴ Based on interviews carried out with the Etosha Hai | |om and others as part of research for LAC on the socio-economic and political status of the San in Namibia.

community forest programme so that it is no longer led by donors and expatriates. This will give it more legitimacy within government in general.

8. RESISTANCE AND ENGAGEMENT

Rural communities have positively embraced the community-based approaches to wildlife and forest management introduced by the Namibian government. This is evidenced by the growth in the number of conservancies from 4 in 1998 to 71 today. There are 13 approved community forests and 33 emerging (i.e. going through the process of meeting legal conditions or with applications made to DoF).

Conservancies generally wish to have more rights over wildlife than currently provided by legislation, particularly more control over human wildlife conflict management. They also wish to have clearer and stronger rights over tourism on their land. However, as yet they are not well organised to carry out their own advocacy. Several regional (i.e. based on Namibian regions) conservancy associations have been formed but there is no national conservancy association that can lobby government on behalf of all conservancies. Such lobbying is carried out by the Namibian Association of CBNRM Support Organisations (NACSO) which represents NGOs working with conservancies. In addition, the public interest law firm, the Legal Assistance Centre takes up various legal issues that conservancies might be faced with. Such issues include cases where private sector partners of conservancies are in breach of contract or where a conservancy might be in dispute with individuals over control of communal resources.

The main areas of community resistance relate to protected area issues. The Etosha Hai||om San have over the past 15 years drawn public attention to the situation through a number of actions including demonstrations outside the gates of the Etosha National Park (ENP). They argue that much of Etosha was in fact their land and their rights to the land should be recognised by government. At a meeting with the Minister of Environment and Tourism, the Deputy Permanent Secretary and other senior officials in May 2011, members of the Etosha Hai||om Association reiterated their claim to the ENP, particularly the !Gobaub and Halali areas (Minutes of meeting held on 30 May 2011). They said they would be prepared to lease the park to the MET and share the profits on a 50/50 basis. Since that meeting there have been ongoing discussions about the Etosha Hai||om moving from the park to the nearby resettlement farms purchased by government for this purpose. MET recognises that the Hai||om lived in Etosha in the past and that many people were removed by the colonial administration. However it does not seem willing to consider solutions that would enable people to continue to live in the park. It argues that the provision of alternative land adjacent to the park is sufficient recognition of past injustices. At the meeting held on 30 May 2011, the Minister of Environment and Tourism said her ministry could not deal with claims regarding ancestral land - that was an issue for the Ministry of Lands and Resettlement. Her ministry had no mandate to address claims for ancestral land and could only deal with how people could make a living. Currently the LAC is advising the Etosha Hai||om Association on how to take the issue further.

As indicated above, communities in the north-west of Namibia successfully opposed plans by MET to establish a National Park on three tourism concessions on communal land. This

resistance led to the start of a process of negotiation and compromise begun by the then Minister and Permanent Secretary. This process in turn led to considerable progress being made on the establishment of a contractual park to be known as the Kunene People's Park. However, a new Minister and Permanent Secretary refused to accept the recommendations of the technical committee for a contractual park. So far MET has not revived its attempt to establish a National Park on the three concession areas.

9. LEGAL AND POLICY REFORM

The most pressing need in order to better enable Indigenous peoples and local communities to govern their ICCAs is for reform of communal land tenure in Namibia. The provision of group tenure over land for self-identifying communities would go a long way towards enabling communities to protect and manage their own natural resources. Ideally community land rights should be accompanied by automatic rights over the wildlife, forestry, grazing and water resources on that land without the need for sectoral legislation allocating these rights. In effect, communal tenure should no longer be a form of second class tenure which provides only use rights over resources at the whim of the state. Communal tenure rights need to be elevated to the same level as freehold tenure rights through the provision of tenure security and rights of exclusion. The MLR is currently considering proposals that could lead to the introduction of some form of group tenure.

In the absence of such reform, there is still a need for stronger use rights over wildlife and tourism to be provided to communal area conservancies and for increased integration between conservancies and community forests.

With regard to protected areas, Government should recognize the basic human rights and the right to settlement of people living within protected areas, and any restrictions on these rights should be in terms of a collaborative management agreement to be negotiated between these people and the government.

Regulations and management plans for protected areas should recognize the presence of resident people and make appropriate provision for them to carry out their every-day activities.

People resident in protected areas should be fully involved in the setting of the overall policies and objectives for these areas, the development of the park management plans and the planning of activities which directly affect them. Mechanisms such as joint management committees should be established to ensure the full participation of the resident people.

Zoning of parks should recognize the areas settled and managed by residents as ICCAs within the parks. MET should recognize and support the management activities of the residents within these ICCAs.

10. CASE STUDIES

10.1 The Kyaramacan Association in Bwabwata National Park

The territory of the Khwe San in the West Caprivi Strip has been proclaimed as the Bwabwata NP. The Khwe have lived in the area since the late 19th Century living from hunting, gathering, small scale cultivation and some livestock. Wildlife was abundant in the area which was first proclaimed as a Game Park in 1963 and then reproclaimed as the Caprivi Game Reserve in 1968.

In the 1970s the park was occupied by the South African Defence Force (SADF) and until shortly before Namibian independence from South Africa in 1990 was used by the SADF to launch raids into Angola against SWAPO insurgents and to support the Angolan rebel movement, UNITA. In 1990, after the withdrawal of the SADF there were between 3000-4000 people, mostly Khwe and !Kung San, living in the park.

The then Ministry of Wildlife, Conservation and Tourism (MWCT) carried out a socio-ecological survey in West Caprivi in 1990. During this survey the great majority of residents interviewed regarded the West Caprivi as their traditional home and did not want to move (Brown and Jones 1994). Residents also expressed their views on conservation and on the area as a proclaimed game reserve. They were generally “mildly to extremely negative” towards the MWCT which they viewed as imposing restrictive laws and as harassing people. The survey report notes however, that much of the hostility reflected the relationship of residents with conservators appointed by the SADF. MWCT officials had been denied access to the park by the SADF for about 20 years prior to the socio-ecological survey. The residents were also negative about the game reserve. The survey report provides a number of quotes from residents, typical of which are the following (Brown and Jones 1994:49):

“We don’t know about the game reserve, we are not consulted about it” – an Omega resident after he had been told that the area had been proclaimed a reserve since 1968.

“Here is something that causes a lot of pain; some say wild animals are more important than people in West Caprivi. Is this so? – an Omega leader at the same meeting.

“How will the game reserve be organised? With the animals put together inside and the people outside? Will Nature Conservation run it alone or with the people? – ex soldier, son of chief Ndumba.

“Nature Conservation has never before come here to ask us what we think – like today. But they come to search our houses and look into our cooking pots. I hear they threw petrol on meat bought in a shop” – a reference to allegations that conservation officials burned suspected game meat.

“Wild animals live in game reserves – is that what we are? – Omega woman.

Since the socio-ecological survey carried out in the Bwabwata National Park in 1990, various steps have been taken by MET to engage with the residents of the area. The survey and follow up work with the community by the NGO Integrated Rural Development and Nature Conservation (IRDNC) led to the establishment of a residents’ association, the Kyaramacan

Association (KA), which in 2006 was recognised by government as the legal structure representing the majority of residents. The MET had in the early 1990s agreed to allow the residents to develop a campsite within the park which was developed with assistance from IRDNC

The KA manages the designated multiple use area within the park where people live in partnership with the Ministry of Environment and Tourism. The KA employs male community game guards who in the past played a major role in stopping poaching including the confiscation of weapons. The game guards carry out joint anti-poaching patrols and game monitoring with MET personnel. The KA also employs female community resource monitors who monitor the use of other natural resources and promote the use of sustainable harvesting techniques. The KA shares the income from a hunting concession with MET and in 2011 earned N\$1.9 million (approx. US\$237 500) from the concession (Friedrich Alpers *pers.comm.*2011). MET has also awarded the KA a tourism concession within the park which is expected to earn the KA around N\$500 000 (approx. US\$65 000) annually. The lodge is expected to employ 15 to 20 people of which most will be Khwe. The lodge will be owned by the KA after 20 years. The KA is exploring other concession opportunities.

A park Technical Committee has been appointed by the Minister which consists of representatives of the MET, the KA, Line Ministries with responsibilities for service provision to communities living in the park, the Ministry of Lands and Resettlement, the Ministry of Defence, the Kavango and Caprivi Regional councils, neighbouring conservancies and NGOs supporting the Association and the conservancies. The function of the committee is to provide advice to MET on the management of the park, particularly regarding the management and development of settlements and infrastructure, as well as livestock, veterinary matters and tourism development. One of the main purposes of the technical committee is to ensure better coordination of services to the people living in the park and that development takes place in a sustainable way (MET 2009)

Although there have been positive steps in MET's engagement with the residents of the park, there are still a number of issues that need to be addressed. The presence of the people in the park has never been formally recognised by MET and the people live in a sort of limbo regarding their basic human rights and freedoms. In some respects this problem is mitigated by the zonation of areas where people live as multiple use zones where activities normally prohibited in a park are allowed. However, the land is ultimately controlled by MET and there is no written agreement regarding people's rights of occupation, freedom of movement etc. Because they live in a national park the development options for residents are limited. Cattle are not allowed in the park due to international veterinary agreements with neighbouring Botswana.

The Technical committee established by MET for the park has only an advisory function. Although co-management is taking place on the ground between park staff and KA staff, MET is reluctant to formalise this and enable residents to be involved in decision-making regarding park management.

Human Wildlife Conflict in the park is an area that also needs addressing. Official policy is that there is no such thing as a problem animal in a protected area. However there have

been incidents of children being mauled by hyenas and people being killed by elephants. Resident people are discouraged from killing predators which threaten them or their livestock, a right given to all other citizens outside protected areas.

Another major problem for the Khwe is the migration of large numbers of people into the park. Since the mid-1990s Hambukushu people have moved into the park, encouraged by their Chief, Erwin Mbambo. MET seemed unable to prevent people moving in because of Chief Mbambo's political connections. The Chief claims the park as his territory. He also claims to be the Chief of the Khwe and has appointed Khwe Senior Councillors as part of his Traditional Authority. The government has not given official recognition to a Khwe Chieftanship although the Khwe insist that they should have their own chief and do not owe allegiance to the Hambukushu chief. The LAC is assisting them in their attempt to have their own chieftanship officially recognised by government, which argues that they first need to appoint a chief before they can get such recognition. However, the Khwe themselves are divided over who they wish to lead them and it is proving difficult to set up the process needed for the election of a new chief.

10.2 Torra Conservancy in Kunene Region⁵

Torra Conservancy was one of the first four communal area conservancies registered by the by government in June 1998. It covers an area of 3522 km² in the arid west of Kunene Region in north western Namibia. It has about 1 200 residents of which the vast majority are Riemvasmakers, the rest Damara, Owambo and Herero. The Riemvasmakers were forcibly removed from near Upington in South Africa in the 1970s under the South African *apartheid* system. The Damara people are from the area or were also forcibly resettled under *apartheid* in Namibia when the Damaraland homeland was created.

Prior to Independence in 1990 the Torra community was one of the first to appoint their own game guards who were drawn mostly from former poachers and local hunters. The game guards reported to the local headmen, looked out for signs of poaching and kept a count of all the wildlife or signs of wildlife they saw while they were out herding their livestock. The game guard system, increased patrols by government conservators, monitoring of species such as black rhino by NGOs and better rainfall, meant that by the early 1990s game numbers were beginning to recover.

In the mid-1990s a prominent southern African tourism company, Wilderness Safaris expressed interest in developing a lodge in the Torra area because of the increased wildlife and the spectacular scenery. Wilderness was interested in working with the local community and in 1995 the Ward 11 Residents' Association Trust was formed as a legal body to enable the community to enter into negotiations with Wilderness. The result was the formation of Namibia's first joint-venture agreement between a community and a private tourism company and the development of a lodge called Damaraland Camp. The contract provided the community with a rental fee for use of the land and 10% of the nett daily rate on each bed night sold. In addition the contract stipulated that local people must

⁵Unless otherwise indicated most material for this profile is drawn from Kemp, L., Mendelsohn, J., and Jones B. 2009. Profile of Torra Conservancy. Namibia Nature Foundation. Windhoek., and with updated information from NACSO 2011.

be employed in the lodge and trained to management level and that laundry would be sub-contracted locally. There was also provision for the community to gradually acquire ownership of the lodge.

Wildlife in the conservancy includes elephant, black rhino, lion, leopard, cheetah, hyena, giraffe, Hartmann's mountain zebra, springbok, oryx, and kudu. The conservancy has medium plant diversity, high overall terrestrial endemism and medium to low plant endemism. Since its early beginnings most ungulates have considerably increased in number as have the populations of elephant, black rhino and lion. The conservancy has set aside land for wildlife and tourism where people do not settle or graze their livestock in areas bordering the neighbouring Palmwag Tourism Concession. However, wildlife roams throughout the conservancy, and it is common to see springbok close to settlements or grazing close to a herd of goats – a good indication of the level of tolerance that local people have for wildlife on their land. The conservancy game guards carry out an annual game count in partnership with government conservators and NGO personnel and implement an ongoing game monitoring system.

Under a new contract with Wilderness Safaris, Torra has gained equity in the Damaraland Camp. The community will gain a share in the profits from the operation in addition to a continued annual income based on turnover. Usually there are about 25 people employed at the lodge and more than 20 of these are from the local community. Two local women have reached management level at the camp. Torra also operates its own camp site at a place called Palm where elephants often drink at a nearby spring. There is considerable potential for the conservancy to develop additional tourism products including more camp sites and lodges, hiking trails and rhino tracking.

Torra is one of three conservancies that as a consortium have been awarded the neighbouring Palmwag tourism concession. The three conservancies are negotiating with Wilderness Safaris and other tourism companies regarding the management of the concession on behalf of the conservancies (Diggle, R.W., *pers. comm.* May 31, 2012).

Torra obtains an annual trophy hunting quota from the Ministry of Environment and Tourism and is able to use certain species for own use (i.e. meat and sale of skins) without permits throughout the year.

In 2002 Torra pioneered live game sales by communal area conservancies when it sold animals to the Nyae Nyae Conservancy. In a two-stage transaction Nyae Nyae bought 441 springbok from Torra, which sent the springbok to a conservancy on freehold land which in turn provided Nyae Nyae with 226 red hartebeest as a swap for the springbok. Another sale earned the conservancy N\$283 000 in cash for 763 springbok.

Torra has regularly been one of the highest earning communal area conservancies in Namibia, with income of more than N\$2 million (approx. US\$260 000) annually. The conservancy uses this income to cover its own running costs, including staff salaries, various wildlife management activities (e.g. the annual game count) and to provide benefits to community members. In 2003 the conservancy used part of its income to provide each member with a cash payment of N\$630. Although this amount might seem modest, at the time it would have bought groceries for the average household for a period of three

months, was almost equivalent to the annual average raised by a household by the sale of goats, and was equivalent to 14% of the annual average individual income in the region at the time (N\$4 500).

Subsequently the conservancy has opted to invest in social projects such as support to the community hall at the main village; support to a local school in the form of office equipment and supplies and wood for cooking; support for various community celebrations; emergency transport and an emergency fund to assist members in times of drought or wildlife-related deaths. Torra was one of the first conservancies to start a scheme to help mitigate the costs to farmers of livestock losses due to predators. The conservancy started a fund to which NGOs also contributed from which payments could be made to farmers who had suffered losses. This scheme has now become a national programme supported by government.

In addition to the jobs provided by Damaraland Camp the conservancy employs its own staff of around 10 people including the game guards and a Conservancy Manager.

Meat is derived from the trophy hunting and the own-use hunting and distributed either to households or sometimes to individual members. In years with good quotas meat is also distributed to community groups such as the church, the youth group, the soccer team, clinic and the police. There is a cooling facility so that meat is not lost to spoiling.

The conservancy has a legal constitution which guides its activities and decision-making processes. It is managed by a committee elected by the community. Over the years Torra has faced a number of governance challenges. Initially there was good consultation between the management committee and the members. However the conservancy went through a period when the committee lost touch with its members and there was financial mismanagement.

Hoole (2008b) reported complaints from members about the lack of transparency in conservancy decision-making regarding spending of the conservancy income and allegations that 'local elites' were being created who appropriated vehicles and other conservancy benefits for their own use.

During 2011 and 2012 a new conservancy committee has tried to address these issues. The NGO IRDNC assisted the committee in improving its financial management procedures and the committee embarked on a survey and consultation with as many members as possible before holding the 2011 Annual General Meeting, with the aim of increasing transparency in decision-making (Davis, A. *pers. comm.* May 30, 2012).

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