"God Gave Us This Land:" The OvaHimba, the Proposed Epupa Dam, the Independent Namibian State, and Law and Development in Africa

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"God Gave Us This Land": the OvaHimba, the Proposed Epupa Dam, the Independent Namibian State, and Law and Development in Africa

SIDNEY L. HARRING*

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I. INTRODUCTION

“We will gather there and they will have to build the dam on top of us.”¹

"Change and trade will follow the overhead power lines from the power plants along the Kunene, new possibilities will open up for agriculture and stock keeping, and even humans and their polities will adapt."^2

In a world with no shortage of sharply focused legal disputes that challenge the capacity of law to achieve both justice and meaningful social change, one of the more graphic disputes is the struggle of the OvaHimba (hereinafter "Himba")^3, a pastoral tribe of about 25,000, against the proposed Epupa Dam on the Kunene River. The river forms the border between Namibia and Angola in a remote corner of Africa without access to either electricity or gas stations.\(^4\) This US$ 600 million dam (before cost overruns), at almost 600 feet high, the highest in Africa\(^5\), would hold a flooded impoundment\(^6\) of up to 380 square kilometers, forty to sixty miles long. It would permanently alter a unique desert ecosystem, flood the spectacular Epupa Falls, and force the relocation of many of the Himba, disrupting their traditional way of life.\(^7\)

Thirty or forty years ago, this might have been a familiar story of development at the expense of indigenous peoples, but the twenty-first century world is a different place. While the Himbas’ legal rights were ignored as recently as 1995, those rights now have a more distinct stature because of the newly-accepted “discourse of development,” and have emerged as an issue potentially either

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3. The proper term is “ovaHimba” which, in the Herero language, means “Himba people.” Outside of the Herero language, the people are ordinarily referred to simply as “Himba,” a usage followed here.


5. The exact height of the proposed Epupa Dam depends upon which location is the final site: the Baynes site would require a higher dam (200 meters) than the Epupa site (163 meters). By way of comparison, the Hoover Dam, on the Colorado River, is just over 700 feet high. In Africa, the Aswan Dam, damming the Nile River in Egypt, is 111 meters high; the Cahora Bassa Dam, on the Zambezi River in Mozambique is 171 meters high; downstream from the Kariba Dam, 128 meters high. Lower Kunene Hydropower Scheme Feasibility Study, Draft Feasibility Report, v. 1, chapter 5.1.2 (on file with author) (hereinafter Draft Feasibility Report).

6. In the business of dam building, as in law, language is everything. Dam builders prefer to call the water reservoir behind a dam a “lake,” because a “lake” offers images of beauty, recreational opportunities, and enhanced real estate values, all of which offset the “costs” of flooding vast areas of land. This language is used to refer to the “lake” at Epupa Dam as well. But the “impoundment” behind the Epupa dam would be a vast mud flat up to sixty miles long and five miles wide much of the year as the water level drops hundreds of feet during the dry season. Then, in optimum conditions, the rainy season from November to April in the Angola highlands would cause the reservoir to fill sufficiently, so that it could hold enough water to enable the dam to make power during the May through October dry season. Thus, it might be hoped that the reservoir might be full for a few months after April, providing for recreational opportunities. Resorts, built on the high water line, would be two to four miles away from the water by November and across a broad and uninhabitable mud flat. In drought years, which regularly occur, the reservoir might completely dry up, down to the original river bed, and stay that way for several seasons. This does not describe a “lake.”

blocking the construction of the dam or, perhaps more likely, significantly raising its cost to the level where the dam is not economically feasible, therefore killing the project. Although no major court case arguing “indigenous land rights” has apparently ever succeeded on the African continent, for reasons having to do with the legacy of colonialism, relatively conservative and political judiciaries who are unwilling to make rulings against the state, unique legal and political problems of rural land development, and the danger of “tribalism” in what have proved to be very fragile nation-states, indigenous peoples now have significantly more legal rights.  

This study will set out the legal framework of the Himbas’ resistance to the Epupa Dam. It begins with the Himba story, a simple history of their existence in northwestern Namibia and southeastern Angola over at least the past four hundred years. The next section describes the Epupa Dam scheme as a legacy of German colonialism, inherited by the British, the South Africans, and finally the government of an independent Namibia. The third section addresses the imposition of the dam in the midst of Himba society; the unsettling specter of Swedish and Norwegian engineers, marching through Himba lands in expensive safari garb from a picturesque tented compound tended by servants, yet completely unaware of the Himba. This gave rise to an angry conflict between the Himba, backed by much of the world environmental community, on one side, and the Namibian government and domestic proponents of the dam on the other, mediated by both law and the language of law. The government of Namibia, the indirect employer of the engineers, has pursued a clear policy, advocating a model of “development” at the expense of the rights of individual tribes, arguing not only that the Himba must yield to the greater good, but that the Himba, themselves, have a “right to development” that the government has a duty under the Namibian Constitution to provide all its citizens.  

Next, the Himba’s land rights will be discussed in the context of their other human rights. Finally, this article will examine aboriginal title and the rights of indigenous peoples displaced by dam construction as possible sources of customary international law.

8. It is inevitable in modern Africa that issues of indigenous land title will reach various African courts over the coming years. One, from the Richtersveld, a region just over the southern border of Namibia, is presently proceeding in the South African courts. See Barry Streek, Richtersveld People’s Land Quest Foiled, MAIL AND GUARDIAN, Mar. 23, 2001; Marianne Merten, Namas Make History in Land Claims Court, MAIL AND GUARDIAN, Sept. 27, 2000. The first round was lost in the Land Claims Court in March 2001, but appeals are continuing. Other cases are also being framed in Botswana and Namibia.

9. Werner Menges, Epupa Dam is Himba’s Right, NAMIBIAN, July 30, 2001. Deputy Minister of Justice Albert Kawana states: “[t]he Government is determined to live within the letter and spirit of the Namibian Constitution, namely, to take economic development to all our communities, including the OvaHimba . . . The OvaHimba, like every Namibian community, have a right to economic development. The development level of an African state is largely determined by the level of development of all communities within it, not just a few of them. Therefore, any well-meaning African government has the duty to ensure that development projects are evenly spread throughout the country so as to ensure that other communities are not left behind, for the sake of nation building.” Id.
Although the law regarding indigenous land rights is unsettled, it is clear that an assertion of these rights alone cannot resolve the issue or protect the future of the Himba within the broader context of Namibian and African development. Himba land rights must be recognized in a context that supports and protects their culture within the modern Namibian state. Existing Namibian law does not provide a legal framework within which this can occur.

II. HISTORY OF THE OVAHIMBA IN ANGOLA AND NAMIBIA

A. THE HIMBA

The OvaHimba are a distinct people because they are visually striking. Their bodies—tall, mostly naked, bejeweled, covered hair to foot with a red ochre and butter paste—are immediately recognizable. They have been featured worldwide in commercials for such brand names as Volkswagen and Samsonite. Their land, called “Kaokoland” in Namibia, is an isolated, mountainous high desert, straddling the border between Namibia and Angola. It is inland on an escarpment above the Atlantic Ocean. Kaokoland is a “wilderness” inhabited by free roaming desert elephants and other exotic game species; a corner of the “real” Africa, relatively isolated, but accessible by anyone with a credit card.

Little is known about the Himba on the Angolan side of the border, because Angola has been involved in a protracted civil war since 1975 that has disrupted every aspect of governmental administration. The Angolan Himba are immediate relatives of the Namibian Himba and the border, although officially “closed,” is de facto open for the Himba who regularly cross for visits and ceremonial occasions, and for the extended families who own herds on both sides of the border. There may be 15,000 Himba in Namibia, probably a smaller number in

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10. The Red People of the Desert, 3 AFRICA: ENVIRONMENT AND WILDLIFE 76-81 (1995) (“Volkswagen of South Africa’s popular Microbus has been rejuvenated. Over and above improvements to its appearance, VWSA engineers have also endowed the five-cylinder engine with more cubic centimeters and more torque at low revs. We put the newcomer to the test in the north of Namibia.”). The advertising feature began with a striking photo of a Himba woman, naked above the waist, in front of two VW vans. The Samsonite advertisements, run on American television in 1998, featured a Samsonite suitcase dropping from the sky into a Himba village. The Himba gathered around the bag, trying to open it. The suitcase survived both the fall and the Himba.

11. See generally J. DU P. BOTHA ET AL., KAOKOVELD: THE LAST WILDERNESS (1988). Although the origin of the term is unclear, it may derive from Okaoko, the Herero word for the left, or south, bank of the Kunene River. The term “wilderness” is itself political, representing cultural images of wild, virgin lands in the path of a large dam. The Himba graze their remote lands with thousands of cattle, so it is, in fact, not a wilderness, as beautiful and remote as it is.

12. While the Angolan Civil War has not been fought in the general area of Epupa since the withdrawal of South African forces by 1990, the impact of the continuing war in other parts of the country has been to spread Angolan governmental resources so thinly that there is no local administration in the Epupa area. This was also true of Namibia as recently as 1996: there were no local government officials, and no border posts, so the border could easily be crossed by fording the Kunene River in several traditional crossing places. Namibia put a small police post at Epupa in 1996. The Angolan side is reportedly still mined in some places, also a remnant of the war.
Angola.\textsuperscript{13}

The Himba's visual distinctiveness is deliberate. Over the past hundred years the nearby peoples, like most Africans, have largely adjusted their dress in response to missionary and colonial demands. The Himba did not, remaining dressed in leather aprons, naked above the waist. This is not, entirely, an indication of their "isolation"; rather, it reflects a prosperous pastoral people with a strong will to continue their lives. South African labor contractors, sent into Kaokoland in the early 1950s, reported that they could not induce the Himba to sign labor contracts because they were so content with their pastoral lives.\textsuperscript{14} Half of the few Himba who did sign such contracts immediately deserted when they found the work not to their liking.\textsuperscript{15}

\textbf{B. THE EMERGENCE OF THE HIMBA AS A DISTINCT PEOPLE}

Formerly an official "native reserve," Kaokoland is now part of the expanded Kunene Region. The Region is part of a deliberate government plan to reduce the influence of the Himba and their Herero relatives in regional politics by including a large number of neighboring Damara in the region.\textsuperscript{16} Besides the Namibian Herero, the Himba are also related to the Zemba, Tyavikwa, Hakavona, Kuvale, Kwanyoka and Ngendelengo, all Herero peoples living in neighboring Southwest Angola.\textsuperscript{17} The exact origins of these Bantu-speaking Herero peoples is unclear, but they probably migrated south from central Angola at least four hundred years ago. The emergence of the Himba as a distinct people probably occurred between eighty and one hundred fifty years ago.\textsuperscript{18}

\textsuperscript{13} Draft Feasibility Report, \textit{supra} note 5, at vol. 6B, ch. 10, p. 5. The most recent census of Namibia, 1993-94, sets the entire 1991 population of Kaokoland at 26,176 with Herero making up 60\% and the Himba and smaller groups making up 40\%, about 12,000 people at that time, rising to about 16,000 in 2000. While Denmark's International Working Group for Indigenous Affairs estimates there are about 35,000 Himba (in both countries), this estimate is higher than the Namibian data would support. Moses Maurhunguirire, \textit{Epupa May Need Tradeoffs, Namibian}, Oct. 3, 1997. Assuming an equal population in Angola, there would be at most 32,000 Himba in 2000. It must be added here that the rural population growth rate in Kaokoland is 5.65\%, among the highest rates in the world. Draft Feasibility Report, \textit{supra} note 5, at vol. 6B, ch. 10, p.5. It is significant that, given the extensive study of the region for dam planning purposes, there are no accurate population statistics on the Himba, the people who live where the dam is to be built. There is some concern that there is a deliberate under-counting for political reasons, although this cannot be proved. For the purposes of this work, I use 25,000 as a reasonable figure; it is still a small tribe standing in the way of a large dam in a nation of 1,700,000.

\textsuperscript{14} Michael Bollig, \textit{The Colonial Encapsulation of the North-Western Namibian Pastoral Economy}, 68 \textit{Africa} 506, 523-24 (Apr. 1998) (hereinafter Bollig, \textit{Colonial Encapsulation}).

\textsuperscript{15} Id. at 524.

\textsuperscript{16} Kaokoland, itself, has a unique history and culture, inseparable from that of the Himba. \textit{See generally Botha}, \textit{supra} note 11; \textit{New Notes on Kaoko, supra} note 2.

\textsuperscript{17} \textit{See Carlos Estermann, The Ethnography of Southwestern Angola}, vol. 3 (1981).

\textsuperscript{18} \textit{See J.S. Malan, Peoples of Namibia} 85-101 (1995); \textit{Margaret Jacobsen, Himba: Nomads of Namibia} (1990); \textit{Louis Fourie et al., The Native Tribes of South West Africa} 155-208 (1928). These accounts are based on oral history: no written records record this history.
About 1750, the Herero moved from Kaokoland to the south east in search of more and better grazing land, occupying much of what is central Namibia. They bore the brunt of German colonial oppression through the Herero War. A war of extermination was waged against them in 1904-05, killing an estimated 50-80% of the Herero. The Nama, who live to the south and west of the Herero also went to war against the Germans in 1904-07, but had fewer casualties: of 20,000 alive in 1904, only 9,781 remained in 1911. A few Herero returned to southern Kaokoland after the war, living near Himba peoples that they had been cut off from for some years.

For unknown reasons, the Himba separated from the Herero, and remained behind in Kaokoland, largely unaffected by these colonial wars. Their occupation of Kaokoland is continuous for perhaps four hundred years, except for some dislocation caused by raiding Swartbooi and Topnaar Nama in the mid- to late-nineteenth century. Dispersed herds could not easily be protected from such raids because the cattle were easily stolen and their herdsmen easily killed. As a result, many of the herds were removed for a few years to the Angolan side of the Kunene River, beyond the reach of the raiders. Modern Himba identity – as a people distinct from the Herero—dates from this period, although their history of land occupation in Kaokoland goes back further. The Himba are those Herero who fled to Angola with their herds; the Tjimba are those Herero who lost their cattle. For a period in the late nineteenth and early twentieth centuries, the Himba effectively played German and Portuguese colonial masters against each other; neither colonial power had effective control of the remote region. By the turn of the century, however, Portuguese colonial power pressed Himba lands from the north, causing them to move south to Namibia.

C. THE GERMAN ARRIVAL IN SOUTH WEST AFRICA

Although the Germans arrived in 1885 and occupied South West Africa, they never exercised any political or legal authority north of the “police line” (also called the “red line” because of the color representing it on colonial maps and still existing today as the “cattle line” because native cattle may not be moved across it), including in Kaokoland. The Germans drew this “police line,” extending

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19. Fourie, supra note 18, at 156-57.
22. Gewald, supra note 20, at 207-08.
23. See Malan, supra note 18, at 88.
25. See id. See also Wolfram Hartman et al., The Colonising Camera: Photographs in the Making of Namibian History (1998); Bollig, Colonial Encapsulation, supra note 14.
completely across northern Namibia to keep their colonists "inside" or south of the line, where they could be protected by the German authorities and live under German law. Conversely, the native people who lived "outside" or north of the line were protected in their lands against the encroachment of colonists and were not subject to German law. Keeping the two peoples apart was intended to provide a peaceful frontier.²⁷ The Germans generally did not disturb the Himba except for a handful of exploring expeditions that passed through Kaokoland during the thirty year German colonial period. These years produced great prosperity, as the Himba traded both cattle and goods to neighbors on all sides, making them independent, self sufficient, and rich in cattle.²⁸ They existed as a pastoral people, well adapted to their region.

D. PASTORAL CULTURE AND PROPERTY RIGHTS

Pastoral cultures are common in southern and central Africa.²⁹ Africa's vast savannas are expansive grasslands ideal for cattle raising. Distinct pastoral cultures developed south of the Sahara Desert; from Niger and Mali to Somalia; from Ethiopia and Kenya to South Africa. The Himba, similar to other Herero, have a complex culture including a system of double descent, with each person belonging to both matrilineal and patrilineal descent groups.³⁰ While land is held communally, different families and clans derive land rights from customary law administered by chiefs and counselors. Herds are large, numbering up to five hundred, and grazing on common lands in a semi-desert environment requires careful allocation of grasslands.³¹

The Himba have definite rights to real property under their customary law. At the basic level, each family "owns" the lands immediately around its household complex. This includes the huts and fenced yards, gardens, graveyards, and nearby pastures for the household animals. The actual "owner" is ordinarily thought of as the senior male in the family, but he holds the land on behalf of his family. These rights are respected by all, extending far back in customary law.³²

²⁷. This kind of strategy was not unique to German colonizers. The Royal Proclamation of 1763 was designed to serve the same purpose in North America. That line, of course, was not "policing," so the experiment failed. A central feature of German colonization, however, was its confidence in bureaucracy and in administration and they made a great effort to "police" this line.

²⁸. See Hartman, supra note 25.

²⁹. See Custodians of the Commons: Pastoral Land Tenure in East and West Africa (Charles R. Lane ed. 1998).

³⁰. See Malan, supra note 18, at 71-75; 89.

³¹. See Hayes, supra note 24.

E. Grazing Rights

1. Background

Grazing rights are held communally in very complex ways. Because many Himba communities share vast grazing lands, each Himba community must respect the respective communal grazing rights of the other communities. The cattle of many families often must graze together. No herd may move ahead of another, nor are the combined herds allowed to move over new grass, trampling or spoiling it before it can be grazed. Grazing lands must be carefully used in order to save the most reliable grass for the driest months. Some grazing land is held in reserve for drought periods. Since cattle have great value, these grazing rights are among the most valuable assets of a community; without the cattle, the community will disappear. Groups of senior men allocate grazing rights, which must be flexible in order to meet changing ecological considerations.33

Although only up to 1000 Himba actually live in the area to be flooded by the Epupa Dam, almost the entire tribe has at least some reserve grazing rights to these lands because they contain the most reliable water and are therefore reserved for the common usage of the community in a drought. It is impossible to calculate the actual extent of potential grazing rights to these lands, or the cost of replacement grazing lands because the grazing system has to be flexible enough to respond to changing environmental conditions in a fragile desert landscape. Cattle are primarily inherited through the matrilineal descent group, while religious and political offices are inherited through the patrilineal group. This system reinforces traditional family linkages, and increases social stability. Decision-making is in the hands of chiefs, who work closely with counselors and wealthy males.34 Under Namibian law, customary law is recognized to the extent that it does not conflict with Namibian state law. These traditional authorities therefore exercise political and legal authority over their communities.35

There are currently fifteen Himba chiefs, each theoretically of equal rank and responsible for a particular area occupied by a well-defined group of people with traditionally defined grazing rights. Five to seven counselors, generally wealthy older men, assist each chief. Relations with South Africa, which created many

33. Id.
35. See CONSTITUTION OF NAMIBIA, Article 66, available at http://www.uni-wuerzburg.de/law/wa00000_.html. Traditional courts have extensive jurisdiction in civil and criminal matters. For example, a Himba traditional court tried a rare murder case in 1999 in which a Himba was convicted of killing another Himba who had previously assaulted him with a club. He was ordered to sell all his cattle and goats and sheep and pay of fine of 65 cattle. "A Himba man who loses his cattle becomes like a dog and where I was previously a man of substance and status in Himba society, I have been reduced to nothing," plead the defendant, as he argued for leniency later in a Namibian criminal court. The judge, taking account of this punishment, gave him an additional twelve year prison sentence. Werner Menges, Justice Denied Ends in Double Tragedy, NAMIBIAN, July 16, 1999.
additional chiefs, altered the original governance structure, with only three chiefs. These new chiefs were incorporated into the administrative structure of the native “reserves,” a system of “indirect rule” in which the South African government paid the chiefs and performed a number of judicial and political functions.36 The Himba chiefs are still paid by the Namibian government, and still perform legal and political duties as allocated under the Namibian constitution.37 These chiefs adjudicate any disputes about customary land or grazing rights and their judgment is final, ordinarily not reviewable by Namibian courts, giving the Himba substantial powers of local self government within the Namibian state.

2. General Communal System of Grazing

The Himba live most of the year in permanent villages which are spread out complexes of round wooden and mud huts, surrounded by fences and outbuildings. They maintain a simple diet of sour goat milk and goat meat. More recently, the Himba began adding to their diets by including meal and a few vegetables. In addition, traditional home-brewed beer has also been augmented by cheap liquor. Because the Himba economy requires little cash, it is seldom necessary to sell cattle in order to get money; the primary value of the cattle is cultural, representing power and wealth.

The proximity of graveyards underscores the permanence of these villages. The graveyards are usually located within one or two kilometers of the villages and are near a river bed. Each Himba picks the spot for her or his grave and this site becomes a gathering place for extended clan relatives, who will come together annually in ceremonial rites to commemorate their dead ancestor. These gravesites are fundamental statements of identity, indicating where a person felt the most comfortable, where they belonged.38

36. HAYES, supra note 24. “Indirect rule” was a feature of British colonial administration in Africa and Asia, perhaps originating in India or Nigeria. While it took different forms in different colonies, essentially local chiefs were kept in power, and continued making most local political and legal decisions, “advised” by a British resident. The advantage of this system was that it was both cheap and stable: one resident and a small staff might indirectly “rule” a colony of thousands or even hundreds of thousands. See generally LORD WILLIAM M. HAILEY, NATIVE ADMINISTRATION AND POLITICAL DEVELOPMENT IN BRITISH TROPICAL AFRICA 204 (1942). RUPERT EMERSON, MALAYSIA (1979) provides one study of how the policy operated. “Indirect rule” was often a fiction, as British authorities, through the local chiefs, took complete administrative power but, for political reasons, concealing this behind the façade of the rule of local chiefs. SALLY FALK MOORE, SOCIAL FACTS AND FABRICATIONS: CUSTOMARY LAW ON KILIMANJARO, 1880-1980, 139 (1986). Obviously, this is not far from the model of the South African and South West African “homelands” which were derived from the same colonial policy.


38. Bollig, Contested Places, supra note 34. The feasibility study archeologist counted 160 grave sites and 95 cultural sites in the area to be flooded. Werner Menges, Epupa Decision to be Made Next Year, NAMIBIAN, Dec. 7, 1998, at 1.
Most of the people do not migrate with the herds, hence the Himba are not "nomads." Even the term "semi-nomadic" can be misleading; some Himbas move quite regularly, while others do not. Because the cattle are dependent on good grass that, in an arid environment is dependent on good water, they must often move. The herds, because they require extensive grazing lands, are dispersed in remote "cattle-posts," tended by young, unmarried males, ranging between twelve and twenty-five years old. These posts move regularly, but always within traditional grazing areas. A few Himba have as many as five hundred cattle, with the average family probably having about one hundred, all kept by young men in a number of cattle posts. A 1972 survey reported that Kaokoland held 160,000 cattle, perhaps half owned by the Himba. 39 There may be fewer cattle at present, but one estimate puts up to 33,000 Himba cattle on the Namibian side within the general range of the proposed dam. 40 This is great wealth by African (or even American) standards; they are a prosperous people, living a privileged life-style.

But this cattle wealth is held in a region without electricity, and most Himba children never attend school. 41 A chief who owns five hundred cattle sleeps on the floor of a mud hut. The whole Kaokoland Region—larger than some of the smaller American states—has two gasoline stations and one mile of paved road for the main street in Opuwo. Transportation is ordinarily by walking, or hitching a ride. An owner who wishes to communicate with one of his cattle posts, perhaps fifty miles distant, will ordinarily send a boy carrying an oral message. The boy, upon getting his instructions, will immediately begin walking toward his destination, without preparation, and without carrying either food or water. He can expect to be fed by each village or cattle post he passes, representing a complex traditional system of social obligation.

Himba herds are in excellent condition and the Himba are not "traditional" in their sense of the market or of modern politics. They are careful breeders, and always interested in new and better stock, as well as better markets for their cattle. Even if cattle are seldom sold, it still matters that when they are sold, they are sold at a good price. Government veterinarians pass through occasionally to vaccinate the herds against disease. Cattle, when they are sold for cash income, are ordinarily sold to Ovambo traders to feed the booming population of neighboring Ovambo regions. A veterinary fence, the "red line," divides Namibia and keeps most black-owned cattle from the markets of southern Namibia, South Africa, and Europe, a sore point to the Himba as well as all others who raise cattle

39. JACOBSOHN, supra note 18, at 16. This may not be the number of cattle now held; a drought killed many cattle in the early 1980s, but herds have substantially recovered.
40. See BOLLIG, RESOURCE MANAGEMENT, supra note 37, at 15.
41. Basic education is widely available in Namibia, reaching almost all villages and almost all children. The Himba are the major tribe in the country not to educate their children in government schools. They fear, perhaps justifiably, a loss of their culture.
in the north. This perpetuates the former colonial structure, and reduces the value of black-owned cattle.

3. The Himba and Early Colonial Administrators

While the Himba appear by their dress and life-style to be “primitive,” they have worked shrewdly and effectively with various levels of colonial administrators—such as the Portuguese, Germans, British, and South Africans, for well over a hundred years. Most recently, they have survived two wars, including both the South African war with Cuba and Angola, and the Angolan Civil War.

During South African rule, effectively beginning some time in the early 1920s, it was obvious that South Africa intended to assert control over the Himba and Kaokoland, abandoning the German policy of leaving the people north of the “police line” alone. The land and people north of the “line” were to be incorporated into the South African economy, serving as both a labor reserve, and a “quarantine zone,” keeping the majority black population isolated from the white farming areas south of the “line.”

In 1921 South Africa put a “native commissioner” in Ovamboland, the densely populated area immediately to the east of Kaokoland, and closed the border between Kaokoland and Ovamboland to the Himba cattle trade. The Ovambo, now the dominant people of Namibia, composing about 60% of the population, had a long history of trade with the Himba. The first native commissioner, Cocky Hahn, was also given jurisdiction over Kaokoland. His job was to apply the British model of “indirect rule” by administering these regions through the local chiefs.

The South Africans also tried, for the first time, to control the border with Angola by forbidding Angolan traders in Kaokoland and Ovamboland and by attempting to stop the Himba and their cattle from freely crossing the border. While the three hundred mile border between Kaokoland and Angola remained porous in spite of these efforts, the closing was partially successful, especially with regard to moving cattle. The impact of closing these borders was devastating to the Himba because most of their traditional trade routes were therefore no longer available. South Africa’s intent was to isolate Kaokoland and destroy the Himba pastoral economy in order to force them into signing migrant labor contracts and going off to work in South Africa’s mines. Kaokoland,

42. Physically, this is a well-maintained six foot wire fence, with shorter fences supporting it on either or both sides. On major roads, a check-post is still maintained, manned by officials. Cars are routinely waved through, often not even stopping.

43. RUTH FIRST, SOUTH WEST AFRICA 121-28 (1963).
45. See Bollig, Colonial Encapsulation, supra note 14, at 518-19.
46. See id at 518-26.
itself, was already emerging as a game hunter's paradise: the South Africans severely punished traditional hunters in order to protect the game for themselves.\textsuperscript{47} Cattle herds were also inconsistent with large populations of wild game because they competed for scarce grasses.

The Himba herds were an economic threat to South African interests and a medical threat as well. Despite the veterinary fence, the fear of cattle disease brought South African veterinary practices to Kaokoland. Himba cattle have been vaccinated since the 1920s. The herds grew rapidly because the Himba kept cattle for social and political as well as economic reasons. The Himba cattle economy was, at its core, so frugal and efficient that it could expand even when their trade outlets were curtailed. This meant that most Himba young men did not go off to the mines, because they could be productively, if not profitably, employed in cattle herding. As the young herders reach marriageable age, they visit senior relatives and ask to "borrow" cattle, to begin their herds. Thus, they continue to manage herds that are a mixture of their own and their relatives' cattle, with the proportion they own rising every year, making each richer and more engaged in the traditionally based culture every year.\textsuperscript{48} South African officials recognized what was happening, but the costs of labor recruitment among the Himba were prohibitive. Labor recruitment, only begun in 1948, was curtailed in the early 1950s.\textsuperscript{49}

4. The Odendall Commission and South African Political Divisions

The Himba were left in Kaokoland with their herds, escaping the demeaning experience of forced labor, and the forced separation of families. When the Odendall Commission in the 1960s divided Namibia into apartheid era "homelands," creating the legal fiction of a white South West Africa, Kaokoland was redesignated a "homeland" but remained isolated within its former "reserve" borders. The Himba were left to an isolated existence compared to some of the other peoples of Namibia.\textsuperscript{50} The small population of Kaokoland—perhaps 9,234 in 1964, about half of them Himba—left very low population densities, making even the costs of indirect administration high.\textsuperscript{51} Opuwo, the capital of Kunene Region and the only town of any size in Kaokoland became an administrative center in the 1950s, at the time an airstrip was constructed there in order to refuel

\textsuperscript{47} See id.  
\textsuperscript{48} See id. at 523-24.  
\textsuperscript{49} FRIEDMAN, supra note 2, at 195.  
\textsuperscript{50} The Odendall Commission investigated native affairs in Namibia and made extensive recommendations to divide Namibia into South African style "homelands," removing black people from the South West African polity. The country was then politically reorganized to follow these recommendations. See SOUTH AFRICA, REPORT OF THE COMMISSION OF ENQUIRY INTO SOUTH WEST AFRICAN AFFAIRS (1964) (on file with author); A.J. CHRISTOPHER, THE ATLAS OF APARTHEID 182-84 (1994); Namibia's experience with "homelands" is analyzed in REGINALD GREEN ET AL., NAMIBIA: THE LAST COLONY 87-111 (1981).  
\textsuperscript{51} Bollig, Colonial Encapsulation, supra note 14, at 528.
airplanes flying from South Africa to Angola.\textsuperscript{52}

In the 1970s and 1980s South Africa built three army bases in Kaokoland during the war for independence. Himba herds were drawn back from the border and the Himba were forced to remove to fortified villages surrounded by barbed wire, under army watchtowers.\textsuperscript{53} Still they tended their herds, although these were not prosperous times. Although there was little fighting in Kaokoland, the Himba remember being assaulted by South Africans for protecting South West Africa Peoples’ Organization (SWAPO) fighters, but then being assaulted by SWAPO for living under the protection of the South African army. Traditional rivalries with the Ovambo, an adherence to their pastoral life-style, and their isolation from participation in the forced labor regime of the apartheid era, kept the Himba from more actively joining SWAPO in the guerrilla war. The ramifications of this disengagement from the war still have significant consequences in the Himba’s distance from the current SWAPO government. The Kunene Region is one of two that returns a majority to the Democratic Turnhalle Alliance (DTA) Party, the main opposition party, and relations between the Himba and SWAPO are poor.\textsuperscript{54}

This underscores political divisions within the Kunene Region. SWAPO is active in the region, and the Epupa scheme is central to SWAPO plans to dominate Kunene Region politics. A Kaoko Development League supports the dam. Based in Opuwo, this group represents businessmen (primarily Ovambo) and youth, allied in plans to “modernize” Kaokoland by bringing in roads, jobs, new stores, and modern conveniences. Dam construction is key to all of these objectives. Politically, the Development League challenges the Himba as representatives of the “community” affected by the dam.\textsuperscript{55}

G. THE MODERN HIMBA DICHOTOMY: TRADITIONAL LIFE VERSUS HISTORY OF ACCOMMODATION TO DIFFERENT COLONIAL GOVERNMENTS

The foundation of the struggle between the Himba and the Namibian government over the Epupa Dam is set in this history. The Himba have a long and deep relationship with their land, amounting to at least eighty years of exclusive and uninterrupted occupation, within the approximately four hundred years of steady occupation marked by the ebb and flow of droughts and wars. While their herding culture is semi-nomadic, the Himba themselves have a well-established relationship with the land, recognized by their customary law. Their traditional governments, headed by chiefs, are still functioning, deciding day-to-day matters and

\textsuperscript{52} Opuwo had a population of just over 4,000 in 2000.

\textsuperscript{53} BOLLIG, RESOURCE MANAGEMENT, supra note 37, at 9-10.

\textsuperscript{54} Weich Mupya, Political Parties and the Elite in Kaoko, in NEW NOTES ON KAOKO, supra note 2, at 207-214.

\textsuperscript{55} John T. Friedman, Mapping the Epupa Debate: Discourse and Representation in a Namibian Development Project, in NEW NOTES ON KAOKO, supra note 2, at 220-35.
adjudicating disputes. By the standards under which they live, the Himba are a wealthy pastoral people, with herds averaging 100 per family and reaching at least 500 for some wealthy families. Kaokoland is a high desert, requiring vast expanses of land to support a pastoral economy. While physically isolated by great distances and poor roads, the Himba enjoy a rich culture and a satisfying life-style, including regular trade for such luxuries as cloth and liquor, financed by a small cash economy from the sale of cattle and from tourism.\textsuperscript{56}

This prosperity, coupled with isolation and the bilinear family structure, has created a remarkably cohesive social structure. Himba communities are well ordered, with little (but some) evidence of social disintegration. The authority of the chiefs and elders is respected. The sacred fires burn in each household, and traditional religion is respected. The various chiefs, while independent and equal, are in continuous contact with each other, producing the near-unanimous Himba denunciation of the Epupa Dam and a common response to the government on the issue.\textsuperscript{57}

Development requires hard choices, however, based on culturally specific norms. The Himba deliberately stay distinct from Namibian society. Their children generally do not attend school, and they suffer a higher rate of death and disease than most Namibians because of their isolation from hospitals and medical care. There is some evidence of malnutrition in children, the result of a monotonous diet that may even include some food shortages among poorer, more remote groups.\textsuperscript{58} And men, not women, inherit cattle and traditional grazing rights.

But the tragedy of the AIDS epidemic illustrates their isolation in reverse: while the Ovambo, who live adjacent to the Himba have one of the highest rates of infection in Africa, AIDS is rare in Himba society.\textsuperscript{59} Because of their social and cultural isolation, they are not having sexual relations with outsiders.

An introduction to the booming business of “eco-tourism” in Kaokoland may bridge the two discussions, one describing the history and culture of the Himba as a “traditional” African people, the other describing their opposition to the Epupa Dam. The recent advent of tourism to Kaokoland has made the Himba and their political cause well known around the world. Namibia’s superior tourist infrastructure allows tourists to fly relatively cheaply into Windhoek, rent a vehicle at the airport, stock up on food and “safari” equipment, buy a road-map, and simply drive off to see the Himba. The tourists are additionally afforded the opportunity to stop off on the way in game parks and spot desert elephants beside the road as they pass through Damaraland, the desert area immediately south of Kaokoland.

\textsuperscript{56} BOLLIG, RESOURCE MANAGEMENT, supra note 37.
\textsuperscript{57} Id. at 52-58, 82-93.
\textsuperscript{58} See Draft Feasibility Report, supra note 5, at vol. 5.
\textsuperscript{59} Id. at vol. 6, part A3, Environmental Assessment, Epupa Site, chapter 8, 21. The estimated rate of HIV infection in the Kunene Region is 1.4%.
Some Himba participate in this tourist trade, selling their photographs or begging, and the Himba operate a "tourist village" where various activities may be viewed.

Disguising their hundred-year history of accommodation to several different colonial governments, the "traditional" quality of Himba life is a selling point for eco-tourists. The Himba are visually striking, and their lands are beautiful, vast, open, and under populated. 60 The political ideal of "preserving" the Himba and their culture is very appealing, and this high level of visibility distinguishes the Himba struggle against the Epupa Dam from the parallel resistance of many other tribal peoples of India, Malaysia, and North and South America.

III. THE EPUPA DAM, THE KUNENE RIVER, AND NAMIBIAN DEVELOPMENT

A. MODERN DAM BUILDING

Just as the Himba assume a symbolic stature because of their representation as a unique traditional African pastoral tribe through tourism and the media, the political context of the large hydroelectric dam project in the year 2000 is much different than thirty years ago. The era of large dam building from the 1930s to 1960s produced thousands of such dams. Their effects can be readily seen and studied—and there are serious questions being posed about the value of these large dams, including calls for their "removal." 61 In November 2000, the World Commission on Dams released a 600 page report highly critical of the world's over-reliance on dams for water and electricity. The report highlighted additional negative effects of dams on traditional peoples, and the high levels of waste and corruption inherent in the dam building enterprise. It additionally advocated careful reconsideration of the role of dams in modern hydroelectric development. 62

B. PLANS FOR DAMMING THE KUNENE RIVER

1. Water and Namibian Development

Water was, and is, a significant problem in planning for Namibian development. The vast Namib Desert, along the coast, is the driest region in the world.

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60. See Bennett Kangumu, Constructing Himba: The Tourist Gaze, in NEW NOTES ON KAOKO, supra note 2, at 129-132; see also Eberhard Rothfuss, Ethnic Tourism in Kaoko: Expectations, Frustrations and Trends in a Post-Colonial Business, in NEW NOTES ON KAOKO, supra note 2.


Namibia is a country with little rainfall and long dry periods. There are only three permanently flowing rivers adjoining the borders of the entire country: the Orange on the South African border in the far south, and the Kunene and the Kavango on the Angolan border in the far north. In between is twelve hundred miles of farms and ranches, carved out of a semi-arid environment without permanent natural surface water. The Germans and the South Africans who followed constructed massive water supply schemes based on the Kunene River as an obvious source of both water, and later, of hydroelectric power.63

The Kunene River rises in the mountains of central Angola, then flows south for about five hundred miles before it turns west to become the border between Angola and Namibia for its last two hundred miles.64 While it initially drains into a well-watered and fertile valley, which is the heart of a densely populated agricultural region in Angola, it later runs through progressively drier country, reaching the Atlantic Ocean along the “Skeleton Coast” in the Namib Desert.65 The river, the only permanent surface water for miles, supports a unique ecosystem.66

2. German Colonial Planning

The idea of damming the Kunene67 River for hydropower or water supply purposes extends back to German colonial planning, the product of colonialism and racism.68 The Germans put engineering at the heart of their colonial enterprise. Their thirty year occupation of South West Africa (1885-1915) was characterized by the construction of railroads, roads, mines, water supply systems, the drilling of thousands of wells, and the construction of hundreds of

64. Rob Simmons, Damming the Mighty Kunene, ROESSING 1-5 (Apr. 1993) (measures the length of the river at 1050 kilometers, or just under 700 miles).
65. See C.T. Truebody, The Kunene River: A Valuable Natural Resource, in SWA Yearbook (1977) (on file with author). The “Skeleton Coast” region has virtually no waterfall or permanent population. Id. at 24-29.
67. The Portuguese spelling “Cunene” is often used in Namibia and is used in the Feasibility Study reports. For consistency, I have used the English spelling, most commonly used in Namibia. I have not, however, changed the spelling in direct quotations.
68. Renfrew Christie, Who Benefits By the Kunene Hydro-Electric Schemes, 2 Social Dynamics 2(1), 31-43 (1976). According to Christie, two German colonists, Brincker and Gessert first suggested damming the Kunene about 1895, just about the time German explorers first viewed it. Damming a river for hydropower and water supply purposes may be contradictory, however. Hydroelectric production requires a large reservoir of water which, while held in “reserve” for hydro-power purposes, cannot be used, thus making the water unavailable for other uses. In addition, while the water is impounded in a vast desert reservoir it evaporates at a high rate. Thus, the business of making hydro-electricity in a desert wastes vast quantities of water in a sparse desert country. The reverse is also true: using the water for agricultural purposes or human consumption makes it unavailable for hydropower production. While some careful planning can reduce the level of waste, a high level of wasted water is inevitable.
small dams for water impoundment purposes.\(^69\)

3. South African Colonial Authorities’ Development of the River

a. Use of Falls and Rivers as Power Sources

The South African colonial authorities who succeeded the Germans also put
the development of the Kunene River high on their list of priorities. In the 1920s,
as the border between Namibia and Angola was delineated, the South Africans
insisted upon a right to use both the Ruacana Falls for power and the Kunene
River for water as a condition for recognizing an Angolan border about six miles
to the south of a disputed German colonial era border. This agreement divided
local Ovambo villages, cutting many black pastoralists and farmers off from
access to traditional watering points on the Kunene River, now on the Angolan
side of the boundary.\(^70\)

b. Construction of Dams on the Kunene River

The South Africans acted on the idea of constructing dams on the Kunene
River in the 1960s. Taking advantage of the financial and political weakness of a
rival colonial power and the 1928 boundary treaty that reserved a right to
southwest Africa of water power from Ruacana Falls, the South Africans
negotiated new treaties with Portugal in 1964 and 1969 to build three dams on the
Kunene in Angola primarily for the benefit of Namibia. This remains a source of
discord in Angola toward further Namibian development of the Kunene River.
Although almost all the drainage and the distance of the Kunene is entirely within
Angola, most of the benefit of the river’s water and power is realized by Namibia,
even though Namibia legally is entitled to no more than half of the water. Almost
all the water, in turn, comes from Angola, so even the “legal” fifty-fifty division
raises issues of equity.

Within Namibia, the primary beneficiaries of Ruacana power have been the
mining and farming industries, but the Kunene also provides water to almost all

\(^69\) Lau, supra note 63.
\(^70\) Randolph Vigne, The Moveable Frontier: The Namibia-Angola Boundary Demarcation, 1926-28, in
Namibia Under South African Rule: Mobility and Containment 1915-1946 (Patricia Hayes et al. eds.,
1988). To the British and South Africans, good relations with their ally, Portugal, were more important than the
territorial integrity of the Ovambo. Similarly, access to the Ruacana Falls for electrical power purposes for
mining development was more important than protecting the agricultural needs of the local black population.
The agreement itself, a Boundary Convention, was signed in Cape Town on June 22, 1926 and does not include
any reference to Kunene River water, although the meeting where the Convention was signed was called to
discuss both the boundary question and the water question. Lazarus Hangula, The International Boundary
of Namibia 40-43 (1993). Since the Ruacana Dam question and the Kunene water question were soon resolved,
it seems that these matters were orally agreed to at the time, a precondition for the settlement of the boundary
question in favor of Portugal: Portugal got the boundary it sought, but had to concede water rights to South
Africa. Id.
of Ovamboland, and, consequently, to almost half of Namibia's population. There was no consultation with the local black populations of either Angola or Namibia when the apartheid-era Kunene hydropower scheme was constructed and most blacks in the region still live without electric power. If the South Africans and Portuguese were still in power the Epupa Dam might have been built by the colonial powers by the 1970s, without any feasibility study.

The largest of these dams is at Ruacana Falls, entirely within Angola but just across the Namibian border—and to this day remains guarded by Namibian troops, just as it once was guarded by South African troops. The Ruacana Dam, put in operation in 1981-83 produces about 50% of Namibia's electric power, but its power output is highly variable and it has never been able to operate at its full capacity of 240 megawatts ("MW") at any point since its construction. About thirty miles above the Ruacana Dam further into Angola is the Calueque Dam. This dam does some flood control and serves as an impoundment for the Ruacana Dam, but its primary purpose is to provide water to irrigate Ovambo farms in northern Namibia. A huge system of irrigation canals carries the water through the former Ovamboland. Another dam at Matala also serves both flood control and impoundment purposes.

The final dam, the Gove Dam, is much larger, is located near Huambo, hundreds of miles further into Angola. It serves a critical function as an impoundment at the base of the mountains where most of the water originates, intended to regularize the flow of water at Ruacana in order to provide a steady production of power. The Gove Dam, which also produces power for Angolan use, was attacked and heavily damaged in the Angolan civil war. It still needs

71. Christie, supra note 68, at 31-35. The Calueque Dam diverts much Kunene water into the Cuvelai River, which flows through Ovamboland before drying out at Ethosha Pan, a large salt flat.


73. The dam is located in a "no man's land" surrounded by barbed wire, set apart from both countries. It is the only place on the Namibian/Angolan border than one can legally simply walk into Angola. The procedure is simple: approaching from Namibia, you ask the Namibian police personnel at the border if you can walk over to see the dam and the falls. They ask you to leave them your passport, and you walk into Angola. No Angolans are present in the dam area, nor can they get there without passing security. South Africa effectively seized control of this small but valuable corner of Angola. In July 2001, when I last visited the area, the police on duty were sleeping and an old woman opened the border gate and let me drive through to the observation area below the dam. The opposite Angolan border post was unattended.


75. STENGEL, supra note 63, at 356-67.

76. Christie, supra note 68, at 31-33.
millions of dollars worth of reconstruction, and can hold only about 40% of its water capacity. Obviously, the reconstruction of the Gove Dam is very important to Angola, as is social development along the Angolan stretches of the Kunene River.

This current Kunene power scheme, complete as of the 1970s, built and maintained by South Africa, is located entirely within Angola. Because the Gove Dam is damaged and cannot hold a full volume of water, its ability to effectively regulate the flow of water to the power station at Ruacana is reduced and irregular, so the Ruacana Dam is producing power at some variable fraction of its potential, generally about 50%.\textsuperscript{77} Since the Kunene is a desert river with a seasonal flow, the Ruacana Dam requires large impoundments of water to maintain steady power production but still loses its ability to make power in drought years.\textsuperscript{78} Without these reservoirs, it could not make power at all during the dry season, which lasts up to six months a year.

4. Proposed Epupa Dam

\textit{a. South African Plans for Construction}

The proposed Epupa Dam is an extension of this already existing Kunene power scheme, consisting of these four existing dams that have been partially broken down for most of thirty years. The scheme, a marginal product of apartheid-era colonial planning, begins with a desert river already burdened by four dams. Of these dams, one is heavily war-damaged, and the largest is currently producing only half of the electricity that it was built to produce.\textsuperscript{79} But, before South Africa withdrew from Namibia, it had the plan to construct another dam at Epupa, over a hundred miles downstream from Ruacana, as an expansion of the same scheme. The waste and inefficiency of this project can only be justified by a colonial-era development mentality that power had to be guaranteed to the Namibian mining and agricultural sectors at all costs.

\textit{b. Transfer of Plans to Namibia}

The retreat of the South Africans from Namibia in 1990 left this plan completely intact. The South West Africa Water and Electricity Company ("SWAWEK," an

\textsuperscript{77} Because the Ruacana Dam is only producing at 50% of its capacity, simply rebuilding and retrofitting the Ruacana and Gove Dams and reservoirs with more modern hydropower technology, would produce more than twice the power currently produced, with no relocation of local peoples and no further inundation of land, at a fraction of the cost of the Epupa project. \textit{White Paper on Energy Policy Goals, supra} note 72.


\textsuperscript{79} Ruacana's production has been as high as 60% of Namibia's energy needs (1995), and as low as 45% (1994). \textit{White Paper on Energy Policy Goals, supra} note 72, at 10.
Afrikaans acronym), was a parastatal corporation and was completely taken over by Namibia at independence and renamed in 1996 with the English acronym Nampower. All property of the South African government became the property of the Namibian government at independence, as SWAWEK was put under the Namibian Department of Mines and Energy. SWAWEK announced that it was moving forward with the Epupa project. The newly independent government embraced the project in the name of "development" and nationalism; it would make Namibia independent of its reliance on "foreign" (essentially South African) power, an important political consideration under apartheid.

Namibia is connected to a southern African power grid that can supply all of its power needs. Ruacana Dam currently provides about 50% of Namibia's electric power. Van Eck, a coal fired power plant in Windhoek, also provides electricity in high demand periods, but is an especially expensive source of power because the coal is imported. Because the Van Eyk power station consumes about 1000 tons of coal daily in normal use, it is kept in "reserve" mode and provides about 10% of Namibia's electrical power. About half of Namibia's electric power is imported from South Africa at highly variable levels that fluctuate throughout the year. Paratus, a diesel and gasoline generator at Walvis Bay, and Zambia, with a line to Katima Mulilo, in the Caprivi Strip, provide very small amounts of electricity. The Epupa Dam, by itself, with a capacity of 2000 to 2500 megawatts (MW) would be capable of providing all of Namibia's power needs – assuming it can function as planned.

5. Preparations for Gaining Foreign Funding: the Feasibility Study

A "feasibility study" was initiated to provide some basis for cost estimates for dam construction and as a required step in gaining foreign funding for the project. The study, financed by Norway and Sweden at a cost of US$ 20 million, was done by NAMANG, a consortium of Norwegian, Swedish, Namibian, and Angolan companies. An earlier "pre-feasibility study" had been completed in 1993,

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80. See Lundmark, supra note 74, at 5.
81. Namibia became independent in 1990 and was actively moving the Epupa Dam project forward by 1992. It is relevant to point out here that the South African government by the time of the Namibian decision to go forward with the feasibility study for the Epupa Dam was the government of Nelson Mandela. Under the former apartheid-era government, energy independence from South Africa might have been a more urgent matter, involving concerns of national security that no longer exist, or are likely to in the future.
82. Lundmark, supra note 74, at 6.
83. Id.
84. Lundmark, supra note 74, at 7. Namibia's existing electrical capacity, for comparative purposes, is as follows: Ruacana, 240 MW; Van Eck, 120 MW; Paratus, 24 MW; South Africa, 200 MW; Zambia, 2 MW, totaling 588 MW, about one-fourth of the potential Epupa Dam generating capacity. Id.
85. NAMANG, an acronym for Namibia and Angola, is a company specifically formed to carry out the feasibility study, was developed by Norconsult International (Norway); Swedpower (Sweden), Burmeister Van Niekerk & Partners (Namibia), and SOAPRA (Angola).
narrowing the potential area down to three possible sites. These sites needed further study for dam planning purposes.  

The fifteen-volume "Lower Cunene Hydropower Scheme Feasibility Study, Draft Feasibility Report" reported on research conducted from 1995-97 and was intended to provide basic information primarily about engineering questions. It was necessary both to show potential funding agencies reasonable cost estimates and to demonstrate an adequate return to repay the loans. At a projected cost of US$ 600 million the Epupa Dam would require one-fifth of the entire annual Namibian budget, a huge debt far beyond the capacity of Namibia to finance by itself. In addition, a range of social questions concerning large dam schemes have emerged affecting some of the major western funding agencies. The World Bank adopted new standards for funding large dam projects in the early 1990s because of increasing concerns about both the damage done to relocated local populations as well as huge debt burdens on third world countries. The United States Embassy in Namibia cautioned against the Epupa scheme, seeing it as both too expensive and too destructive of the environment.

The Governments of Norway and Sweden funded the feasibility study through their respective foreign aid programs. Norway and Sweden have large hydropower industries with no new domestic projects, under-employing a large number of hydropower experts. The $20 million (Namibian, about US $5 million at the time) in funding employed a large number of these engineers. This funding was granted, apparently, with little thought about the social issues raised by construction of the dam.

Although it seems unfathomable, work began in 1995 on the feasibility study with little consultation with the Himba. The entire Epupa project is on lands the

86. LEGAL ASSISTANCE CENTRE, THE EPUPA DEBATE: A SUMMARY OF SOME OF THE KEY ISSUES AROUND THE PROPOSED HYDROPOWER SCHEME ON THE LOWER CUNENE RIVER, Pamphlet, at 3 (hereinafter Legal Assistance Centre Pamphlet). The Feasibility Study and its failure to deal with the rights of the Himba have embarrassed Norway and Sweden, both with major world-wide involvement with human rights. The Pre-Feasibility Study was small and limited to technical factors, and has been supplanted by the Feasibility Study. Norpower, in association with SwedPower and Burmeister van Neikerk & Partners, Epupa Hydropower Scheme, Prefeasibility Study, Final Report, Feb. 1993. Updated Sept. 1993 (on file with author).

87. Draft Feasibility Report, supra note 5. The Study was originally posted on-line for easy public access, but was removed after substantial opposition developed, focusing highly technical criticism on the poor quality of some of the research. It is currently available in the Namibian National Archives, Windhoek and Nampower headquarters, also in Windhoek.

88. Legal Assistance Centre Pamphlet, supra note 86. The cost estimates for a dam at the Baynes site is US$ 551 million and US$ 539 million for a dam at the Epupa site (in 1998 dollars). These figures are unrealistically low, including little, for example, for relocation costs.

89. Personal Communication. While there was no "official" United States position, the U.S. Embassy staff in Windhoek was critical of the Epupa Dam scheme. The Embassy also promoted development of the Kudu gas fields, in the Atlantic Ocean off Luderitz, as an alternative, giving rise to some cynical commentary about their "promotion" of obvious American interests in oil and gas exploration and development. At the same time, the U.S. Embassy views the Epupa Dam scheme as an internal Namibian matter.

Himba use to graze cattle and are allocated to particular Himba herders through traditional law, but the project built a large tented and luxurious “safari” style camp beside the Kunene River, about a mile above the Epupa Falls. In a region with dirt roads, and among a people who owned no vehicles, a dozen expensive ‘four-wheel drive trucks and a helicopter supported the study.\(^{91}\)

The Himba, although they formally granted permission to construct the camp, resented this intrusion on their lands, but did nothing to interfere with the feasibility study. But the seeds for the political discord that appeared later were sown at this time. Proper protocol in Himba society would require the engineers, or any other visitor, to directly approach the appropriate Himba chief and request his permission to construct the camp and to conduct the various research activities.\(^{92}\) Although some rudimentary effort was made to obtain such permission, it is clear that the Himba were not fully consulted, did not realize the extent of this intrusion on their lands, and did not clearly recognize exactly what their “permission” was requested for.

Rather, NAMANG apparently assumed that this land was “state land” and that the Namibian government had authorized their use of it, and that they needed to approach the Himba for “permission” only for symbolic reasons. For over a year, several dozen engineers or other experts went to work every day, literally passing through Himba villages, or homesteads, gardens, or graveyards, without engaging the people trespassing on various kinds of “private” places, traditionally guarded by particular Himba families. The Himba felt angry and betrayed; misinformed about the purpose and extent of the project.\(^{93}\)

Because the Namibian government did not want to acknowledge Himba property rights by more formally requesting their permission to live and work on Himba lands or by discussing the dam project with them, the Himba viewed the government’s actions as direct affronts to their political and property rights. As long as the Ministry of Mines and Energy viewed the land as “state land,” and the Himba were not seen as a physical threat to the project, there was no need to acknowledge Himba property rights. Another possible answer, equally offensive in Himba eyes, is that the slight was inadvertent and nobody even thought to ask the people actually living at the dam site. Engineers working at the site believed that the Namibian government had dealt with the local people and that dealing with such local social issues was not in their job description.\(^{94}\)

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91. I visited the region in 1995 during the feasibility study work and again in 2001; much of the material which follows is from personal observation or interview.

92. See generally Rachel L. Swarns, Losing Track of the Centuries, N.Y. Times, April 2, 2000, at Travel 8-9 (describing the process of organizing a tourist visit to a Himba village).

93. BOLLIG, RESOURCE MANAGEMENT, supra note 37, at 82-90. There is no clear agreement about exactly what was said to the Himba at this time and the issue of this “miscommunication” is still unresolved.

94. I was present on several occasions when engineers simply walked through groups of Himba without even acknowledging their presence. There were also serious language difficulties as none of the engineers spoke Herero, and few Himba speak European languages.
6. Variations of the Dam Scheme

a. Engineering Concern

Different variations of the dam scheme emerged from this research. The rugged terrain changes at Epupa Falls made it a difficult engineering feat. Above the falls, the river runs through a broad valley, lined by gently rolling hills, set back several miles from the water. The hills would contain the impoundment behind the dam, but only in the form of a very broad and shallow lake up to five miles wide, and approximately forty miles long. Except for the remoteness of the site, it is a “perfect” location for a large dam.

This “Epupa site” would be the easiest to build, using existing dam technology, but such technology would be highly disruptive of Himba life because it would require flooding a broad valley extensively used by herders and farmers. This valley is the heart of Himba territory, holding hundreds of important sites such as graveyards, gardens, herding camps and households. The construction of the dam here would block traditional traveling routes between Namibia and Angola. Although only 600-1000 Himba actually live in the area to be flooded, at least 3500 to 4000, approximately 25% of the people, use the area at some point during the year.95 In drought years, the river is of much greater importance, because it is the final place where herds can be watered.96

Immediately below the falls, the river drops through a steep canyon, with the mountains close to the river. Here, the impoundment would be narrow and deep, and the dam would be just over six hundred feet high—the highest dam in Africa. In contrast, the “Baynes” site, about twenty miles west of Epupa Falls, would create more technical difficulties and higher construction costs, but would displace far fewer people because the mountainous area is much less inhabited or used for grazing.97 An impoundment placed here, however, would hold much less water, and would cause the dam to produce less power. While the Baynes site is less damaging to the environment and to Himba culture, it would require relying on water stored in existing impoundments further upriver in Angola. A dam at the Baynes site is therefore less profitable and more politically vulnerable, because of its dependence on Angola.

Additional engineering problems existed. Because the Kunene is a small river with a seasonal flow, a large dam would require an extensive reservoir to store water in the wet season to use to make power in the dry season. The area is a high desert and such a huge reservoir would have a high evaporation rate. This

95. Draft Feasibility Report, supra note 5, at v. 8, 23.
96. POWER CONFLICTS, supra note 90, at ch. 12.
97. While the Lower Kunene Hydropower Scheme Feasibility Study technically focuses on both the Baynes and Epupa sites, it has always been the Epupa site that has been the focus and the entire scheme is popularly referred to as the “Epupa” Dam, a usage followed here.
evaporation would waste vast quantities of water in one of the driest countries in the world, and would have unknown potential environmental costs, including possible climate changes. The Baynes site, because it is much narrower and is hemmed in by steep canyon walls, will hold much less water, therefore requiring reservoirs up-river to operate it at full efficiency. But, it is also much more remote, necessitating a larger and more expensive road construction effort and increased construction costs.

The smaller power generating capacity of the Baynes Dam would also change the economics of the project, producing less hydropower to sell to repay the debt. Geographically, the Baynes site is more accessible from Angola; more remote from Namibia. The construction of the Baynes dam would for the first time offer an independent Angola a choice in how its water resources might be used for its own development. Moreover, as the Baynes site is dependent on the rehabilitation of the Gove Dam in central Angola, its construction would be of further benefit to the Angolans at the expense of the Namibians. While Namibia will benefit from the electricity generated, construction in Angola will shift a greater proportion of the construction budget and subsequent benefits to Angola, meaning less revenue for Namibian construction companies.

The engineering portions of the Feasibility Study were done between 1995 and 1996. While judging the quality of this work is beyond the scope of lawyers, there is some evidence of questionable practices. For example, although the volume of water flow is an absolutely critical variable in a desert river, the engineers never systematically measured it over the course of the two-year study. Rather, they based their calculations on data from the flow of the Kunene River at Ruacana and from the Okavango River at Rundu, almost five hundred miles to the east, combined with a limited actual measurement of the flow at Epupa to develop a theoretical model of the river flow.\(^9\)\(^8\) It is not correct to estimate highly irregular river flow volumes in this way, especially with a billion dollar project at stake.

\subsection*{b. Economic Concerns}

This questionable estimate of the volume of water was carried through in equally questionable economic projections. It is not a simple matter for a third world country of less than two million people to pay off a US$ 600 million debt. Despite basing the economic projections for the dam on the lowest possible cost estimates and the highest possible power production estimates, the dam was still only marginally a sound investment. Since cost overruns are routine in dam construction projects, averaging 56\%,\(^9\)\(^9\) (at least US$ 400 million more in the

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99. Dams and Development, \textit{supra} note 62, at 39, 40. These data are based on an average for 81 large dam projects. While there is wide variability in the range of cost overruns, they are consistently high. Moreover, the
Epupa case, making it a billion dollar project), the income generated from a dam is often insufficient to pay for its construction costs. Similarly, if revenue from power were somehow lower than expected, the dam could also not pay for itself. Additionally, if water levels dropped, reducing power production (as has happened every year at Ruacana), the dam would likely not be profitable. This would burden the Namibian government with foreign debt that it could not repay.\textsuperscript{100} Thus, there are three different scenarios, each independently possible, that counter the projections that the Epupa Dam is economically viable.

\textit{c. Additional Studies}

Additionally, the dam planners did not initiate the various social and environmental studies until very late in the study, almost as an afterthought. Given the recent World Bank reassessment of its policies regarding the construction of large dams because of the impact on local populations, the lack of attention to the "issue" of the Himba, who calmly herded their cattle right past the planners' safari tents, is incomprehensible.

This failure to study the effects of the proposed dam on the Himba and their culture was not accidental. The Namibian government, represented here through the Ministry of Mines and Energy and SWAWEK, maintained the South African era colonial mentality and did not acknowledge that the Himba might have any legal or social interest in the Epupa Dam scheme. There was no question that the Himba could not be moved cheaply and without difficulty further into desert Kaokoland. There was, however, some concern with environmental issues because Namibia has a well-developed environmental science apparatus and the Kunene River and its riparian ecosystem supports some species that are rare and endangered.\textsuperscript{101} These environmental issues, while substantial, have been overshadowed by the Himba and their opposition to the dam.

IV. \textit{"There Will Be No Dam Here": The Himba Confront the Dam Builders: A Discourse on Namibian Development}

Any confrontation between tribal peoples and modern development assumes unique qualities because, by definition, these events are defined by cultural forces that are fluid and in formation. In this situation, the Himba and their cattle are posed against a huge dam built by international conglomerates.


A. THE HIMBA LEADER

Hikuminue Kapika, the traditional chief of the area that includes the Epupa Dam, is an unlikely actor on this scene. He is one of fifteen Himba chiefs, and one of four whose lands border the Kunene River as it courses through Kaokoland. Over eighty years old, he speaks only Herero, the language of the Himba, never having had enough contact with the South Africans to learn Afrikaans. A rich man, Kapika owns vast herds in both Namibia and Angola. He lives in Omuranga, a mud, stick and thatch settlement of a few hundred people, with no electricity, twenty miles south of Epupa Falls.102 The opposition of Kapika and his people to the dam has been bold and loud, a simple theme repeated over and over: "God gave us this land. It is our land. You cannot build your dam here. Go away."

B. THE "PUBLIC" MEETING

As the Feasibility Study went forward, problems began to develop between the locals and the dam builders. The conflict spilled into the open at a "public" meeting held at Epupa Falls in August of 1995 to the surprise of the government and the engineers.103 The meeting was scheduled as a consultation with the local community, as part of the Feasibility Study process. The Permanent Joint Technical Commission, originally established by South Africa and Portugal in 1969, is an agency of both the Angolan and Namibian governments to develop the Kunene River and the Epupa Dam.104 The commission meets approximately once a year, usually alternating between Windhoek and Luanda. Andamo Toivo ya Toivo, then the Namibian Minister of Mines and Energy, led the Namibian delegation. The location of the meeting at Epupa was therefore especially significant.

The idea of this public meeting at Epupa Falls was likely conceived as an opportunity for celebration of the dam and for photographs documenting the approval of local peoples for the dam. The closest town is about a hundred twenty miles and four hours away on poor dirt roads, so the logistics of such a meeting are formidable. This was the second meeting at the falls; the first, a consultation with local officials a year earlier, resulted in a report that local peoples had given their approval to the dam.105 Thus, the plan for the second, larger and more formal meeting was to carry this theme forward to this a propagandized event, showing local people meeting with the dam builders.

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102. The son of a famous chief, Munemuholo Kapika, who died in 1982 at age 102, Kapika was born in Angola and has lived his entire life within a few miles of Epupa.
103. Obviously a "public" meeting at a place where few people live is a symbolic kind of meeting. This one was on the banks of the Kunene River, a few hundred yards downstream from the camp of the feasibility study.
A small circle of white folding chairs was set up on a sand bar under palm trees along the bank of the Kunene River. During the previous night two armored vehicles, "Caspirs" inherited from the South African army, came up the rough track along the river from Ruacana bringing a visible symbol of Namibian governmental administration to the area. About forty armed soldiers occupied the site, infuriating the Himba because they saw this as a governmental show of force directed at them. The soldiers milled around in a casual demeanor, one of them distributing handbills advertising shares of stock in a mercantile company in Ovamboland. A handful of Toyota Land Cruisers arrived from Opuwo, carrying about twenty regional governmental officials. A few Ovambo businessmen also arrived, representing the "dam boosters" in the region. Additionally, two small airplanes arrived, carrying government officials from Windhoek and Angola, respectively. With the attendance of perhaps fifty Himba and twenty scientists from the Feasibility Study camp, there were approximately a hundred people at the meeting.106

Surprisingly, the Himba took over the meeting. The respective ministers had hardly gotten past words of welcome, when Chief Kapika, politely but firmly interrupted the proceedings. He reminded the listeners that he had repeatedly opposed the dam, but that no one had consulted the Himba. He explained that he didn't understand the purpose of the meeting, declared that "there will be no dam here," and concluded that there was no need for a meeting to discuss it. He talked at great length, going through the history of the land, the uses his people made of it, their first knowledge of the plan for the dam, the intrusion of the camp and the Feasibility Study, repeating that the government had ignored the Himbas' ownership of the land. His language was bold and powerful. At one point, when a small herd of goats wandered through the meeting, he interrupted Minister Toivo ya Toivo, pointing out that the goats had more of a right to the land than the government did because the goats at least lived there. Kapika also gestured at the armored vehicles, saying that the current Namibian government was treating his people worse than the South Africans had, and claimed that he wasn't afraid of the army.

Other Himba spoke as well, echoing the same message. While they were civil in their demeanor, their language was powerful and highly offensive to the Namibian government. Comparing the SWAPO government unfavorably to the South African government is powerful rhetoric in modern Namibia. Similarly, saying that goats have more right to land than the Namibian government ridicules the state's claim to ownership of the communal lands. These word choices were not accidental; strong language is common in Namibian politics.

The carefully planned meeting had gone wrong, embarrassing the Namibian

106. I was present at this meeting, held on Aug. 24, 1995. See Sidney L. Harring, There will be No Dam Here: Himba Leaders Confront the Government, 11 WORLD RIVERS REVIEW (June 1996), available at http://www.irn.org/pubs/wrr/9606/9606namibia.html.
government. The officials and the engineers working on the study were taken aback by this level of local opposition, seemingly unaware that it existed. The strong statements of opposition from the Himba had been clear and unambiguous, but they were an absolute surprise to the officials present. Minister Toivo ya Toivo promised that the Himba would be consulted before the plans for the dam were finalized. Gerd Burmeister, managing director of the engineering firm that was responsible for the feasibility study, spoke, saying that the plan was to construct a “very large dam” that would significantly disrupt Himba society. Burmeister also promised to consult with the Himba and not to build the dam until the local residents’ views had been taken into account. The meeting, which had lasted about two hours, broke up on an unsettled note. From this point on the Namibian government was aware that it faced substantial local resistance to the dam project. The government’s strategy quickly emerged: the Himba were attacked as “backward and primitive” and their opposition was attributed to “outside agitators” such as NGOs, lawyers and other members of the environmental movement. This discourse continues to the present.

C. HIMBA OPPOSITION TO THE DAM

The origin of Himba opposition to the dam is difficult to document. There are many stories, but no documented moment that opposition began. There is an oral history that begins with the Himba being told by various officials that the government was considering building a “dam” on the Kunene River above the Epupa Falls, but the word “dam” was translated into Herero as a small earth dam, the kind built to impound small seasonal rivers for water for cattle.107 The Himba had no understanding of a large hydroelectric dam, and no understanding of the flooding of the heart of their lands with a reservoir approximately forty miles long. Indeed, there are no such reservoirs anywhere in their country.

It seems that for several years the Himba were generally aware of plans for a “dam,” but had no idea of the scope of the project until it was explained to them, perhaps in 1993 or 1994. It is not clear who first explained this to the Himba, although several different people may have brought it up on several different occasions. One anthropologist reports that a registered letter in English announcing plans for the pre-feasibility study and generally describing the proposed dam was sent to the illiterate Himba chiefs in 1993. He found it unopened when a chief produced it from a corner of his hut.108 By this time the scope of the project was widely known throughout Namibia, so word could have reached the Himba through many different sources. At that time, engineers, government

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107. Chief Katjira Muniombara put this simply: "In our world a dam is a small thing that gives cattle water. What you are talking about is something else and will finish the Himba." Ezzell, supra note 4.

108. Power CONFLICTS, supra note 90 (quoting Chris Tapscott, a Namibian anthropologist and consultant to the pre-feasibility study).
functionaries, tourists and missionaries regularly passed through Himba lands, and several anthropologists resided there. Regardless of how or when they actually learned of the dam, the Namibian government did not adequately present the Epupa proposal to the Himba before they sent scientists to their lands.\textsuperscript{109}

The Himba resented their land being taken for a dam without their consent. The issue was not only that their land would be taken for a dam, disrupting their lives and culture; it was the disrespect shown them in the process by SWAWEK and the government. There are also stories of various Namibian government functionaries passing out small gifts, including liquor, telling the Himba that the land was not theirs, promising great benefits if the dam were built.\textsuperscript{110}

The earlier June 1994 meeting can now be re-assessed. The Himba honestly came to "be consulted" about what they believed to be a small dam. From their point of view they sat and listened as the government and SWAWEK made their presentations. Dozens of people present made statements, including many from local politicians strongly supporting the dam, while Chief Kapika and his people politely listened. Kapika, himself, did not speak, except to defer to his counselor, who spoke saying that the Himba needed more time to consider the matter.\textsuperscript{111}

Two issues emerged from this. First the Himba's silence was mistaken for either acquiescence or even approval, and second, the full extent of the plan and its disruption of Himba life for the dam was not accurately presented. By 1995, a year later, the Himba, with more information and more time for internal discussion, had become opposed to the dam. It also seems that the Himba had become angry with the government for misleading them, for ignoring them, and for trespassing on their lands without acknowledging their rights.

D. THE POLITICAL HISTORY OF MODERN NAMIBIA

The political history of modern Namibia is relevant here because the poor relationship between the Himba and the Namibian government has been a long time forming. The Himba and the Ovambo, while not enemies, have traditionally had an arm's length and commercial relationship. The Kaokoland Region, with a large Himba and Herero population, does not support SWAPO, the ruling party of Namibia, which is dominated by the Ovambo. Ovambo people, in turn, dominate the entire governmental apparatus, including the local government of Kunene Region, of which Kaokoland is a part. Businessmen and politicians, many of them Ovambo, stand to make enormous profits from the construction of the dam, subcontracting for a wide variety of materials from food to asphalt and cement to machinery. Because Kaokoland is so underdeveloped, much of the construction money will flow through Ovamboland, immediately to the east.

\textsuperscript{109} BOLLIG, RESOURCE MANAGEMENT, supra note 37, at 82-90.
\textsuperscript{110} Id.
\textsuperscript{111} Hoogenhout, supra note 105.
While these profits would be realized even without corruption, and the level of corruption in Namibia is not particularly high, in Namibia, as in other countries, such contracts often require various “kick-backs” or under the table “business partnerships” to various government officials.112 Thus, issues of national development and self-sufficiency become merged with the growing specter of ordinary self-interest and corruption, driven by the extraordinary profits that flow from this particular form of “development.”

The sheer economic expenditure of the Epupa project (the US$ 1 billion cost—including cost overruns) makes it the largest single Namibian development project. The project will make many people, in and out of government, rich, and directly and indirectly provide jobs or income for thousands more. The Namibian government, like the governments of many third world countries, has been spending a fortune on construction, all on borrowed money: the Epupa Dam project is distinguished only by its great size and cost. The skyline of Windhoek has changed dramatically since 1995, with the construction of several dozen expensive, non-descript government buildings, mostly debt-financed. It is not clear how the small and poor country is going to repay this debt. The government of Namibia, solidly in the hands of SWAPO which controls the National Council, has become increasingly insensitive to the concerns of minority tribal peoples in Namibia, reflecting both the Ovambo’s 60% majority of the population and also traditional tribal rivalries. The country faces a serious risk of destabilization, prompting concerns about human rights.113

In 1994 the Rehoboth Baster community sued the government over a complex land issue that resulted from the government displacing Baster people from farms they had occupied for over a hundred years. The Basters’ lost the case, but remain bitter over their treatment by government officials.114 In 1997 communities of Kxoe Bushmen were moved off their lands in Caprivi to make way for expensive tourist “safari” camps. These people dispersed, with large numbers fleeing to neighboring Botswana.115 In 1999 a small insurrection was mounted in Caprivi as the Fwe, another small tribe with a long history of grievances against the

112. Pieter Mietzner, Namibia’s No. 30 on Transparency, New Era, 2 July 2001, at 1-2. The 2001 “Corruptions Perception Index” of Transparency International listed Namibia number 30, close behind Botswana (26), about the middle third for corruption in the world, but second lowest in Africa. By contrast Nigeria and Bangladesh, at 90 and 91, respectively, have the highest levels of official corruption in the world while Finland, Denmark, and New Zealand (at 1, 2 and 3, respectively) the lowest. SWAPO has tabled anti-corruption legislation in the National Council, and Prime Minister Hage Geingob has spoken out against official corruption.


Namibian government, carried out an armed attack on a Namibian police post in Katima Mulilo, the regional capital. Several dozen people were killed as a result of that fight and the army’s retaliation against the Fwe. Hundreds of people were arrested on treason charges and still remain in prison, awaiting trial.\footnote{It is still not entirely clear what occurred on August 2, 1999 and there is some evidence that the government of Namibia has exaggerated the nature of the insurrection. \textit{Maria Fisch, The Secessionist Movement in the Caprivi: A Historical Perspective} (1999).} Obviously, treason trials of hundreds of disaffected rival tribe members in a small country has an enormous political impact on a new and fragile democracy. The government’s overreaction may be calculated to send a message to other disaffected minority tribes.

The Himba are not politically isolated, but are allies with their Herero relatives, in the Democratic Turnhalle Alliance (DTA), the leading opposition to SWAPO. There are about 100,000 Herero in Namibia, a small population compared to the Ovambo. However, with about the same population as the Kavango and Damara, the Herero are among three tribes ranking as the next largest tribes in Namibia.\footnote{The Namibian census of 1993-94 did not take account of ethnic identification. The 1989 census reported Herero, Kavango, and Damara has having 7.5\% of the population each, or about 100,000 each based on the current population estimate of 1.6 million. \textit{Malan}, supra note 18, at 2.} The Herero are also advantaged by their geographical position, in the colonial heartland of Namibia, and a well-established traditional system of chiefs and government. The Herero have been pressing claims for compensation for the loss of their lands in central Namibia to the Germans after the Herero War of 1904-05.\footnote{John Grobler, \textit{The Tribe Germany Wants to Forget}, \textit{Electronic Mail and Guardian}, March 13, 1998, \textit{at} \texttt{http://www.mg.co.za/mg/} (last visited Aug. 10, 2001).} These claims are opposed by SWAPO, who claim that no particular group is entitled to compensation since all tribes suffered under colonialism.

In this context, the Herero’s blocking of the Epupa Dam, the largest potential development project in the entire country, takes on a new, and very political, meaning. The idea of forcibly removing the Himba from their lands does not faze the SWAPO government; this is how politics is practiced in modern Namibia. It would amount to settling a score against the Herero, providing a clear example of what happens to people who get in the way of SWAPO development projects. It also goes a long way toward explaining how the government could promote such a large dam project for several years without consulting with the people who live there. The simple answer is twofold: first, the Himba did not matter to the government, and second, there was no political reason to even acknowledge their legal rights in the face of the dam.

Other political factors enter this process as well. The Namibian government now represents a powerful black elite with interests distinct from the poor villagers in the north. To them, “development” means electricity and modern buildings, and a vision of an industrially developed Namibia. Similarly, the
SWAPO government strongly rejects any idea of “tribal” interests, citing a history of tribal civil wars in Africa as undermining African development.\(^{119}\)

E. MODELS OF DEVELOPMENT

This political dispute also contains a discourse on development that was put forward in plain language; there are different models of development that must be considered, even within the context of Namibian politics. The DTA opposition in Parliament demanded that the government consult the traditional chiefs before it proceed with the Epupa project, asserting that the decision making process was defective in that it overemphasized the role of SWAPO party functionaries at various levels of government and failed to consult traditional leaders, a completely valid criticism of the process.\(^{120}\) Chief Kapika is the traditional chief of the area that includes the dam, holding traditional governmental authority in the area—a political position recognized in the Namibian Constitution.\(^{121}\)

Similarly, organized Namibian and international environmental groups raised obvious issues about the social and environmental impact of the project, another discussion rooted in a vast, world-wide experience with large dams and their accompanying economic and social costs, which are often born disproportionately by remote indigenous populations.\(^{122}\) The NAMIBIAN, an influential and often critical national newspaper, raised basic issues about the political process underlying the dam project and challenged the basic economic soundness of the project itself.\(^{123}\) What distinguishes Namibia from many other African nations is that there is generally a free press and open political disagreement with governmental policies. Therefore, the Himba’s position is well known throughout Namibia and receives accurate coverage in the press.

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120. Christof Maletsky, Epupa Could Result in Himba Court Case, NAMIBIAN Feb. 21, 1997. DTA Vice President Katuure Kaura pointed out that under Article 102(5) of the Namibian Constitution requires the government to appoint and consult with a Council of Traditional Leaders. His point was that such a council would have given the government different advice on the dam than it got from party underlings and technocrats. This is a direct critique of the political process that underlies who makes “development” decisions and what social values are embodied in those decisions.

121. Article 66 recognizes the “customary law” of Namibia as long as it does not conflict with the Constitution or statutory law. Article 111 recognizes the power of “local authorities,” which include the traditional authorities. CONSTITUTION OF NAMIBIA, available at http://www.uni-wuerzburg.de/law/wa00000_.html (last visited Aug. 10, 2001).


123. See generally Editorial, Epupa Decision very Worrrying, NAMIBIAN, Feb. 21, 1997; Editorial, Need for a Clean Debate on Epupa, NAMIBIAN, July 19, 1996; Editorial, Nyamu Discredits Epupa Process, NAMIBIAN, March 14, 1997. The government, over this and other issues, has stopped purchasing the newspaper, claiming that it is anti-government in its reporting.
F. OWNERSHIP OF THE LAND

A legal framing of the Epupa Dam issues followed shortly after the articulation of the same issues. Legal posturing began in 1995 in the context of this debate over development.124 The immediate issue that concerned the Himba was the obvious legal question of who owned the land. The question of land ownership underlies the construction of the dam; with so much land being either used or flooded, the government’s assertion that it owned all the land was an affront to the Himba, as well as of great practical significance in the effort to stop the dam. The builder of the dam would have to own the land. Similarly, if the Himba owned the land, they thought they would have a right to live there as well as standing to object to the dam project. The legal history of dam building is replete with cases denying the land rights of the tribal peoples living in the path of dams. Therefore, this issue became key in framing the Himba’s opposition to the dam.

G. ADDITIONAL LEGAL ISSUES

This issue of land ownership was of the utmost significance, but it became apparent that there were other issues as well. The shoddy quality of the Feasibility Study and the enormous environmental damage that would be caused by the dam raised a number of potential legal questions in the areas of environmental law and administrative law. Environmental law is very underdeveloped in Namibia, and there is little to guide the courts in dealing with environmental matters as complex as those raised by the Epupa Dam. In general, matters of environmental protection receive a low priority, perhaps typical of third world countries with more pressing domestic issues.125 Even if Namibia, or any other third world country, had a regime of environmental law, it is unlikely that it would be adequate to legally regulate the construction of a large dam because of the extra-ordinary technical complexity of such an enterprise.

Article 95 of the Namibian Constitution requires that the “state shall actively promote and maintain the welfare of the people by adopting policies aimed at maintenance of ecosystems essentially 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 . . . .”126 This language, however, is contained in a section of the Constitution delineating “principles of

124. Maletsky, supra note 120. This article was the first report of a legal framing of the case. The Himba, however, first met with lawyers in a preliminary way, in the fall of 1994 and, in the fall of 1995, met with the Legal Assistance Centre to discuss their legal options. The content of those discussions is confidential, a lawyer’s advice to his clients.


state policy” rather than setting out “rights.” Moreover, this language is so
general that it is subject to judicial interpretation in a country where courts give
great weight to political decision-makers. A court has no way to measure
“sustainable” use of natural resources, for example, but must defer to scientists
working for various government ministries.

Administrative law issues are even more difficult for courts to address. The
fact that SWAWEK (now Nampower) is a parastatal corporation raises these
issues, because although it has substantial corporate powers to act independently
of the Namibian government, it is still a government body under the Ministry of
Mines and Energy. This relationship was underscored as the drafters of the
Feasibility Study blamed the Namibian government for the failure of the required
social impact study, arguing that the government neglected its political duty to
build a relationship with the local people. However, like environmental law,
administrative law in Namibia is underdeveloped, making these governmental
failures difficult to translate into violations of administrative law.

In 1997 and 1998, the discourse on development in the context of the Epupa
Dam became increasingly polarized and politicized, a test of loyalty to the
SWAPO government. At a meeting in Opuwo in March of 1997, Jesaya Nyamu,
then Deputy Minister of Mines and Energy (and presently the Minister), an-
nounced that the dam would be built, no matter what the Feasibility Study
concluded. This confirmed the worst of the opposition’s fears. The Himba
announced that they would not cooperate any further with the Feasibility Study
since their input could not matter after a decision had been reached. Therefore,
the critical final step of studying the impact of the dam on the local population
and developing a mitigation scheme could not be completed.

H. THE NAMIBIAN RESPONSE

At this point, President Sam Nujoma entered the fray, denouncing “foreign”
agitators for “using” the Himba to oppose the dam for their own selfish reasons.
In a speech to foreign diplomats, he stated that “the Government will not be
deterred by the misguided activities of those who want to impede economic
development and upliftment of the standards of living of our people.... We
fought for human rights, democracy and social change. We refuse to succumb to
sinister manipulations and misinformation of people who do not have Namibia’s
interest at heart.” In another speech he accused the Legal Assistance Centre,

127. Deon Obbes, Maintaining Biological Diversity – A Namibian Constitutional Perspective, 6 S. AFRICAN
128. Draft Feasibility Report, supra note 5.
129. Legal Assistance Centre Pamphlet, supra note 86, at 16.
130. Id.
131. Chrispin Inambao, Epupa Gets Green Light, Nujoma Slams ‘Sinister Manipulators,’ NAMIBIAN, Aug.
The only public interest law firm in Namibia, and the lawyers for the Himba, of being unpatriotic, and interfering in Namibian development by representing foreign interests. The full weight of the government had come down on the side of the Epupa Dam, with or without the Feasibility Study.

The government continued its support of the dam by authorizing a police raid in November 1997 on a meeting between the Himba and their Legal Assistance Centre lawyers held at Omuramba, Chief Kapika’s village. The police’s pretext was that the meeting was in violation of a South African-era statute that prohibited large public meetings without a permit. The Legal Assistance Centre argued in court that the statute was unconstitutional and was not applicable to a meeting between lawyers and their clients. The Centre sought an injunction against the local chief of police to prohibit him from interrupting future meetings with their clients. The injunction was granted, to the embarrassment of the government, and the judge declared the colonial-era law that the police relied on unconstitutional. The government then obtained an injunction against Chief Kapika by claiming that his language was threatening, despite the fact that they used it out of context. Chief Kapika was ordered not to injure various government officials.

I. PRESENTATION OF THE EPUPA FEASIBILITY STUDY

The Epupa Feasibility Study was publicly presented at a well-attended meeting in Windhoek in February of 1998. The social aspects of the study, mostly relating to the dispossession of the Himba, were the topics of focus, although technical data dominated most of the study. Two of the most eminent anthropologists working with the Himba, Margaret Jacobsohn and Michael Bollig, were hired to hastily complete this part of the study. Both had long relationships with the Himba and integrity beyond question, necessary at this point to overcome the hostile situation that had developed.

The reason that Jacobsohn and Bollig were approached so late in the process itself reveals some measure of bad faith on the part of the designers of the feasibility study process. The project had originally hired a team of social scientists from the University of Namibia, apparently assuming that they would write a routine report diminishing Himba concerns and thereby open the way for the removal of the Himba from the Epupa area. These scholars, who are not named here, not only failed to get the work done, but were so untrustworthy that the Himba would not even talk to them. The integrity of Jacobsohn and Bollig

132. Id.
134. Personal communication, Andrew Corbett, Director, Legal Assistance Centre, 1999.
also structured their conclusions, which was an obvious problem for the dam builders. The scientists were well aware of the significant Himba interests in the region and their well-established culture that would, in fact, be severely impacted by construction of the dam. Because of the extensive publicity, the government was forced to recognize the Himba's interests, as included in the Feasibility Study. It was too late to complete the critical (and required) "social mitigation" report. Such a study should have determined and proposed the measures needed to "mitigate" damage to the Himba and their culture by the proposed dam.  

However, one questions how such a grave threat to a traditional culture could be "mitigated." Where could a substantial pastoral culture, including tens of thousands of cattle, be moved anywhere in Namibia? If the Himba were relocated without their herds to rural slums, how can the effect of such cataclysmic social change be mitigated? The Feasibility Study contained a few references to population relocation schemes done before other dams were built, but neglected to point out that none of these schemes were successful. At its most disingenuous, the Study pointed out that, since the Himba were poor, it would not cost much to move them, therefore keeping "social mitigation" costs down. In fact, since mitigation and relocation costs were not included in the Feasibility Study, its economic projections resulted in artificially low cost estimates.

With the abandonment of the social impact and mitigation study, the Epupa Scheme became an "outlaw" project in the world of modern hydropower development. In the year 2000, it is not possible to plan such a project without addressing the needs of the local population. The World Bank, for example, adopted new standards for funding dams in the mid-1990s as a result of concerns about displaced local populations. Additionally, as the World Commission on Dams report concluded, virtually all cases of removal and relocation of indigenous people by dams has led to social disaster for the people involved.

136. As of August, 2001, it was not even under way. Nampower insists that it is the Himba who have prevented this study by refusing to co-operate. While a number of views of this are possible, one is simply that the duty to conduct a social mitigation study rests with Nampower and the whole matter, including Himba resistance, is their responsibility. The idea that an indigenous people might, for their own selfish reasons, block a social mitigation study is theoretically interesting, but a gross distortion of the political process that accompanies a large dam. Conflict in planning large dam projects is not unexpected and can be mitigated by proper discussion and planning. Resolve Inc, Participation, Negotiation and Conflict Management in Large Dam Projects, World Commission on Dams, Thematic Review v. 5, available at http://www.dams.org.

137. Lower Cuene Hydropower Scheme Feasibility Study, Environmental Assessment, supra note 101, at v. 13, 2, 3.


139. It is useful to recall here that the "study" didn't even count the local population. The government of Namibia and the Epupa project planners do not know how many Himba there are. In addition, 600 to 1,000 are listed as living in the area to be flooded: nobody even knows how many people live in the area.

140. POWER CONFLICTS, supra note 90, at ch. 3.

Also lost in the chaos of the social impact study was the environmental impact study. The Epupa Dam also was likely to create serious ecological consequences that could not be mitigated. The Kunene River, which flows through the world’s driest desert, is the only permanent water source which can support a riparian environment for hundreds of miles. Many of the endemic species present have been isolated in the Kunene Valley for centuries are potentially doomed by the dam. The environmental impact study concluded that the Epupa Dam would cause great damage to the environment. Across the board, socially and environmentally, the Epupa Dam would be a drain on human and environmental resources.

J. THE NAMIBIAN GOVERNMENT VERSUS THE HIMBA

The harsh criticism of the Feasibility Study only hardened the position of the Namibian government. It increased its attacks on the Himba by calling them "backward" and "primitive," and by spouting nationalistic and isolationist rhetoric. Minister of Trade and Industry Hidipo Hamutenya told the BBC: "[t]hey (the Himba) need to cope with the vagaries of nature—the heat and the cold—by putting on what everybody else has; ties and suits, rather than being half naked and half dressed." The Namibian government repeatedly asserted that it was prepared to go ahead with the dam and claimed that other countries were contacting Namibia, eager to finance the dam project. Rumors of Arab and Malaysian money circulated, always without particulars. In fact, no country has yet come forward to finance the dam; once the project was demonstrated to be of only marginal economic benefit, its attraction to lenders operating purely for economic reasons disappeared. The major providers of foreign aid, economic assistance rendered for social rather than economic reasons, are mostly Western countries. Their concerns about human rights cannot be met under the current Feasibility Study.

The Himba were not intimidated by the hostility of the government and matched the increasing level of rhetoric. Chief Kapika proclaimed that if the dam was built "we will all gather there and they will have to build the dam on top of us." He and Chief Paulus Tjavara went on a tour of Europe, getting good press and good crowds in Germany, Sweden, Norway and England.

Kapika addressed crowds of environmental activists and additionally went to the foreign offices and leading banks in each country to ask them not to fund the Epupa Dam. Not only was his visit well covered by the local press, but a number of foreign

143. Chrispin Inambao, Epupa Gets Green Light, Nujoma Slams Sinister Manipulators, NAMIBIAN, Aug. 19, 1997. This statement is another example of the kind of rhetoric used in this dispute, much the kind of thing South African officials might have said.
144. Id.
officials promised not to finance the dam. Such promises were a powerful victory over the Namibian government’s insistence that it had numerous funding sources available. In Norway, the chiefs requested a meeting with Norconsult to protest that company’s involvement in the Feasibility Study. When Norconsult responded that it was “unprepared” to meet with them, Kapika announced he would come anyway. Norconsult obviously could not work uninvited in Himba lands and then turn them away at their door in front of local television cameras so it hastily agreed to meet with the Himba.\textsuperscript{145} The visual image of these Himba chiefs clad in traditional clothing making the rounds of expensive offices, asking people not to fund the Epupa Dam was powerfully conveyed in Europe and was an embarrassment to the Namibian government.\textsuperscript{146} The Namibian Ministry of Mines and Energy put out a press statement alleging that Kapika was the “tool of environmental extremists,” calling his tour a “well organized farce aimed at perpetuating European preconceptions and stereotypes about Africa.”\textsuperscript{147}

The problem with this approach was that, in a democracy, the Himba had every right to take their case to the source of the funds or anywhere else they chose. The Namibian government’s response was inappropriate.\textsuperscript{148} Because there was no similar way to get prime time television coverage in Europe for their position favoring the dam, the government clearly lost this part of the propaganda war. Because the Feasibility Study itself had been discredited, the Himba had more overseas credibility than the Government on the Epupa issue. Every claim they made about damage to their culture was true, so the Ministry was unable to launch the kind of attacks they usually engaged in. Democratic ideals, including the right to criticize the government, are not well entrenched. Therefore, for the Himba to take their case directly to the funding sources was seen by the SWAPO government as an act of great disloyalty, embarrassing Namibia in the world, and undermining its national development.

But the Himba weren’t finished with their political initiative. Two months after the official release of the Feasibility Study, Chief Kapika announced the creation of the Kaoko-Epupa Development Foundation, a Himba-led organization that would focus on developing the region’s economy, including sponsoring studies of solar and wind power alternatives to the Epupa Dam, as well as protecting Himba cultural traditions.\textsuperscript{149} Such an organization directly challenges the Namibian government’s monopoly over the development of Kaokoland.

\textsuperscript{145} Himba Make Headlines in Sweden, \textsc{Namibian}, July 2, 1997; Himba Come Face to Face with Epupa Consultants in Norway, \textsc{Namibian}, June 27, 1997; European Support for Himba Mounts, \textsc{Namibian}, June 24, 1997; Himba Gain Support from German Banks, \textsc{Namibian}, June 20, 1997; Himbas Win Support in Germany, \textsc{Namibian} June 16, 1997 (all available at http://www.saep.org/sadc/country/namibia/epuparticles.htm).

\textsuperscript{146} Mines Ministry Loses Cool over Himba Trip, \textsc{Namibian}, June 18, 1997.

\textsuperscript{147} Id.

\textsuperscript{148} Ministry’s Approach is Embarrassing, \textsc{Namibian}, June 20, 1997.

\textsuperscript{149} Christoff Maletsky, Himba Seize Initiative: Kapika Heads New Development Body, \textsc{Namibian}, April 6, 1998.
V. HIMBA LAND RIGHTS AT EPUPA FALLS

At its core, this dispute is about Himba land rights. But communal land rights are complex, involving a number of considerations. The value of the land is the most apparent measure of these rights, but such considerations are as much social as economic.

A. VALUE OF THE LAND

One of the basic errors in the US$ 600 million cost estimate of the Epupa Dam is that the Feasibility Study put the cost of the land, of relocation, of water, of the environmental loss, at only US$ 2.6 million, plus the unknown cost of relocating the Himba.150 This was based on the questionable assumption that the Government of Namibia “owned” the communal lands, water, and natural resources. Although this is the dominant view of communal land and water rights throughout Africa and the world, it requires analysis, for it has great social and legal consequences. While the Himba have objections to the dam on many levels, their position is centered on their honest belief that they “own” the land, and the government of Namibia cannot put a dam on their traditional lands. Therefore, considerations of land and resources ownership underlie the legal position of both sides. A number of complexities follow from different legal positions of the underlying land ownership.

To begin, the simplest argument is that even if the government owns the land and water, these elements still have value that must be calculated in the cost of the dam and that doing so would raise the cost of the dam so much that it would no longer be economical. Land, whether owned by the government or not, can only be degraded or flooded at some cost to the nation. Water, especially in a desert country, has value. The loss of various species has potential environmental costs, even if the value cannot be neatly calculated. Moreover, these unknown social costs are not “one-time” costs, valued at their loss at a particular point in time. The loss of water is a continuous loss; a cost each year for the life of the dam. So, not only would the cost of water in the present be lost to the dam, but the cost of water in 2020 and 2040. Of course, no one can compute the value of water in Namibia forty years from now. The same is true of the real cost of the land, and the cost of the relocation of the Himba. The Himba culture is lost forever; the tribe may need to be repeatedly relocated, and supported socially and economically for generations. An indirect cost in the loss of the value of Himba culture, the contribution of the Himba, as a people, to Namibian development should also be included in the calculations. Although there is no way to precisely determine these “costs,” they would appear conservatively to amount to several hundreds of

millions of dollars.\textsuperscript{151} This puts the discussion of Himba land rights in perspective. The actual value of their lands, however they are legally held, is only a small part of what is at stake. But this issue is complex as well. Ordinarily, compensation to peoples displaced by large dam construction only is paid to those with a legal title, an obvious injustice to tribal peoples who lack access to lawyers and land registration offices.\textsuperscript{152} This puts a great, even impossible, burden on most tribal peoples throughout the world. No one contests the fact that the Namibian Himba are the exclusive occupants of their lands at Epupa, and have been so for at least a hundred years. As original inhabitants, the Himba have substantial rights to their land under natural law, the English common law, German colonial law, and international law.\textsuperscript{153} Although Namibian courts have not yet recognized indigenous title, they should, under domestic law. They could only have lost their indigenous land rights if somehow some political power or positive legal action had extinguished their title.

If the Himba's indigenous title was somehow extinguished, it has to have been done by (1) the Germans before 1915; (2) the British between 1915 and 1990; (3) the South Africans between 1921 and 1990; or (4) the modern Namibian state at some point after 1990. A parallel colonial process occurred on the Angolan side, but that colonial history is simpler. In Angola, Portuguese occupation from the 16\textsuperscript{th} Century was the only possible colonial assertion of title. These colonial assertions of land rights against the indigenous peoples of southern Angola ultimately fell to the newly independent Angola in 1975. This Article does not further inquire into the nature of Portuguese or Angolan claims to Himba lands on the north side of the Kunene River.\textsuperscript{154}

B. INDIGENOUS LAND RIGHTS

1. Transition to the Recognition of Indigenous Land Rights

As a foundational principal of law, indigenous people must have some kind of legal right to lands that they live on.\textsuperscript{155} Before the rise of the modern nation-state,

\textsuperscript{151} Id.
\textsuperscript{152} Dams and Development Report, supra note 5, at 102-07.
\textsuperscript{154} The question of Himba land rights in Angola is an important one, also not dealt with by the Feasibility Study. Because issues of indigenous title are case and country specific, this requires a careful analysis of Portuguese colonial dispossession of indigenous land in the Kunene region, as well as of both Portuguese and Angolan law and post-colonial Angolan political developments on issues of indigenous land rights. While Kaokoland has never been occupied by European settlers, Portuguese ranches lined the north bank of the Kunene in the 1960s. These legal developments are not directly related to those in Namibia and it is possible that different legal conclusions would follow.
\textsuperscript{155} JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 104-07 (1996).
people occupied land through a wide variety of customary systems, all without benefit of formal land title, a European innovation, spread around the world through various colonial legal systems. Various forms of social organization with distinct patterns of land occupation developed around the world. Land rights were based on use and occupation, and these changed through a number of social processes. There is no need to go back before the original point of colonial occupation in order to establish Himba land rights. Modern discussions of land rights begin at the point of indigenous occupation at the time of the first colonial assertions of domination and control. While historians might quibble about this date, it is clearly in the range of either the date of the first German political claim on Kaokoland, 1885, or effective colonial assertion of administrative authority over Kaokoland, about 1921. Since the Himba were in occupation of their lands on both dates, this is not at issue.

While there was once, in colonial legal theory, a legal argument that indigenous people could not "own" land because of their "primitive" state of social organization (including their lack of formal legal institutions), this is now completely rejected in international law and under the common law. In any case, this argument is not applicable to the situation of the Himba at Epupa Falls because no one in Namibia now asserts this position.

The "usufructuary" concept was incorporated into Canadian law from Roman law in order to define aboriginal title under Canadian law. Essentially, it is an underlying "use right," subject to the Crown's radical title, but still requiring the Crown's recognition. In fact, the Crown was legally obligated to purchase this usufructuary right from its aboriginal title-holders. There are also a variety of positions on the precise nature of the land rights of indigenous peoples. The English common law refers to these rights as "use rights," a "right of occupancy,"


157. See Kent McNeil, *Common Law Aboriginal Title* (1989); see also Bennett, *supra* note 153, for an analysis of the doctrine of aboriginal title in relation to South Africa, much of which applies to Namibia as well.

158. In re Southern Rhodesia [1919] AC at 232-234 is an infamous colonial case in which the House of Lords declared that the Matabele of Zimbabwe are of such "primitive" character that they could not own land. Various Australian cases held that Australia was "terra nullius," empty land, because the Aboriginal people who lived there were in such a "primitive" state of social organization that they could not be said to "own" land. These doctrines have both been rejected. Advisory Opinion on Western Sahara [1975] I.C.J. 12, at 85-86 holds that, in international law, no land is terra nullus but belongs to its indigenous occupants. Mabo v. State of Queensland (107 C.L.R. 1 (1992) is the leading common law case providing a detailed analysis of aboriginal title. Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010 (Can.) analyzes the same problem in the Canadian context.

159. Attorney General of Ontario v. St. Catherine's Milling and Lumber Company (1887) 13 S.C. 577 is the seminal Canadian case, finding, for the first time, in Canadian law, a usufructuary right for native people. The case was appealed to the Privy Council of the House of Lords, where this judgment was upheld, making it one of the most important cases in Commonwealth indigenous land rights. See Sidney L. Harring, *White Man's Law: Native People in Nineteenth Century Canadian Jurisprudence* 125-47 (1998).
or a "usufructuary right." While these rights have similar meanings, they are not precisely identical. In general, common law aboriginal title is not seen as an "absolute title," but some lesser land right. It clearly is, however, a right to use the land forever, reserved to the indigenous occupants of the land and their future generations. It is a legal title that may be enforced in courts and its loss must be compensated. Its ultimate value may well be the same as absolute title: a right to occupy land "forever" is worth almost the same as absolute title.160

2. Failure to Recognize "Aboriginal Title"

The colonial legal theory lives on, however, in the failure of Namibia, like with most other modern African states, to recognize "aboriginal title." SWAPO, during the long independence struggle, was influenced by contemporary socialist ideology, and came to believe that the state should own the land, as a representative of the interests of all the people. This perspective makes policy sense in a context where the alternatives were private ownership by white commercial farmers and communal land systems, in the hands of traditional chiefs. In the view of the anti-colonial political movement, both of these forms were inadequate to the needs of a developing Africa.161 State ownership of the communal lands has been the dominant model in Africa, with different levels of recognition accorded the land rights of communal landholders.162

The problem underlying state ownership of the communal lands is basic to the problem of decolonizing the racist legal order of Namibia. Although black people under apartheid did not have access to "land title," white farmers did. The reasons for this discrimination are basic to the logic of colonialism. By failing to legally recognize existing black land rights in their communally-held lands, the only form of land tenure available to them, modern black agricultural regimes are undermined. Thus, the modern African states preserve existing colonial land regimes which were designed to give the best land to whites and to force blacks into the colonial economy as laborers.163

Virtually all the legally registered land titles in Namibia at the time of independence were white land titles, primarily for farms and city lots. The South African state held title to lands used for a wide variety of public uses, such as for roads, parks, military bases, and wildlife preserves. The Himba, however, lived on their land for hundreds of years without any need, nor any means, to legally register their land titles. These land rights were recognized in their own

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160. The United States Supreme Court in Worcester v. Georgia 31 U.S. 515 (1832) is an important early summary the British common law recognition of aboriginal title. See also McNeil, supra note 151.


customary law and unchallenged by the South African colonial authorities. Namibian statutory law, however, is silent on questions of aboriginal title. The government takes the position that Article 100 of the Namibian constitution gives the state title to the communal lands, but this is not clear on its face. Therefore, it is left to judges to "discover" aboriginal title in Namibia either in natural law, the common law or in international law. A later discussion of aboriginal title in international law will return to these themes.

C. EXTINGUISHING THE HIMBA LAND RIGHTS

1. German Colonialism in Kaokoland: Did Germany Extinguish Himba Land Rights?

To begin, German South West Africa was established as protectorate, not as a colony, a legal distinction that may be of importance. In colonial-era political theory, a protectorate explicitly recognized the existing indigenous political, legal, and social order with the dominant power taking these existing polities under their "protection." While actual German practice in the settled areas was more along the model of traditional colonialism, the underlying legal structure of the "protectorate" remained the practice in northern Namibia. Germany established a "protectorate" and also affirmatively recognized indigenous land rights. Germany took indigenous land for settlement purposes in other parts of Namibia through a variety of devices, including treaties, individual purchases, simple occupation, and conquest. German South West Africa was divided into two distinct legal regions: the colonized area, settled by whites, and the "native" area, north of the "police line." With one exception, Germany made no claims to land ownership north of the "police line." In fact, the very meaning of the "police line" in German colonization meant that Germany enforced no colonial legal rights beyond this line, restricting its settlers' legal rights to areas within the policed area. The German claim to the region north of the "police line" was a political claim of sovereignty, directed against other colonial powers, primarily the British and Portuguese, who had interests in the region. This claim of political


165. MALCOLM SHAW, TITLE TO TERRITORY IN AFRICA 46-48 (1986).

166. There is no complete history of German land occupation in South West Africa, although all of the standard historical works devote some attention to the subject. This became an administrative problem for British and South African officials during the mandate. A report, Land Tenure Under German Government in South West Africa, written by A.N. Rowan, Register of Deeds, Windhoek, 1924, held in the Namibian National Archives, discusses the various types of land titles held by German settlers (on file with author).

167. FIRST, supra note 43, at 121-128.
sovereignty included the whole of Kaokoland, all of the land now occupied by the Himba.

Beyond this, there apparently were only a handful of German exploration parties that even traveled in Kaokoland during the entire thirty-year German colonial period. None of these ever claimed any land under German law, and there was never any German occupation, use, or regulation of the local people or their land.\textsuperscript{168} Thus, there is no basis to argue that Germany extinguished indigenous land rights anywhere in Kaokoland, including the Himba's. Such an extinguishment cannot occur by accident, or by mere travel; it must be a direct extinguishment under positive law.\textsuperscript{169}

The one possible German claim involves the mining and land rights of the Kaokoland Development Company. Their claim is best described as something between a venture in land and mineral speculation and outright fraud, and is easily dismissed; these German land and mineral rights were legally challenged by British investors in the 1920s and the claim was abandoned. It was never recognized by British and South African courts or political authorities, hence cannot possibly now be relied on to diminish Himba land rights.\textsuperscript{170} This might be the end of consideration of this title, but since this was the only German claim to Kaokoland, it requires some further analysis because it illuminates a good deal about the nature of German colonial land titles and colonial era treaties.

Adolph Luderitz, the merchant who founded German South West Africa, made a number of personal treaties with various chiefs up and down the Atlantic Coast. In the late 1880s, Luderitz purportedly purchased Kaokoland through a treaty with a Nama chief. The Omaruru Herero, claiming that the land was Herero land and therefore could not be sold by any Nama chief, immediately contested this claim.\textsuperscript{171} This shows that the legal question of land rights based on the Luderitz treaties was immediately raised under German colonial law, although it was never conclusively resolved.

German colonial authorities gave a great deal of credence to this Herero claim. However, as long as no Germans settled Kaokoland, they never had to resolve the issue.\textsuperscript{172} Later, the Herero were held to have "forfeited" most of their lands in

\textsuperscript{168} Bollig, Colonial Encapsulation, supra note 14.

\textsuperscript{169} This point is well established in international law, distinguishing a claim of political sovereignty from a claim of land rights. The best discussion of this is in Mabo v. State of Queensland, supra note 158.

\textsuperscript{170} "Report on the Land and Mining Titles in South West Africa Claimed by the Deutsche Kolonial Gesellschaft fuer Sued-West Afrika," (no author, no date) Namibian National Archives, BB 0133 (copy on file with author).

\textsuperscript{171} See Horst Drechsler, Let Us Die Fighting: The Struggle of the Herero and Nama Against German Imperialism (1884-1915) (1966). This land was not Herero land, but Himba land. It is not clear whether this Herero claim was lodged on behalf of the Himba, or was as speculative as the Nama claim.

\textsuperscript{172} Report on the Land and Mining Titles in South West Africa, supra note 170, at 16-18. This typewritten document, apparently a memorandum of law, running to several hundred pages, appears to have been produced in the 1920s as part of a British and South African effort to resolve the remaining land title issues connected to German colonial occupation.
central Namibia in the Herero war but, again, none of the war was fought over the lands in Kaokoland, and no German ever maintained that any of Kaokoland was "forfeited" in the Herero war. In fact, the Herero who fled to Kaokoland after the war were left alone for the remaining years of German colonial occupation.

Luderitz, who sold the company the "land rights" he had acquired from various Nama chiefs, incorporated the Deutsche Kolonial Gesellschaft fuer Sued-West Afrika (DKG), and this company was legal successor to whatever land rights Luderitz had claimed.\(^{173}\) Held by both British and German capital, the company was primarily formed to speculate in the mineral resources of Namibia. This was the era of the vast expansion of the gold and diamond mines of South Africa, and there was reason for Europeans to believe that Namibia had the same kind of wealth.\(^{174}\) Most of the actual white settlement and agricultural development followed by another decade, after the end of the Herero War in 1905.

The Kaokoland Mining Company was divested from the DKG in the 1890s and acquired the DKG’s "land and mining rights" in Kaokoland. Its activities were limited to three exploration expeditions to Kaokoland and it never did any actual mining.\(^{175}\) The company’s land title was never clear because that depended on the validity of the "sale" of most of Kaokoland to Luderitz in 1885.\(^{176}\) The Luderitz claim covered a strip of Atlantic Coast as far north as the Portuguese boundary, although that boundary had not yet been finally determined because neither Germany nor Portugal had actually explored that area.

Luderitz’s land also extended along the coast, from north to south the length of South West Africa and inland for "twenty geographical miles".\(^{177}\) Because this strip, the "Skeleton Coast", is almost entirely without water and is therefore worthless for herding or crop production, the Nama readily agreed to sell it. The DKG, however, later claimed that these treaties ceded land to a depth of "twenty old German miles", an archaic and largely unused unit of measurement equal to


\(^{175}\) Id. at Appendix B, p 9-11. "The Kaokoefeld is now claimed by the daughter Company of the Deutsche Koloniale Gesellschaft, the Kaoko - Land and Mines Company, but the validity of the present claimants’ title depends entirely on the validity of the original [title]." The Kaokoland Mining Company was simply a successor syndicate of mining speculators.

\(^{176}\) Id. These two claims are discussed in detail at 51-70. A hand drawn map representing the extent of these land sales in Kaokoland appears after p. 61.

\(^{177}\) The first of these treaties, dated August 25, 1883, reads as follows:

"[o]n this, the 25th August 1883 Captain Joseph Frederiks of Bethany has sold to the firm of F.A.B. Luderitz of Bremen in Germany a certain portion of his territory - to wit" the whole coast from the mount of the Groot - or Orange - River as far as the 26th degree of Southern Latitude, including all bays and Harbours together with the land lying 20 (twenty) geographical miles inland from each and every point of the coast line - in consideration of which shall be paid: 60 (sixty) Westley-Richard rifles and L500 (five hundred pounds) in gold.
about four conventional "British" miles. This meant that the Company claimed about four times the land that the Nama believed that they sold including a great deal of arable land. Neither the Nama, nor the British, recognized this claim, seeing it, instead, as evidence of German fraud and dishonesty.178 Ironically, there is evidence that even the German government saw the Company's claims as fraudulent, but needed the pretext of these claims to support their colonial intervention into Namibia.179 The Kaokoland claims were even less defined. While the Nama launched regular cattle raids into Kaokoland, they never lived there. It was the Himba, Tjimba, and Herero who lived there although, as semi-nomadic peoples they both moved regularly and also regularly retreated to the north to escape from Nama raids.180

The chaotic state of the land rights in question in the period immediately before German colonization is clear. During the 1860s and 1870s Topnaar and Herero fought over much of the territory, with the actual occupation of particular lands being traded back and forth. By the early 1880s the Herero took the upper hand, actually driving the Topnaar back to British protection in Walvis Bay in 1882 and occupying Sesfontein. Thus, three years before the Sesfontein Topnaar sold Kaokoland to Ludertiz they didn't even occupy their own lands, having temporarily lost them to the Herero.181

Other circumstances of these "treaties," such as the extremely low price of the land in question, raise basic questions of their legality. The Nama chiefs essentially sold all of their land for an extremely small amount of money. Neither chief spoke English, the language of the treaty, so it is not clear that either actually understood what the treaty documents they signed said. Later documents, not a part of the original treaties, claimed that the Nama owned lands as far east as Waterberg, and as far north as Angola, statements that were clearly false, raising questions about who was defrauding whom.182 On one hand, the Germans had an interest in broad purchases of vast quantities of land in order to politically justify their protectorate, and to pre-empt British mining and territorial claims. On the other hand, opportunistic petty chiefs also had an interest in selling land they didn't own for quick cash. One British suggestion is that this was a case of mutual fraud, deliberately engaged in for the benefit of both sides. In any case, the process was probably illegal and fraudulent.

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178. Id., at 25-26. The Nama, many of whom had moved north from the Cape Colony, had a familiarity with British measurements, but there was no accepted meaning for the term "geographical mile" used in Ludertiz' treaties, and interpreted by the Germans as the "old German mile." In common use was the standard mile of 5,280 feet, and the nautical mile, about 1.15% of a standard mile, two usages that were so close that they would have made little difference on the ground in tribal Africa. One view, put forward by the British, is that Ludertiz simply intended to defraud the Nama of their land by confusing them with this unknown measurement.

179. GEWALD, supra note 20, at 31.

180. Michael Bollig, Contested Places, supra note 34.


182. Id.
Manasse, a Herero chief at Omaruru, immediately objected to the Sesfontein treaty, claiming both that the Topnaar did not own that land, and that it was Herero land, containing water holes and grazing areas used by Herero cattle. Manasse argued that the lands the Topnaar claimed had always been Herero and had never been the object of any war, that the Topnaar had never conquered the lands. Manasse then pointed out that since the Herero were under the protection of the Germans, it was their duty to protect his lands from the Topnaar. Manasse offered one final legal argument—he accused the two chiefs who sold the land of being “thieves” for selling his land, and he accused Luderitz of being a “thief” for purchasing stolen lands from them.

While the Himba do not directly figure into Manasse’s claim, the Himba at this time were understood to be Herero, occupying Herero lands, and Manasse probably included them in his own history of the conflict. They were “poor relatives,” the literal meaning of “Himba” in the Herero language, under the protection of their Herero tribesmen. The Himba lived in Kaokoland, together with the Herero. Many had retreated to Angola, others were hidden in remote mountain valleys, and others had fled to more powerful Herero clans. The Himba were dispersed but in the process of forming a distinct tribal identity at this time. In any case, this dispute clearly shows that both the Nama and the Herero believed that they owned their lands in the 1880s, with both asserting claims of ownership against the Germans. Manasse even asserted his right to German “protection” of his land rights against the Nama, an assertion of his indigenous land rights under German colonial authority.

The British and South Africans, following the defeat of Germany in 1915, did not legally recognize the land claims of these German syndicates. They dismissed Ludertiz’s land titles as frauds, based on both his misrepresentation, poor physical description of the lands being acquired, as well as on the exaggerated claims of the Nama chiefs he bought the land from, often selling worthless lands that they had no claim to. A British report analogized the situation to a Nama chief selling the Cape of Good Hope to the Germans, forcing the British residents there to defend against a German land title. At the same time, the land titles of the German farmers in central Namibia were recognized, as required, under international law. It was well accepted among European peoples that the property rights of individuals had to be respected when territory changed hands after acts of conquest. The vicious German wars against Namibia’s people were “legal”.

185. Id. at 20.
in the colonial-era international law of that time, and the violent dispossession of
the Herero and Nama had the effect of vacating their lands, leaving them open to
settlement under German law. But Himba lands were not seized by the Germans,
and were not opened up to white settlement. The Himba remained there under
their “protectorate” status.

This was the end of German land claims in Kaokoland. However, under
German law, mining rights and surface land rights were entirely separate matters.
Thus, these companies did not need to entertain claims to the land surface. Desert
lands that were largely unusable for agriculture had never really been at stake in
the Kaokoland land claims. Rather, the German and British speculators were
following in the footsteps of Rhodes, holding the promise of vast mineral and
diamond deposits to attract additional investors. When no significant mineral
deposits were found in Kaokoland, the mining rights claims came to have no
value, effectively ending the matter.

In sum, the Kaokoland Mining Company was an international syndicate of
mining speculators that never took any concrete form in Kaokoland, held a
dubious land title, never occupied any land, and never displaced any Himba
people. What “title” the company held was based on two Nama treaties of
doubtful legality, applying arguably to only a few parts of Kaokoland actually
under the control of the Sesfontein Topnaar, which did not extend to northern
Kaokoland and Epupa, the heart of Himba country. More importantly, this land
title was never legally recognized by Britain or South Africa. Indeed, it is not
even clear that German authorities prior to 1915 recognized the title, because the
area was completely beyond the reach of the colonial legal system. German
occupation was, by all accounts, “hardly noticed” in Kaokoland. Nothing in
German occupation of Kaokoland leads to the conclusion that Germany took a
land title from the native inhabitants. Their lands, therefore, were still held by
them at the time of British (and South African) occupation.

2. British Occupation of Namibia and the League of Nations Mandate,
1915-1921

The question of British colonial influence on Himba land rights may seem so
irrelevant that it does not require discussion. The whole mythology of the South
African Mandate is that it was South African, and not British. However, great
legal significance flows from the assertion of British colonial law in Namibia.189
The British Empire took South West Africa from the Germans in 1915. The
British kept the German colony, but administered it through South Africa under
the League of Nations Mandate for both political and administrative conven-
ience. The Mandate was conferred upon “his Britannic Majesty to be exercised

189. ALLAN D. COOPER, THE OCCUPATION OF NAMIBIA: AFRIKANERDOM'S ATTACK ON THE BRITISH EMPIRE 1-5
on his behalf by the Government of the Union of South Africa." 190 This meant that South African domestic law applied in Namibia, subject to the will of British Parliament and the House of Lords, which was the highest court and the final authority on South African law. But, in plain language, it was the King of Great Britain who held the Mandate, trusting South Africa to administer its domestic matters on behalf of the Crown, the ruler of the British Empire.

The British, by 1920, had a great deal of experience with colonial rule, and ordinarily engaged in political negotiations with indigenous people when purchasing land for white settlement. As one of their few acts as rulers of Namibia, British colonial authorities issued a famous report. 191 This tract is a bitter denunciation of German colonial rule, complete with numerous photographs of tortured black people. Its purpose was to clear the way for a more humane and liberal British colonial rule, through its South African government. The forcible dispossession of native people from their lands by the German army and the violence German farmers visited upon their laborers were central themes to the report.

Still, the new colonial government of South West Africa was bound, under international law, to recognize existing German land titles. While the lands of native peoples could be seized and permanently alienated by "right of conquest," European countries were bound to recognize the land rights of "Christian" peoples. 192 Therefore, Britain and South Africa were required to recognize legally established German South West Africa colonial era land titles. This gave rise to some confusion in the 1920s as many people claimed land under dubious German titles. 193

A large number of farms remained in the hands of their German owners, who had acquired a legal title under German colonial law, although no such land titles existed in Kaokoland. Therefore, while the British and South Africans took some measure of political sovereignty over Namibia, they did not take actual land title beyond the title actually held by the German government. Rather, the British took the colony subject to existing land rights, including both the land titles of the white settlers and the traditional rights to the communal lands held by black inhabitants. This is the classic distinction between the Crown's "radical" title, the

190. ROBERT LOVE BRAUM, SOUTH WEST AFRICA UNDER MANDATE 22 (1976).
192. KORMAN, supra note 188. See also M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 316 (New York: Negro Universities Press, 1969; orig. 1926) ("Rights of private property, including land and concessions, which foreigners have acquired in backward territory, remain unimpaired when the territory passes under the sovereignty of an advanced state.").
193. This apparently is the purpose of the report by A.N. Rowan, Register of Deeds at Windhoek, "Land Tenure Under German Government in South West Africa," 1924. While, after 1915, many Germans were either expelled by British authorities or voluntarily left, their land titles often wound up in the hands of British or South Africans, who sought to have these titles recognized under the new colonial regime.
ultimate political sovereignty over the land, and the right of occupants or owners to continue to use land that they actually enjoyed the use of. This distinction is basic to European land law, tracing back to feudalism.\textsuperscript{194}

At this point, for a second time, the law of the German protectorate applies. While the Herero and Nama went to war with Germany and had their protected status terminated, losing their lands to conquest, the Himba and other peoples of the north did not.\textsuperscript{195} They lived north of the police line, peacefully under German "protection," under their own law and their own chiefs, beyond the reach of German law. The British and South African Mandate was applied to this political and legal structure.

The whole scheme of early to mid-twentieth century British colonial law applies to Namibia. This may be important to note because during this period, the British common law carved out, primarily in North America and the Pacific, an extensive jurisprudence of indigenous land rights that has never been applied in Africa. While the British assigned their Mandate to South Africa, they did this as an imperial power, designating the administration of South West Africa to a colony on its behalf.\textsuperscript{196} Therefore, it is both the common law and South African law that applies to the land rights of the Namibian people during the period of the Mandate, 1921 to 1990. This point will be returned to after a discussion of the South African rule of Namibia under the Mandate.

It may seem anomalous that the House of Lords was the highest legal authority, theoretically reviewing Roman Dutch law, but this was established law in a Commonwealth with a long history of the absorption of distinct peoples and their laws. The "common law" of the British Empire was never simply "British law," but an evolving law, looking carefully to the local law, and the legal history of a particular people, and applying the broad and flexible principles of the British common law. This common law was the law of Namibia through the mandatory period, until independence in 1990, and is therefore a part of Namibia's legal heritage. The impact of South African law must be understood in this context.


There can be no question that South African law diminished indigenous peoples rights, including land rights, in Namibia during the years of South African occupation. The first inquiry is to what extent those legal actions impacted on indigenous land rights, including those of the Himba, in Kaokoland.

\textsuperscript{194} McNeil, supra note 151. The theory behind the concept that the Crown always holds an underlying title to the land within its sovereignty: all land is held subject to the power and will of the sovereign, with an army, a power to tax, and a power of eminent domain.

\textsuperscript{195} Gewald, supra note 20, at 191.

\textsuperscript{196} See generally Cooper, supra note 189.
If Himba land rights survived the German colonial era, the question was whether South African positive law extinguished their indigenous land title. Assuming South African law diminished these indigenous peoples' land rights, the next question is whether these laws and legal actions still control Namibian law. It seems clear that much of the apartheid era action that South Africa took in Namibia was "illegal" in that it violated the League of Nations Mandate. At the same time, South Africa enjoyed, under Article 2 of the Mandate, "full power of administration and legislation over the territory," a clear and unambiguous granting of power.\(^{197}\)

Therefore, the task here is to both analyze the nature and legal basis of South African legal control over the indigenous peoples of Namibia, and then the legality under international law of those relationships that governed the League of Nations' Mandate. At independence, the Namibian government took all South African government owned land in Namibia. Although German and British land rights in Kaokoland are relatively easy to dispose of because neither country ever claimed land ownership, as distinct from political sovereignty, over the local population, that is not true of South Africa. The South African colonial government had a distinct racist agenda regarding "native" rights in South Africa and, for the most part, extended that regime to Namibia, thereby affecting the underlying legal title that the indigenous people of Namibia held in their traditional lands.

The basic South African system for holding and administering "native" lands was through the "reserve system." While some traditional lands were expropriated and turned over to Afrikaner farmers, most of these communal lands were legally constituted as reserves. These lands were declared "trust lands" by statute, the first formal claim in Namibia of European ownership of traditional lands. These lands were legally held in trust "for the benefit" of the native population of Namibia by the South African state.\(^{198}\)

The South African agenda for Namibia, however, was not limited to creating native reserves. Namibia was to be completely incorporated into South Africa. The indigenous people of Namibia had value only in relationship to the booming South African economy. The reserve system was designed to support a vast reserve labor force, able to travel thousands of miles to work in the mines or in agriculture. Just as some of these mines became Namibian mines, some of the agriculture became Namibian agriculture. South Africa, by the 1920s, was a fully settled agricultural nation. Namibia offered cheap new lands for Afrikaner settlers and, with government subsidies, thousands of poor whites resettled to the very borders of Kaokoland.\(^{199}\) Thus, Namibia became a de facto extension of South Africa, politically, legally, and economically.

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197. Mandate for South West Africa, Article 2. See Braum, supra note 190. This volume is a compilation of various documents relative to the South West Africa mandate.
198. Harring, supra note 164.
199. See Cooper, supra note 189.
The full legal history of South Africa’s administration of Namibia is still being written, and a number of issues, including whether South Africa even had the legal right under the Mandate to seize native property and convert it to its own use, are unresolved. While these arguments are important, this analysis actually turns on the legal status of the communal lands under South African rule. South West Africa became a protectorate of South Africa in the Treaty of Versailles of June 28, 1919. The Mandate for South West Africa published under this treaty was signed in December 1920 and published on June 6, 1921. The Administration of Justice Proclamation of 1919 extended South African Roman Dutch law to Namibia, including land law. While South Africa generally administered Namibia as its “fifth province,” there were always legal distinctions between South Africa and its League of Nations Mandate territory, and South West Africa never fully became a part of South Africa.

The Native Reserves Trust Funds Administration Proclamation of 1924, extended and refined by the Native Trust and Land Act of 1936, is the foundation of the current Namibian argument that the state “owns” native land. These statutes both asserted that the South African state holds legal title to native “reserve” land and required that those lands be held in trust for the benefit of the native people. Various amendments to this law occurred over the years, and the 1954 South West African Native Affairs Administration Act provided that land reserved for natives was “vested” in the South African Development Trust, which had been established by the Native Development Trust and Land Act of 1936. This is a statutory declaration that the communal lands of Namibia were “vested” in the South African Development Trust as of 1954. The “Trust” was, in turn, under the “ownership” and control of the South African state. Following this logic, it is a simple matter of positive law that the land title of the Himba lands passed to the Government of South Africa in 1954, then to the Government of Namibia in 1990 under the Constitution of Namibia, which clearly purports to transfer to the Namibian government all lands held by the various native trusts

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201. Schedule 5 of the Constitution of Namibia states that South African state property “vests” in Government of Namibia at independence, then goes on, in detail, to list some of the categories of this property. This is, obviously, the other half of the argument that Article 100 confers title to the communal lands on the Namibian state. If the communal lands are “otherwise not lawfully owned” they fall to the Namibian government under Article 100. If these lands were “owned” by the South African state and conveyed under Schedule 5, then the Namibian state already owns them. Neither of these positions satisfactorily disposes of this issue: it is a question of the land rights of 44% of the population of Namibia and should be directly addressed under Namibian, not South African, law. CONSTITUTION OF NAMIBIA, available at http://www.uni-wuerzburg.de/law/wa00000_.html (last visited Aug. 10, 2001).
203. Harring, supra note 164, at 480.
and homeland authorities.\textsuperscript{205}

But there are at least two arguments that the Himba lands did not pass to the Namibian government. The first is because the government of South Africa didn’t actually “own” these lands. Rather, some legal right to administer these lands passed to the state, but only in its capacity as administrator of a trust. The Native Trust Administration, in fact, is the actual holder of the land title, holding it for the benefit of its occupants; in this case, the Himba. Through this circle, there was never any intent on the part of the South African state to take title to Himba communal lands. Rather, the intent was primarily racist, to keep black people and white people separated, and to establish an administrative trust to effectively administer apartheid era racial policies of increasing complexity in the middle of the twentieth century.\textsuperscript{206} While the trust technically “owns” the land in the sense that it has a statutory title, it has no right to dispose of it except for the direct benefit of the Himba. As a pastoral people, the Himba have no reason to ever dispose of their land—and the land, in fact, has not only never been disposed of, but is still entirely in Himba hands. Thus, it cannot be said that the Himba have ever lost “title” to their land through this legal device.\textsuperscript{207}

Trust doctrine is complex, and is applied to Native lands in a number of countries, including the United States and Canada.\textsuperscript{208} While the “trust” holds legal title to the land, it holds it subject to such extensive indigenous rights that it cannot dispose or diminish the title in any significant way. Put in the context of modern trust doctrine, if the beneficiaries of a trust bring a legal action to restore

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\textsuperscript{205} CONSTITUTION OF NAMIBIA, Schedule 5, available at http://www.uni-wuerzburg.de/law/wa00000_.html (last visited Aug. 10, 2001). “(1) All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1989 (Proclamation AG8 of 1980), . . . or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia. (2) For the purpose of this Schedule, ‘property’ shall, without detracting from the generality of that term as generally accepted and understood, mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein.” Id.

\textsuperscript{206} A.J. CHRISTOPHER, THE ATLAS OF Apartheid 32-35 (1994). The system of apartheid was geographical: separate areas were designated for whites, blacks, and other races. The system required a legal power to administer those geographical relationships and the Native Trust concept had that capacity. It gave the South African state absolute political and legal control of Native land. But that 1936 purpose is not necessarily “legal title” in year 2000 law.

\textsuperscript{207} Another way to make this point is direct through the analogy of a simple trust: Father leaves Daughter a million acre farm through a trust, which administers the farm “for her benefit.” While the trust might actually hold the title to the farm, in every sense it “belongs” to Daughter. Should the trust breach its duty, for example by giving away the farm, Daughter’s remedy is to sue for breach of trust, asking that her lands be restored, even asking that the trust be terminated and the lands revert to her, the lawful beneficiary of the trust. The common law provides a full range of equitable remedies in such situations. There is also a long tradition in the common law of judicially terminating or modifying trusts that violate public policy, for example, trusts that serve racist ends.

\textsuperscript{208} See Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 UTAH L. REV. 1471.
their lands because the "trustees" have breached their duty, they have clear property rights independent of the legal status of the trust. The court then has a number of legal remedies available, including terminating or modifying the trust and vesting title in its beneficiaries. This is especially true if the original trust is the racist product of the colonial era and in violation of modern public policy.

But this isn't the end of the issue of the "ownership" of the communal lands of Namibia. Even if the 1954 Native Trust is somehow still legal, a racist abomination in twenty-first century Namibia, the Government of Namibia did not necessarily take an unrestricted title to the communal lands. Rather, it took a title fully subject to the obligations of the trust that, in turn, hold the lands for the benefit of the traditional holders of the communal lands. Under this theory, while the Government of Namibia may have some kind of title, it is subject to such extensive underlying Himba rights to use their land that the government's title is essentially meaningless because it cannot dispose of the land without harming the Himba. Flooding the land upstream from the Epupa Dam and forcibly removing the Himba breaches that trust, subjecting the Namibian government to extensive claims for damages, both for the loss of the land and for the residual damages that follow from the loss of the land, including damage to their culture.

The second argument that the South African Development Trust did not pass title to the communal lands turns not on trust doctrine, but more broadly on the nature of the 1920 League of Nations Mandate. South Africa did not acquire absolute and unfettered control of South West Africa; rather, it took control of domestic administration subject to both a legal mandate and international law. The legal mandate required that South Africa administer to South West Africa "for the benefit" of the peoples who lived there. Article 2 clearly states: "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory."209 The apartheid legal regime that was imposed in Namibia was declared illegal by the United Nations, the relevant political and legal authority, because it broke the terms of the Mandate. This led to the United Nations General Assembly Resolution revoking the Mandate, which would appear to invalidate any South African laws passed after 1966 applying to Namibia.210 Moreover, South Africa, by the terms of the Mandate in Article 7, agreed to the jurisdiction of the Permanent Court of International Justice "if any dispute whatever should arise between the Mandatory and another member of the League of Nations relating to the interpretation or


210. General Assembly Resolution 2145 (XXI), 1966. Security Council Resolution 276 (1970) declares that "the continued South African presence in Namibia is illegal and consequently that all of South Africa's acts and legislation concerning Namibia were null and void." GINO NALDI, CONSTITUTIONAL RIGHTS IN NAMIBIA: A COMPARATIVE ANALYSIS WITH INTERNATIONAL AND HUMAN RIGHTS 4 (1995). This would appear to include much of the legislation imposing the Odendall Plan, the imposition of black homelands in Namibia.
application of the provisions of the Mandate."\textsuperscript{211} This provision, which would have forbidden the application of all apartheid era laws in Namibia, including the land laws, had it been honored, also renders these laws in violation of the Mandate.

The South Africans took immediate administrative control of the native lands in the North in 1921 through a resident commissioner, C.H.L. "Cocky" Hahn, who governed Ovamboland, but early on had jurisdiction over Kaokoland. Hahn governed from 1921 through 1946, the period in which Kaokoland went from being almost inaccessible to having an administrative center, Opuwo, and a settlement located around an airstrip designed to refuel flights from South Africa to Angola.\textsuperscript{212} But, this administrative control was always through the local chiefs, with these administrators never claiming "title" to native land.

Hahn’s mission was to reduce the Ovambo and other northern Namibian peoples to a state of dependency, creating a willing labor force for South Africa. He did this in Ovamboland, but failed in Kaokoland. Basically, Kaokoland was much more remote and much less populated, permitting the people there, particularly the Himba, to carry on their tradition herding practices and creating an alternative local economy vibrant enough so that the Himba did not need to become migrant laborers.\textsuperscript{213} The Ovamboland economy, however, was soon destroyed by overpopulation and drought. In addition, the greater population density of Ovamboland made it more economical for the South Africans to more tightly administer it, putting more effort into forcing the Ovambo into migrant labor.\textsuperscript{214}

In any case, both Kaokoland and Ovamboland were legally constituted as "reserves," although Kaokoland was never brought under South African authority to the same extent as Ovamboland. Kaokoland was gazetted as the reserve of three tribes, the Himba, the Herero, and the Tjimba. Later, it was reduced in size as a "native reserve" and the surplus land (land in southern Kaokoland, not occupied by the Himba and therefore irrelevant here) legally protected as a game reserve.\textsuperscript{215}

The issue remaining is whether the South African action of creating a "native reserve" for the Himba in Kaokoland results in South Africa taking legal title to the Himba lands through the statute creating that reserve, and related statutes defining the legal status of native reserves. The simplest view of those statutes is that they never asserted any "ownership" right to native lands and instead

\textsuperscript{211} General Assembly Resolution, \textit{id.}, at Article 7.

\textsuperscript{212} Patricia Hayes et al., \textit{The Colonising Camera: Photographs in the Making of Namibian History} 171-81 (1998).


\textsuperscript{214} \textit{Id.}

“reserved” native people their own lands. There is an extensive and complex law of “reserves” in the common law world that does not fully answer the question of land title.216 The “reserves” designated land rights for native people, essentially guaranteeing basic rights to lands that had traditionally been theirs. Thus, the act of “reserving” native land implicitly recognized the underlying native title. The issue, nevertheless, is very difficult and here the analogous cases from North America do not fit the Namibian and South African situation.217

While it is clear that the South African state exercised some limited dominion over native reserves in the form of administrative centers and army bases, the fundamental ownership and use of the land did not change. Even if South Africa asserted that the state “owned” the lands, this ownership is not inconsistent with native property rights. It is analogous to European property traditions in which the King owns an underlying interest in the land while individuals, lord or peasant, own the land itself for all intents and purposes, but are still subject to the King’s underlying property rights.

4. The Namibian Government’s “Ownership” of the Communal Lands: South Africa’s “Land Title” Inherited

The modern irony underlying the Namibian government’s policy over the communal lands is that it is based on the racist, apartheid era reserve policy of South Africa. In independence, however, Namibia took “title” to all South African property located in Namibia, including all forms of real property.218 Thus, if the communal lands of the various Namibian native peoples were, in fact, South African state land, the Namibian government took title. If, on the other hand, these lands were not owned by South Africa, the Namibian government did not take title, and Namibia’s claim to legal title of the communal lands is

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216. Most of this law is from the United States and Canada, which operate hundreds of “reserves” for Indians. The basic land law of these reserves is complex, but is probably best summarized as the government claims underlying land ownership, but cannot alienate it without the payment of its full value in compensation. This is a de facto recognition of tribal ownership: the tribe is entitled to the full value of the land as payment for alienation, not some portion. For a in-depth source on the legal status of reservations in the United States, see FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982). The law is much more unsettled in Canada. Guerin v. The Queen [1984] 2 S.C.R. 335 involves Indian reserve lands leased to a golf club. The Supreme Court of Canada, without specifying exactly what the land tenure rights of the Musqueam Nation are, concludes that Canada has a fiduciary duty to secure those lands for the benefit of band members. Dozens of “land claims” are currently being posed in Canada, in which aboriginal nations secure substantial rights to lands through assertions of “aboriginal title.”

217. The “native reserve” is a common institution in British colonial policy, appearing around the world, in its ordinary meaning “reserving” to indigenous peoples some parts of their own traditional lands. In this sense “reserved” lands are often traditionally held native lands, never alienated by colonial powers.

218. Article 100, CONSTITUTION OF NAMIBIA, available at http://www.uni-wuerzburg.de/law/wa00000_.html (last visited Aug. 10, 2001) (“Land, water, and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.”). Id.
completely derivative. Because it assumes it has title to the communal lands, the Namibian government has done nothing to alter this legal relationship since independence.219 The analysis is not so simple because it is not obvious whether South Africa ever held “state ownership” of the communal lands.

By any standard, the unilateral seizure of the legal title to the communal lands of black people by the white South African state, a racist, apartheid era measure, cannot be said to “benefit” the people of Namibia. Nor can confining almost all of the black population of Namibia to first the “reserves,” then to the “homelands” north of the police line. Accordingly, it was an illegal seizure of native title and should not be recognized by current Namibian, South African, or international law. Where conflicting interests occur, for example when whites occupy lands that were seized from blacks, there may be a legal need to mediate between conflicting claims, but no such problem exists in the former “native reserves” now present within Namibia. The people who now live on the land have lived there for lengthy periods of time; it is “their land,” owned communally as it always has been. Following this logic, the Himba have owned their land for about two hundred and fifty years and continue to own it in spite of South Africa’s illegal, apartheid-era, claim of state “ownership.”

If South Africa did not “own” indigenous lands, holding a legal title, then it could not transfer “ownership” to Namibia under Article 100 of its Constitution, which only conveys lands “not otherwise owned.” This would be in direct contravention of Article 16 of the Constitution of Namibia, providing that “all persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and moveable property.” This was clearly intended to guarantee a wide variety of property rights, not just private property held in fee simple. In fact, the plain meaning of the term “all” forms of property must refer to all forms of property known to the makers of the Namibian constitution in 1989-90, when communal land holders held about 40% of the land in Namibia. Similarly, the idea that “all” persons referred only to white people and their property rights is both impossible and also politically and legally untenable. To hold otherwise means that the Namibian constitution protects white private property but not black communal property, a racist proposition, inconsistent with the spirit of the rest of the Constitution.220

Obviously, for administrative purposes, some governmental or parastatal agency might, in fact, hold some kind administrative power over the communal lands, but that right would be held subject to very clear formal requirements that the land be held for

219. After independence some other African states, presumably with less constitutional protection of private property rights, passed statutes asserting state ownership of their communal lands. While such a statute might appear to resolve some of the uncertainty in Namibia, it would also run the risk of contravening Article 16, recognizing all forms of property rights.

the benefit of the communal landholders. This, in fact, is the most common legal status of communal lands in Africa. While the state ordinarily claims formal title to the communal lands, the communal landholders enjoy a high level of security of tenure because the state usually de facto recognizes an indigenous title to the communal lands. 221 This system works as long as the state defers to traditional authorities to allocate and administer the land. There is no need for the courts to be called on to determine who actually owns the land as long as this native title is not actually threatened. This has largely been the actual practice in Namibia; although the state claims title to the communal lands, it has generally deferred to the traditional authorities to organize and distribute these lands according to customary law.

This customary law of communal land rights is, however, subordinate to statutory law. There is no Roman Dutch "common law" of aboriginal title for an obvious reason: Roman Dutch law was underdeveloped during the apartheid era. While the British common law in the colonial settler societies of the United States, Canada, Australia, New Zealand had to confront very complex issues of aboriginal rights in the modern human rights era in a context which encouraged liberal and creative judicial thinking, no such legal culture could exist in South Africa and South West Africa. But this does not mean that Roman Dutch law, properly applied, could not develop a parallel common law of indigenous land rights appropriate for Namibia and South Africa. Indeed, the Canadian concept of "usufructuary rights" derives from Roman law.

All of this discussion of the nature of the legal title to the Himba lands needed for the Epupa Dam, as complex as it is, may be nearly irrelevant in the struggle against the dam. Under the Article 16 of the Namibian Constitution, the Namibian state "may expropriate property in the public interest subject to the payment of just compensation." There is no question that this provision applies to the land needed for the Epupa Dam, whoever owns it. Thus, whether the state needs to pay a trust, or Himba chiefs, or each Himba man, woman, and child, the Epupa Dam can be built, under Namibian law, provided such "just compensation" is paid to the relevant "owners" of the property underlying the dam, the reservoir, and other areas used in dam construction.

It has been suggested that this principle of eminent domain, based on the idea that the state holds an underlying title to all the land under its sovereignty, may be limited by basic principles of human rights. 222 Thus, there is an argument that this principle is not absolute, but must be weighed against other fundamental rights. The basic right of a tribal people to exist and related indigenous rights are the opposing rights, presenting a very difficult human rights issue, obviously without precedent in Namibian courts.


Desert land in Namibia is inexpensive. Farms of 8,000 hectares can be bought for a million Namibian dollars, with improvements (US$ 150,000). The 300- to 400-square kilometers of land under the dam, plus some other land needed for roads, the village housing Epupa Dam employees, may well have a fair market value of only a few million US dollars. Especially in comparison to the price of the project, the actual value of the land is not what is really at issue.

That, precisely, is the reason why a simple assertion of Himba “ownership” of their lands has not been their only argument against the dam. Their graves, their culture, the future needs of their people and their herds, are their real values for which they cannot be compensated. These rights involve their right to exist as a people, a new generation of rights just beginning to be recognized in world forums, and yet to be recognized in Africa.

VI. THE INTERNATIONAL CUSTOMARY LAW OF ABORIGINAL TITLE IN NAMIBIA

A newly emerging body of international law protecting indigenous rights has potential impact in Namibia because Namibia’s constitution explicitly incorporates international law into domestic law. While the National Assembly has the power to legislate otherwise if it so desires, the Constitution generally recognizes customary international law as part of the public law of Namibia. Indigenous peoples enjoy various rights under international law, including a right to their traditional lands, to maintain their cultures, and some measure of local sovereignty to protect those lands and cultures.223 Therefore, communal landholders in Namibia have some form of recognizable land title.

These new developments in international law began with Convention 107 of the International Labor Organization (ILO) of 1957, an organization predating, but now affiliated with the United Nations. This convention both extended the scope of “international law” to indigenous peoples living within member nations, and required that member nations “shall have the primary responsibility for developing coordinated and systematic action for the protection of the populations concerned.”224 Other rights followed in international law, including a broad “right to self-determination” that not only refers to a right to sovereignty, but also a more general right to self-government and self-regulation of local affairs, as well as the right to maintain indigenous cultures.225 While these measures are not very developed in Africa, all potentially protect Himba interests at Epupa.

The simplest place to begin a discussion of Himba rights under international law in the context of the Epupa Dam is with their land rights. The idea that a modern nation-state can displace an indigenous people who have lived on the

223. See Anaya, supra note 155, at 104-08.
224. Id. at 45 (quoting ILO Convention No. 107 of 1957, Article 2).
225. Id. at 75-112. Article 27 of the International Covenant on Civil and Political Rights, recognizes the right of ethnic minorities to “enjoy their own culture.” Id.
same land for two hundred and fifty years without compensating them for their lands belongs to another historical epoch.\textsuperscript{226} Indeed, the Government of Namibia, while not admitting that the Himba have any land rights, has apparently conceded that they would receive some compensation for their removal.\textsuperscript{227} This appears to be a way for the Government to acknowledge Himba rights at Epupa while, at the same time, avoiding recognition of indigenous land rights, which would have consequences in other parts of Namibia. The government’s compromise seems to be to pay the Himba for “removal expenses” rather than compensating them for their lands.

But the communal land rights of the Namibian peoples are too important to be settled in this way. The Himba land rights are one particular set of land issues, involving one remote corner of the country. There are at least a dozen peoples in Namibia, each with a history of recognition of communal land rights by South Africa. These land rights, in turn, are all based on unique historical circumstances. For some of the peoples, particularly north of the “police line” like the Himba, Ovambo, Kavango, Fwe, their occupation of the land has been exclusive and lengthy, extending back through colonial times. These represent the strongest land rights claims in international law. The Damara, on the other hand, occupy communal lands given them by South Africa as recently as the 1960s, purchased from Afrikaner farmers, who were settled as late as the 1950s on lands traditionally belonging to Damara, Nama, Herero, Bushmen, and other peoples.\textsuperscript{228} These land rights issues are extremely complex, historically specific, and difficult to resolve. Moreover, much of the land involved is in more settled, and therefore valuable, parts of Namibia. The Herero, for example, claim much of the best farm and ranch land in central Namibia.\textsuperscript{229}

The argument for recognizing communal land rights under international law is based on considerations of both law and equity, questions of simple fairness and justice. While modern land law is based on the complex law of real property, requiring recorded titles and deeds, there can be no question that people living in societies without such devices also “own” their lands, and have a legal right to land under whatever customary law governs those societies. This proposition

\textsuperscript{226} Id. The Universal Declaration of Human Rights, Art. 17, provides that “no one shall be arbitrarily deprived of his property.” Id.

\textsuperscript{227} Christof Maletsky, \textit{Himba’s Hour of Destiny Beckons}, NAMIBIAN, Sept. 26, 1997, at 1 (reporting that Minister of Mines and Energy Toivo ya Toivo told Parliament that he did not have a precise estimate of Himba compensation figures, but indicated that the combined costs of damage to the ecosystem, removing graves, and resettling the Himba was US$ 8.9 million for the Epupa site and US$ 6.7 for the Baynes site). Not only is the grouping of “damage to the ecosystem” with “relocating the Himba” difficult to understand, but the estimate seems impossibly low.

\textsuperscript{228} Sian Sullivan, SSD Research Report: The Communalization of Former Commercial Farmland: Perspectives from Damaraland and Implications for Land Reform, University of Namibia, Multidisciplinary Research Centre, Jan. 1996 (on file with author).

extends well back in the English common law and, indeed, was even recognized by the colonial German authorities that used various kinds of legal devices such as treaties and individual sales to gain title to Namibian land. Since no authority ever exercised any permanent dominion over Himba lands inconsistent with their rights, their basic land rights remain.

Modern international law, with the rise of the “new” United Nations and its increased third world membership, has moved away from the euro-centric conceptualization of various rights to look more broadly at the actual shape of rights, including land rights, in the modern world.\textsuperscript{230} The idea that indigenous peoples can be arbitrarily and even violently displaced from their lands, without compensation or any acknowledgment of ownership rights at all, is derived from the logic of colonialism, the same ideology that gave rise to the European “race” to seize the lands of the various peoples of Africa, Asia, and America. This is no longer consistent with international common law.

This has already been well-stated above. For example, the Himba could be lavishly compensated for “removal” expenses and the disruption of their lives, without being compensated for their land. Or they could be compensated for their land “in kind,” with new grants of lands and new villages. Virtually all of the large dam construction schemes in the world have involved some “relocation” programs, most of which have left native people living in remote slums, with economies destroyed, and cultures irreparably damaged.\textsuperscript{231} These payments do not represent legal payments for indigenous lands and the likely destruction of culture. Rather, they are simply removal expenses, paid to move indigenous people out of the way.

The problem with this proposition is that Himba interests cannot be compensated with money, and international law requires more than just an acknowledgment of their traditional land rights. The payment of money damages, whether for land, moving expenses, relocation villages, is the “cheap” solution, adding a few million dollars to the cost of a US$ 1 billion dam.\textsuperscript{232} The inevitable result will be social decay, impoverishment, and the loss of a distinct Himba culture. The traditional calculus of dam building as been to justify this as “regrettable but inevitable,” an unfortunate cost of development.\textsuperscript{233} A few people, often small and weak people are injured, but for the greater good.

This discourse, while it can be cast in legal terms under broad principles of

\textsuperscript{230} Colchester, \textit{supra} note 222.


\textsuperscript{232} The actual preliminary figures put forward put the cost of more than 380 square kilometers of land, relocation of 600 to 1,000 Himba and their cattle, relocation of graves, and the cost of “damage to the ecosystem” combined at about US$ 10 million – about 1% of the cost of a billion dollar dam. Christoff Maletsky, \textit{Himba Hour of Destiny Beckons, Namibian}, Sept. 26, 1997, at 1.

\textsuperscript{233} Dams and Development Report, \textit{supra} note 62, at 97-112.
indigenous rights in international law, is primarily political, ultimately a decision for the Namibian government, with a broad mandate to respect the needs of all the countries peoples. Existing arguments about the marginal economic potential of the Epupa Dam enter into this calculation. Obviously, for some, while displacing the Himba for a much needed dam might be justified, displacing them for a marginal project does not make sense. Indeed, most of this argument relies on the position that the Epupa Dam doesn’t make sense on purely economic grounds, with or without Himba removal. Thus, the rights of the Himba become a “cost” to be taken account of in the decision to build the dam, right alongside all other costs.

But any question of Himba communal land rights in Namibia under international law is, under Article 144 of the Constitution, subject to extinguishment by a simple act of the National Assembly that would override any rule of international law. This makes these complex human rights—rights to land, culture, and self-determination—essentially political questions, subject to the will of Parliament, completely in the hands of the SWAPO majority.

There is no small irony in the fact that Namibia, as a nation, is a product of international law, more than any other nation in the world. The dispute in international law over the original League of Nations’ Mandate and its systemic and brutal violation by South Africa took seventy years to revolve, including repeated actions by the World Court and the General Assembly of the United Nations. International law ultimately prevailed as the U.N. finally presided over Namibia’s independence and the withdrawal of South African authorities.\textsuperscript{234} Namibia, in turn, created a constitution featuring the most extensive bill of rights in Africa and recognition of international law.\textsuperscript{235} None of this has yet to offer the Himba any legal support, although, obviously, it has created a framework for articulating their rights in the context of opposing the Epupa Dam.

\textbf{VII. Evolving Customary International Law: The Rights of Indigenous Peoples Displaced by the Construction of Large Dams}

Since the middle of the 1990s, some clear international standards on the rights of indigenous peoples displaced by large dam projects have emerged. These standards do not fundamentally depend on a “land rights” approach to indigenous peoples living in these regions. Rather, issues of “land title” are irrelevant; the underlying issue is that of the negative social impacts of removal—such as unemployment, poverty, disease, disruption of communities, and cultural despoliation—impact disproportionately on the the displaced peoples. While issues of aboriginal title are extremely complex, testing the capacity of modern courts and polities, arguments about social mitigation programs are much more directly

\textsuperscript{234} \textit{See John Dugard, The South West Africa/Namibia Dispute} (1973).
\textsuperscript{235} \textit{Naldi, supra} note 210.
based on the law of equity; no government should do harm to poor peoples in order to advance particular schemes of national development. And, in the event such schemes are justified, basic principles of equity require that the social costs be fairly born by all, so that those benefiting from the large dams should pay proportionate relocation costs.236

In an era when exaggerated claims under international law are not uncommon, it has to be clearly stated that these new standards cannot yet be said to have become part of the corpus of international customary law. Therefore, it has to be clear that there is no argument that Namibia is currently bound by these standards. At this level it is a political question, and these organizations have great experience at these kinds of political matters. The argument is that Namibia should be bound by these standards because they are equitable.

These standards have emerged as both ethical standards for dam builders as well as standards for banks and other funders of dam projects. The World Bank and the World Commission on Dams, both international organizations, are the two organizations instrumental in setting out these standards. The World Bank, which is not involved in funding the Epupa project, has a long and dismal history of financing large scale development projects in the Third World that are modeled on western conceptions of development, run up huge debt, and do great damage to indigenous peoples and the environment. Some of this experience underlies the World Bank’s decision, in a series of related directives, to set out standards for large-scale development projects that involve forced removals of local peoples.

Without going into unnecessary detail, the essence of the World Bank standards requires both careful and systematic study of the impact of large dams on local populations, as well as additional standards requiring that forced removals not occur unless the displaced peoples can be relocated without loss of their culture in a position where they are at least as well off economically as they were before relocation.237 This standard is essentially unmet in modern large dam construction. It was the failure of the Government of India to provide this level of support that led the World Bank to abandon funding the now infamous Narmada River project in India.238 If this standard is adhered to it could mean the end of World Bank funding for large dam projects. Given the influence of the World Bank in western banking and

236. See Dams and Development, supra note 62.
237. POWER CONFLICTS, supra note 90, at ch. 5. Operational Directive OD 4.01 (1991) requires environmental impact assessments to “improve decision making process and ensure that the project options under consideration are environmentally sound and sustainable . . . . The Bank expects the borrower to take the views of affected groups and local NGOS fully into account in project design and implementation.” OD 4.20 (1991) requires special sensitivity to indigenous peoples, and OD 4.30 (1990) sets standards for forced resettlement. Id.
238. Id. The Indian Government has been determined to finish the project on its own resources, a position supported by the Indian Supreme Court. Narmada Bachao Andolan v. Union of India and Others, Supreme Court of India, Writ Petition (c) No. 319 of 1994, delivered Oct. 18, 2000. A history of the project is found in SANJAY SANGVAI, THE RIVER AND LIFE: STORY OF THE NARMADA BACHAO ANDOLAN (2000).
foreign aid circles, it is likely that this standard will be widely applied as an ethical standard by western funding sources.

However, at the same time, this also represents a "legal" standard, relying extensively on modern views of the legal rights of indigenous peoples to their lands and their cultures. These issues now have been the subject of various United Nations enactments, beginning with International Labor Organization (ILO) Convention, which states that "indigenous peoples shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."239 Similarly, in 1993, the United Nations Commission on Human Rights adopted a resolution condemning forced evictions as "a gross violation of human rights."240 In this sense, the World Bank, using the advice of its own lawyers, applied an evolving customary international law to its own operations.

The World Commission on Dams is an independent commission, made up of experts and jurists from all over the world, which undertook the first global study of the impact of large dams on the development process. After three years of investigation, involving reports of over three hundred dam projects,241 it issued a report in November 2000, calling for new standards to be applied in approving large dam projects. Among these was a requirement that local populations both be consulting and also that the impact of the dam project on local peoples be considered as part of the cost of the project in evaluating overall feasibility.242

Their findings in some ways paralleled those of the World Bank, but recommended a higher standard of protection of indigenous rights.243 In a careful survey of each project, it was clear that the displaced local populations bore significant human costs that were rarely considered in evaluating the costs of dam projects. The "feasibility study" process itself was found biased in favor of engineering and economic issues such as if the dam could be built and paid for. Yet, the cost of making permanent refugees of millions

241. These three hundred reports include one on Epupa by Andrew Corbett, Director of the Legal Assistance Centre, who represented the Himba in the feasibility study process. "The Epupa Dam Question: Its Impact on the Local Himba Community and the Natural Environment," paper submitted to the World Commission on Dams, 1998.
243. While the World Bank's initial standards for dam construction were influential in the World Commission on Dams work, the World Bank has since, in February 2001, announced "that it would not adopt the WCD's recommendations and guidelines "if taken as a checklist of requirements to be complied with and conformed to" but would use them as "non binding reference when considering new dams." Peter Bosshard, NGOs Protest World Bank Position on WCD Guidelines for Dams, WORLD RIVERS REVIEW, April 2001, 15. Obviously, reconciling these two positions is both complex and political. While the World Bank does not inherently object to any of the particular recommendations or guidelines of the WCD report, it refuses to read them as "standards" that must be universally met before a dam can be constructed. Thus, the "standards" themselves are still recognized in customary international law but in a flexible way.
of people, and their children, often for generations, is staggering, fundamentally changing any rational calculation of the "costs" of building and operating a dam. Again, the work of the World Commission on Dams was strongly influenced by evolving international human rights norms on the rights of indigenous peoples. Therefore, their conclusions, like those of the World Bank, are "legal" conclusions, important in setting out current standards of customary international law relating to the rights of indigenous peoples living in the way of large dam projects.

VIII. CONCLUSION

The Himba base their opposite to the Epupa dam on a wide range of issues, but the core of their position is that the land is "theirs" and they have a legal right to live there. These legal rights are not statutory, but are developed through a complex set of arguments about the nature of communal land rights in colonial Namibia, apartheid-era Namibia, and now under the independent Namibian state.

The law is about process as much as it is about result. It is a common theme of environmental controversies that they are never "finished" because any decision stopping development can be reversed in future years. Nothing about the Epupa Power Scheme has been resolved; nothing is "finished." This Article is not a story about how one tribal people "defeated" a large dam; the Government of Namibia might announce plans to build the dam tomorrow. In fact, one scenario in Namibia is that the project is "shelved" for twenty years or so, both because there is sufficient power for the present, and also to let the current controversy die to await a more favorable time, both in relation to the Himba protest and to the continuing war in Angola.

The Epupa Dam is the product of German colonial era planning, dating back to at least 1904. This span of almost a hundred years reminds us that a river can always be dammed, because it will be there for another hundred years and there is always increased development pressure. While a powerful assertion of Himba rights, coupled with a continued civil war and world economic stagnation, has apparently put the Epupa Dam on hold at the turn of the twenty-first century, the fact that this scheme has already gone through a hundred years of planning testifies to its potential.

A set of economic and human rights concerns about dam building generally, as exemplified in the World Commission of Dams Report, arose at an opportune time in the Epupa debate. A new sensitivity to calculating the "real" costs of the dam, rather than just the value of electric power, makes the costs of what previously might have been a marginal project, appear prohibitive through this new economic calculus. Adding cost overruns, the cost of removing the Himba and of violating their human rights, land and relocation costs, ecological costs, the hidden costs of water consumption, the costs of removing the dam when it is obsolete in perhaps forty years make what might have initially appeared to be a
“marginal” project a hopelessly wasteful one- another third world planning disaster.

These economic concerns stagnated plans for the Epupa Dam and made the dam impossible to build from a financial standpoint, but the old colonial imposition of South African dams on Angolan soil also resurfaced. Despite the discussion of a Permanent Joint Technical Commission, there was almost no “joint” in the project because almost all of the electricity was for Namibia. Angola would get a few jobs, the construction village, some roads, but little more after the construction was finished. Although the Kunene River is largely an Angolan river, its water and power would disproportionately go to Namibia.

Potential increased use of the Kunene within Angola for agriculture and power will reduce the flow of water to Epupa and reduce the power capacity of the dam. A Portuguese concession to South Africa in the 1920s, completely disregarding the needs of an independent Angola, created the situation where Angola yielded its water rights to Namibia. Angola’s insistence on the Baynes site could potentially keep more of the water in Angola, but it is still only a fraction of the use Angola could derive from the Kunene River. Namibia and Angola are, however, longstanding allies with a good relationship, and this political difference could be negotiated.

Similarly, it must be obvious that the continuing war in Angola overshadows all other border issues in both Namibia and Angola. While the immediate area of the Epupa Dam is safe and removed from any fighting since the 1980s, the upper Kunene River is in the center of the Angolan Civil War. No foreign investment is likely in a war zone. Angola, itself, cannot engage in the kind of strategic planning that Namibia has in relationship to its use of electrical energy. Therefore, it is not clear that the Epupa power scheme in its present form is in the interests of a post-civil war Angola. The answer to that question presupposes a rational and careful Angolan planning process, which is contingent on peace and an end to the famine that haunts that land.

Angola, whenever the war ends, will be in great need of development and reconstruction. The Kunene River is central to the planning of agricultural development in south central Angola, a rich agricultural region that has been devastated by war. Angola does not need the approval of Namibia for internal development, but any extensive Angolan use of the Kunene River above the Epupa Falls will affect the dam’s operation.

The Himba still claim that they own the land needed for the proposed Epupa and Baynes Dams. Their land claims have never been litigated because the Namibian government has always left them undisturbed on their traditional lands. The government’s indecision on going forward with the Epupa Dam has left the Himba people in a state of uncertainty. Yet the broad legal issues raised by the Himba, particularly their land rights, cast a large shadow over Namibian development. The land rights of the half of Namibia’s population that live in the communal lands are uncertain; and these people may be subject to forced
removal at any time, for any political reason. The Himba land at Epupa is distinguished only by the immediate importance and massive size of the power project.

Yet, by asserting their rights against the Namibian government, the Himba and their Herero relatives opened up a discourse of indigenous rights in Namibia, challenging the right of the government to their lands, and forcing the government to begrudgingly acknowledge some Himba rights. The Government of Namibia did not rise to the challenge and instead engaged in an unprincipled campaign to malign Himba people, accusing them of being “dupes” of foreign environmental activists and “backward” and primitive tribal people who were selfishly and ignorantly blocking a needed development project. These charges mimicked the paternalism that colonial authorities always exercised on behalf of the African peoples, a paternalism based on assumptions that indigenous peoples lacked the intelligence to understand their own interests. The government’s assertion that the Himba have an “equal” “right to development” under the Constitution of Namibia that can be forced on them defies both legal reasoning and common sense and fails to acknowledge the validity of Himba rights within the broader development process. The reaction of the Himba to the Epupa Dam has to be seen as a reflection of their basic right to control their own destinies, in their own lands. The Himba struggle against the Epupa Dam represents basic democracy moving forward in one corner of Africa, a discourse on development that includes the impacted tribal peoples as well as government functionaries.

The role of lawyers in these events is significant. There is no question that the Legal Assistance Centre’s representation of the Himba has been important both in supporting the Himba, and in demonstrating to the Namibian government that it could not simply ignore issues of Himba rights as the dam planning process moved forward. Although the Government accused the Himba of being “dupes” of their lawyers and the international environmental movement, the position the lawyers have represented has actually been that of the Himba’s.

Similarly, the international and Namibian environmental movements, including the International Rivers Network and Survival International, played important roles in publicizing the Himba struggle against the Epupa Dam, but all became involved well after Himba opposition was well advanced within Namibia by the Himba themselves. The importance of international pressure on Namibia is difficult to measure, although the government, defending Namibian nationalism, vigorously denies any impact. This environmental discourse was advanced within Namibia, by the active political reporting of the NAMIBIAN, which took an early interest in the Epupa project, and set a model of careful environmental reporting, analyzing the meaning of “development” in all its complexity.

While the language of law has apparently served the Himba well to date, it is not clear that the Namibian legal system is the appropriate venue to protect Himba rights, even though the Namibian judiciary has played an important and independent role in Namibian development. It is a conservative and politically
cautious judiciary, subject to occasional attacks from the government and therefore exceedingly careful in the judgments that it hands down. It seems quite likely that the judiciary is prepared to defer to the government on matters of public policy, including issues relating to the ownership and disposition of the communal lands.

There is a final irony here, that it is the Himba who may have “gotten it right” in this complex situation. How a well-financed feasibility study could go so wrong is a classic study of the experts turning over on themselves, an arrogance of power corrupting the underlying science of dam building. The US$ 5 million feasibility study could not measure the actual flow of a small river, made economic calculations that left out some of the key variables, financed an inadequate social study, and simply forgot to formulate a required “social mitigation program.” These mistakes are not accidents but the actions of technical experts who were single-mindedly focused on the technological end of building the dam. The study was approached as a basic “third-world” kind of study that would never be seriously challenged. The Himba asked the important questions, the basic “what are you doing here on our land?” that led to the answers that unraveled the whole project.

This observation is consistent with the call of the World Commission on Dams for new ways of thinking about hydropower projects, a calculus that takes some account of both the rights of indigenous peoples and also their viewpoints on development, as well as rethink the way that “costs” are calculated. While the Himba were cast as “backward” and “obstructing national development,” it cannot be accepted that a “development” that puts Namibia a billion dollars or more in debt in return for thirty years of electric power is in the national interest. Rather, the whole process of thinking about “development” has to involve more variables, evaluated in a more balanced way. Here, precisely, is where tribal peoples and their values have much to say about “development.”

At the same time, it is questionable whether the various environmental laws of Namibia are inadequate to regulate a project as vast and complex as the Epupa hydropower scheme. Even as simple a matter as carefully studying the ecological consequences of the dam project and weighing those costs against the gains of development may well be beyond the scope of Namibian lawmakers. Once the question of the Himba and their land and cultural rights is added to this complexity, Namibian legal process is even more taxed. This is not an indictment of the Namibian legal system. Rather, it is inherent in the regulation of highly complex third world environmental issues. Such networks of environmental laws and enforcement regimes cannot be built overnight with few resources.

This is not the place to speculate about all the possibilities. It is obvious that plentiful and cheap electric power is important in development, one variable among many that must be carefully weighed. But this power would not stay in Namibia’s under-developed and poor north. Rather, it would be used in mines and farms, and to power an already fully electrified and sprawling Windhoek, a
modern city with a white core, surrounded by miles and miles of shantytowns, built by black people from the north hoping for work. More and cheaper electricity is not a critical question in discussing the future shape of Windhoek as an African capital city: the critical questions are where and how can people live? How can they earn a living? How can racial equality be achieved after sixty years of South African colonial rule? And how can Namibia achieve a meaningful and democratic culture?

The Himba are not living in urban slums, but in traditional villages; they are not standing by the roadside in mining towns attempting to get jobs as day laborers, but are fully employed as herders. If anything is known about the prospects of African development, it must be that there are no prospects for an Africa that look like Europe. Africa must be different, and it must be developed differently. The exact process is still developing, is unknown, and is likely to be complex, but must be determined by Africans. Above all, it has to be obvious that the Himba have some role to play in this process; that they have something important to say about development in Africa.

This comes full circle to the Himba, the Epupa Dam, and the discourse of development in Kaokoland. The “real” Africa must be a place where “real” African people can live with their basic needs secure. There is no model, anywhere in the world, of what a major hydroelectric project at Epupa might look like that actually met those needs. The best image we have is one that physically resembles a cross between the Kariba Dam on the Zambezi River between Zimbabwe and Zambia, lined with docks, houseboats, and eco-tourist resorts, and the Glen Canyon Dam, the large desert dam on the Colorado River, flooding hundreds of miles of canyon lands, that more closely resembles Epupa visually, although both without the vast mud flat that will characterize Epupa for most of the year. Somehow, neither of those models stands as much of a prospect for the majority of Africa.

The 57,000 Tonga people displaced by the Kariba Dam are still suffering from their forced relocation forty years ago. It is not clear that the cheap electricity that the Kariba Dam generates helps to alleviate the modern economic problems of Zambia or Zimbabwe, but cheap electricity is obviously of some economic benefit. Both economies, despite of this cheap electricity, are in ruins, both democracies are fragile; both populations suffer from poverty and disease generations after independence. And, in neither country, do the masses of black people enjoy the simple luxury of electric light in their homes.

There is now the chance to pause and think about what this all means. Namibia, because of South African occupation, was not developing in the 1960s, 1970s, and 1980s, and does not have to be saddled with the debt, instability, and legacy

245. Id.
of bad development decisions made by most Third World nations of that era. The Epupa Dam offers one small and very expensive path toward one image of development. It cannot be clearly said that it is worth the price.

This leaves the OvaHimba, still mostly naked, not yet clad in suits and ties like the various government functionaries who are trying to move forward with the Epupa Dam project, and still herding tens of thousands of cattle in Kaokoland. It is impossible to put a value on their culture. While anthropologists can remind us that their life style is not "traditional" in that it has evolved and "modernized" throughout the twentieth century, it is still a unique pastoral culture, a window back to another era in Namibian and African history. It is impossible to say how long their society can last. It is fragile, and under a great deal of political and economic pressure.

The Namibian government, faced with demands for "land reform," could end Himba society as it exists today just by moving thousands of Ovambo, Herero, or Damara and their cattle into the vast lands of Kaokoland and removing the Himba to a small corner of their present lands. Even if the Epupa Dam is not built, massive and uncontrolled tourist development at the Epupa Falls could bring more outsiders than the village that would house the dam workers. Another drought could kill most of the Himba cattle, and the government could use this opportunity to remove the tribe from their lands. The Himba lead a precarious life-style, facing great environmental and political threats, with or without the Epupa Dam.

But it is "their" culture; it belongs to the Himba and all they ask at the present is that they be left alone on their lands. Whatever the future development models for Africa, one model must include strengthening and supporting the people as they make a living off their traditional lands. The other model, the model of planned and reasonable development, must not be seen as inherently in opposition. Rather, it must take full account of the needs of all the peoples of Namibia, as opposed to one expensive and wasteful model of electric power generation. The World Commission on Dams Report suggests new standards for the evaluation of complex, large-scale third world hydroelectric projects such as Epupa.

It seems doubtful that the Epupa project can be justified under this model. Indeed, it seems difficult to justify the Epupa project under any model, even without considering the Himba refusal to permit the dam in their country. It is the kind project that harkens back to another era of dam building, more common in the 1950s, a billion dollar neo-colonial disaster that is destructive of a unique eco-system and its traditional people, and that saddles Namibian taxpayers with debt that can never be repaid for electricity that isn't needed. The entire half-million Ovambo population could be provided electricity from the existing Ruacana Dam, if it could be operated at 100% capacity, with a surplus to support Namibia's power supply.

It is testimony to the strength of colonial-era development models that the
project has come this close to fruition. The specter of building the Epupa Dam over the bodies of the Himba is a powerful image, as is the governments’ threat to “neutralize” the Himba if they resist the dam,246 both images hopefully remaining metaphoric, but invites a critical rethinking of the Kunene hydropower scheme, the rights of indigenous peoples living in the path of large dams, the development of Kaokoland and northern Namibia in general, and of the future of dam building in Africa.

246. Jesaya Nyamu, the current Minister of Mines and Energy made this threat in an interview published in Scientific American in June 2001, clearly not the kind of image the Namibian government wants to project to the world. “We know them. They cannot do anything. If they try anything, we will neutralize them, of course. But I do not think it will come to that.” Ezzell, supra note 4.