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## (RE)EMPOWERING THE COMMUNITY: A CASE STUDY OF NAMIBIA'S LEGAL EVOLUTION OF WILDLIFE GOVERNANCE

STEFAN CARPENTER\*

Throughout much of the twentieth century, wildlife management found in Sub-Saharan Africa mirrored that found across the globe—primarily relying on a “fortress-model” approach of demarcated protected areas, nationalization of wildlife, and bans on the hunting or utilization of protected species.<sup>1</sup> This approach has deep historical roots, beginning with the setting aside of certain hunting ground for elites of the Roman Empire<sup>2</sup> and continuing through the assertion of sovereign ownership over wildlife within Europe’s Medieval and Renaissance kingdoms.<sup>3</sup> The modern form of the approach, starting with the creation of Yellowstone National Park in 1872, involves the use of national parks (along with wildlife refuges and other governmental protected areas).<sup>4</sup> However, beginning in the 1960s and 1970s, countries in southern Africa began experimenting with devolving control over wildlife resources—first to private landholders and subsequently to communities located in communally owned lands.<sup>5</sup>

These experiments coincided with the rise of the “Washington Consensus” in the 1980s—a neoliberal development policy that emphasized

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<sup>1</sup> Stefan Carpenter, *The Devolution of Conservation: Why CITES Must Embrace Community-Based Resource Management*, 2 ARIZ. J. ENV'T L. & POL'Y 1, 6 (2011); Rowan Martin, *When CITES Works and When it Does Not*, in ENDANGERED SPECIES, THREATENED CONVENTION: THE PAST, PRESENT AND FUTURE OF CITES 29, 29–37 (John Hutton & Barnabas Dickson eds., 2000).

<sup>2</sup> Thomas Fischer, *Hunting in the Roman period*, in HUNTING IN NORTHERN EUROPE UNTIL 1500 AD: OLD TRADITIONS AND REGIONAL DEVELOPMENTS, CONTINENTAL SOURCES AND CONTINENTAL INFLUENCES 259, 260–61 (Oliver Grimm & Ulrich Schmölcke eds., 2011).

<sup>3</sup> Michael Wolfe, *The History of German Game Administration*, 14 FOREST HIST. NEWSL. 6, 10 (1970); John Fletcher, *The Impact of Hunting on European Woodland from Medieval to Modern Times*, in THE IMPACT OF HUNTING ON EUROPEAN WOODLAND FROM MEDIEVAL TO MODERN TIMES 116, 117–18 (Keith Kirby & Charles Watkins eds., 2015).

<sup>4</sup> Wolfram Dressler et al., *From Hope to Crisis and Back Again? A Critical History of the Global CBNRM Narrative*, 5 ENV'T CONSERVATION 5, 6 (2010).

<sup>5</sup> INT'L INST. ENV'T DEV., COMMUNITY MANAGEMENT OF NATURAL RESOURCES IN AFRICA: IMPACTS, EXPERIENCES AND FUTURE DIRECTIONS 6–7 (Dilys Roe et al. eds., 2009); Brian Child & Grenville Barnes, *The Conceptual Evolution and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future*, 37 ENV'T CONSERVATION 283, 284–85 (2010).

the free market and limited involvement by the state.<sup>6</sup> The resulting devolution of wildlife management rights to rural communities—often referred to as either Community-Based Natural Resource Management (“CBNRM”) or Community-Based Conservation (“CBC”) (the term used herein)—marked a notable shift from the paternalistic and increasingly rigid wildlife management policy favored by the countries’ prior colonial rulers.<sup>7</sup> The CBC approach has had both notable successes and failures, and it has been criticized on both theoretical and practical grounds.<sup>8</sup> Among other things, states, NGOs, and local officials are often reluctant to fully devolve control over wildlife resources to the local communities.<sup>9</sup> Nevertheless, it remains a popular and widely utilized wildlife governance approach, particularly in the global south.<sup>10</sup>

Namibia exemplifies the struggle to adopt effective wildlife governance in that it has, throughout its colonial and post-colonial history, implemented some of the world’s most notable national parks and CBC efforts. Its national parks are generally successful from a wildlife conservation standpoint, but their formation was often part of a systematized effort to marginalize the country’s Black population, and they provide little economic or institutional benefits to local populations.<sup>11</sup> Namibia has aggressively pursued a formal CBC program, and some of the areas under that governance have obtained notable successes.<sup>12</sup> Yet many have

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<sup>6</sup> INT’L INST. ENV’T DEV., *supra* note 5, at 7; *Washington Consensus*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Washington-consensus> [<https://perma.cc/PZFF3-J9L3>] (last visited Jan. 12, 2022).

<sup>7</sup> INT’L INST. ENV’T DEV., *supra* note 5, at 6–7.

<sup>8</sup> W.M. Adams & D. Hulme, *If Community Conservation Is the Answer in Africa, What Is the Question?*, 35 ORYX 193, 195–97 (2001); Brian Child, *Community Conservation in Southern Africa: Rights-Based Natural Resource Management*, in *EVOLUTION AND INNOVATION IN WILDLIFE CONSERVATION: PARKS AND GAME RANCHES TO TRANSFRONTIER CONSERVATION AREAS* 187, 187–88 (Helen Suich et al. eds., 2009); Marshall W. Murphree, *The Strategic Pillars of Communal Natural Resource Management: Benefit, Empowerment and Conservation*, 18 BIODIVERSITY & CONSERVATION 2551, 2552–53 (2009); Dressler et al., *supra* note 4, at 5–6; J. S. Gruber, *Key Principles of Community-Based Natural Resource Management: A Synthesis and Interpretation of Identified Effective Approaches for Managing the Commons*, 45 ENV’T MGMT. 52, 52–53 (2010).

<sup>9</sup> CLARK GIBSON, *POLITICIANS AND POACHERS: THE POLITICAL ECONOMY OF WILDLIFE POLICY IN AFRICA* 119 (1999); INT’L INST. ENV’T DEV., *supra* note 5, at viii–ix; Piers Blaikie, *Is Small Really Beautiful? Community-Based Natural Resource Management in Malawi and Botswana*, 34 WORLD DEV. 1942, 1945 (2006).

<sup>10</sup> Gruber, *supra* note 8, at 52.

<sup>11</sup> Ute Dieckmann, *The Vast White Place: A History of the Etosha National Park in Namibia and the Hai//Om*, 5 NOMADIC PEOPLES 125, 125 (2001).

<sup>12</sup> Karol C. Boudreaux, *Community Conservation in Namibia: Devolution as a Tool for the*

struggled to meet some or all of their conservation and development goals.<sup>13</sup> In short, Namibia serves as a parable for many of the challenges faced by developing countries attempting to craft wildlife policy that balances the immediate needs of its rural—and generally poor—populations while sustainably managing their wildlife resources.

This Article will introduce the theoretical foundation of the CBC approach. It will then use Namibia as a case study to both: (a) illustrate the sort of historical, political, and economic drivers that motivate the adoption of CBC across the global south, and (b) highlight the existence of potential structural weaknesses present in even the most lauded CBC programs. Finally, this Article will present some of the common theoretical and results-based criticisms of CBC and discuss broader lessons that can be drawn from the Namibian experience. The analyses in this Article draw from academic literature, Namibia's statutes and Constitution, and the Stefan Carpenter's original field research in four conservancies (CBC areas) located in Namibia's northwestern Kunene region.

#### I. CBC: DEVOLUTION OF CONTROL AND REALIZATION OF BENEFITS

At its core, the CBC approach calls for a degree of empowerment of local communities to manage wildlife stocks found within their own territories,<sup>14</sup> and it is premised on the concept that local populations will be incentivized to actively participate in wildlife conservation efforts when they can manage the resource and share in the resulting profits.<sup>15</sup> Child and Barnes observe that the term refers to both an aspirational ideal and real-world implementation of the approach.<sup>16</sup> However, much as is the case with other aspirational terms such as “democracy,” there is not a universal agreement about the range of governance approaches that should fall under the label of “CBC.”<sup>17</sup> The term is used in different regions of the globe to refer to a range of approaches that can vary significantly

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*Legal Empowerment of the Poor* 1–2 (George Mason Univ. Mercatus Ctr. Working Paper No. 10-64, 2010).

<sup>13</sup> *Id.* at 2–8.

<sup>14</sup> Derek Armitage, *Adaptive Capacity and Community-Based Natural Resource Management*, 35 ENV'T MGMT. 703, 704; Gruber, *supra* note 8, at 53.

<sup>15</sup> Frik de Beer, *Community-Based Natural Resource Management: Living with Alice in Wonderland?*, 48 CMTY. DEV. J. 555, 565 (2012).

<sup>16</sup> Child & Barnes, *supra* note 5, at 283. Child and Barnes refer to “CBNRM” in their paper.

<sup>17</sup> Child, *supra* note 8, at 187; Murphree, *supra* note 8, at 2553; Child & Barnes, *supra* note 5, at 283; Gruber, *supra* note 8, at 52; Thomas G. Measham & Jared A. Lumbasi, *Success Factors for Community-Based Natural Resource Management (CBNRM): Lessons from Kenya and Australia*, ENV'T MGMT. 649, 650 (2013).

in conceptualization and design.<sup>18</sup> This Article examines the form of CBC that evolved out of southern Africa, which primarily focuses on wildlife governance and which Child describes as a “shorthand for a set of economic, political, and organizational principles within a strongly devolutionary rights-based approach.”<sup>19</sup>

The aspirational goals of the CBC approach represent the interests of myriad different stakeholders. The approach is alternately (and often simultaneously) viewed as a mechanism for: (a) the empowerment and economic development of rural communities, (b) the formal recognition of local knowledge and culture, or (c) a more effective approach for the conservation of natural resources.<sup>20</sup> The approach rests on two core assumptions. The first is that local populations have a greater potential for the sustainable use of resources than does the state.<sup>21</sup> Part of this potential lies in the fact that, in theory, local communities are more aware of local environmental and ecological conditions.<sup>22</sup> Local communities may also have their own institutions—formal or informal—that are better suited than equivalent national institutions at facilitating the sustainable use of wildlife resources.<sup>23</sup>

The second assumption is that, if they receive an enduring interest in and are able to control and profit from wildlife resources, communities will govern those resources in a sustainable manner in order to ensure the availability of future benefits.<sup>24</sup> In this respect, CBC functions as an economics-based approach.<sup>25</sup> Simply put, the approach holds that people

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<sup>18</sup> Adams & Hulme, *supra* note 8, at 194; Sushenjit Bandyopadhyay et al., *Benefits to Local Communities from Community Conservancies in Namibia: An Assessment*, 26 DEV. S. AFR. 733, 734 (2009); Child, *supra* note 8, at 188.

<sup>19</sup> Child, *supra* note 8, at 187. See also Adams & Hulme, *supra* note 8, at 193; Child & Barnes, *supra* note 5, at 283.

<sup>20</sup> Armitage, *supra* note 14, at 703; Anna Lowenhaupt Tsing et al., *Introduction: Raising Questions about Communities and Conservation*, in COMMUNITIES AND CONSERVATION: HISTORIES AND POLITICS OF COMMUNITY-BASED NATURAL RESOURCE MANAGEMENT 1–2 (Peter Brosius et al. eds., 2005); Child, *supra* note 8, at 188; Child & Barnes, *supra* note 5, at 283; Gruber, *supra* note 8, at 53.

<sup>21</sup> Tsing et al., *supra* note 20, at 1; Dressler et al., *supra* note 4, at 5.

<sup>22</sup> Tsing et al., *supra* note 20, at 1; Blaikie, *supra* note 9, at 1942; Michael Cox et al., *A Review of Design Principles for Community-Based Natural Resource Management*, 15 ECOLOGY & SOC'Y 38, 39–40 (2010).

<sup>23</sup> Tsing et al., *supra* note 20, at 1.

<sup>24</sup> Alexander Songorwa et al., *Community-Based Wildlife Management in Africa: A Critical Assessment of the Literature*, 40 NAT. RES. J. 603, 613 (2000); J. A. Silva & A. W. Mosimane, *Conservation-Based Rural Development in Namibia: A Mixed-Methods Assessment of Economic Benefits*, 22 J. ENV'T & DEV. 25, 26 (2012).

<sup>25</sup> Andrew Lyons, *The Rise and Fall of a Second-Generation CBNRM Project in Zambia:*

will sustainably manage their resources when the perceived benefits of doing so outweigh the perceived costs.<sup>26</sup> Wildlife can potentially generate income through tourism, trophy hunting, and harvesting for live sale or bushmeat, and smaller game species, such as deer, bushpig, or rabbit, can provide critical supplemental income in the form of meat for consumption or trade.<sup>27</sup>

On the other hand, wildlife of all types can inflict substantial personal or economic harm on rural populations. Most rural populations rely on some form of agriculture or pastoralism for their primary source of income.<sup>28</sup> Wildlife conflict can impact such populations in a multitude of ways, including livestock predation, crop-raiding, destruction of food stores, attacks on humans, disease transmission (to both crops and humans), and foregone economic or lifestyle choices due to either the presence of wildlife or restrictions related to conservation areas.<sup>29</sup> Large carnivores are especially likely to be involved in human-wildlife conflict (“HWC”) because of their expansive home ranges and their dietary requirements.<sup>30</sup>

For subsistence and small-scale farmers and pastoralists, the economic losses resulting from HWC can be devastating.<sup>31</sup> Lamarque, et al., observe that, for some of these residents, “losses to wildlife can mean the difference between economic independence and dire poverty.”<sup>32</sup> And, given that the official records of HWC reflect only overt human-wildlife conflict, and not more passive conflict resulting from disease transmission (such as rabies, anthrax, foot-and-mouth disease) or impact on livelihood choices (such as the loss of grazing or foraging territory resulting from the threat of overt wildlife conflict or the loss of schooling opportunities by children tasked with guarding crops), the true economic impact of HWC is likely even greater.<sup>33</sup>

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*Insights from a Project Perspective*, 51 J. ENV'T MGMT. 365, 367 (2013).

<sup>26</sup> Murphree, *supra* note 8, at 2554.

<sup>27</sup> *Id.* at 2555, 2557.

<sup>28</sup> Songorwa et al., *supra* note 24, at 622–23.

<sup>29</sup> A. J. Dickman, *Complexities of Conflict: The Importance of Considering Social Factors for Effectively Resolving Human-Wildlife Conflict*, 13 ANIMAL CONSERVATION 458, 458 (2010).

<sup>30</sup> Muhammad Kabir et al., *Assessment of Human-Leopard Conflict in Machiara National Park, Azad Jammu and Kashmir, Pakistan*, 60 EUROPEAN J. WILDLIFE RSCH. 291, 291 (2014).

<sup>31</sup> F. LAMARQUE ET AL., FOOD & AGRIC. ORG., UN, HUMAN-WILDLIFE CONFLICT IN AFRICA: CAUSES, CONSEQUENCES, AND MANAGEMENT STRATEGIES 27 (2009).

<sup>32</sup> *Id.* at 11.

<sup>33</sup> See generally Maan Barua et al., *The Hidden Dimensions of Human-Wildlife Conflict: Health Impacts, Opportunity and Transaction Costs*, 157 BIOLOGICAL CONSERVATION 309, 309 (2013).

To address the fact that wildlife conservation exposes participants to an increased likelihood of HWC, formal CBC policies are often designed to provide communities with economic benefits.<sup>34</sup> However, participants can also have non-economic incentives associated with CBC participation, such as a sense of pride associated with management activity, enjoyment from observing wildlife, or (as will be discussed later in this Article) the feeling of having regained a degree of ownership and autonomy previously lost under colonial administration.<sup>35</sup> Nevertheless, it should be emphasized that seeking to increase the value of wildlife to communities does not alone mean that a program utilizes a CBC approach. The approach requires the presence of both benefits and of the devolution of control over the wildlife resources.<sup>36</sup>

## II. THE DEVELOPMENT OF NAMIBIA'S CBC PROGRAM: FROM TRIBES TO CONSERVANCIES

Thirty-nine percent of Namibia's total land area (home to approximately two-thirds of the country's population) currently falls under communal ownership, where ownership is legally recognized as collectively belonging to the "traditional communities" of the area in which it is located, and permanent individual ownership rights are generally prohibited.<sup>37</sup> Namibia has embraced the implementation of CBC in these communal areas, and its program is frequently held up as one of the world's flagship examples of CBC success in promoting wildlife conservation.<sup>38</sup> CBC features prominently in tourism marketing materials for the country.<sup>39</sup>

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<sup>34</sup> Child, *supra* note 8, at 188; Murphree, *supra* note 8, at 2551.

<sup>35</sup> Brian Jones & Chris Weaver, *CBNRM in Namibia: Growth, Trends, Lessons and Constraints*, in *EVOLUTION & INNOVATION IN WILDLIFE CONSERVATION: PARKS AND GAME RANCHES TO TRANSFRONTIER CONSERVATION AREAS* 223, 234–35 (Helen Suich & Brian Child eds., 2009).

<sup>36</sup> Brian Child & Martha West Lyman, *Introduction to NATURAL RESOURCES AS COMMUNITY ASSETS: LESSONS FROM TWO CONTINENTS* 1, 1 (Brian Child & Martha West Lyman eds., 2005).

<sup>37</sup> *Namibia*, USAID (Oct. 2010), <https://www.land-links.org/country-profile/namibia/#1529257975757-7d5ef4da-df61> [<https://perma.cc/UT9R-D423>]; *Communal Land Reform Act of 2002*, 2787 Gov't Gazette of the Republic of Namib. 2 (2002).

<sup>38</sup> In one example of such praise, the WWF wrote a 2011 article titled "*Namibia: how communities led a conservation success story.*" See *Namibia: How Communities Led a Conservation Success Story*, WWF (Apr. 12, 2011), <http://wwf.panda.org/?200002/Namibia-how-communities-led-a-conservation-success-story> [<https://perma.cc/267C-M5BN>].

<sup>39</sup> *Conservation*, NAMIB. TOURISM BD., <https://namibiaturism.com.na/page/conservation> [<https://perma.cc/4VWX-KSW8>] (last visited Jan. 12, 2022); *Damaraland Camp*, WILDERNESS SAFARIS, <https://wilderness-safaris.com/our-camps/camps/damaraland-camp> [<https://perma.cc/VA8R-NDAK>] (last visited Jan. 12, 2022).

For instance, the official website of the Namibia Tourism Board describes Namibia's implementation of CBC as "facilitating a remarkable recovery of wildlife," and notes that this recovery "has led some to call Namibia's conservation effort the greatest African wildlife recovery story ever told."<sup>40</sup> Similarly, Wilderness Safaris (a high-end tourism company with numerous tourist lodges spread across seven African countries) writes that its Damaraland Camp is the "successful result" of a partnership with the Torra Conservancy (located in Namibia's northwest Kunene region) that "has become an inspiration for communities and conservationists throughout Africa."<sup>41</sup>

CBC in Namibia, however, is not merely an alternate approach to effectuating wildlife governance, but it also represents an attempt to combat the grossly inequitable legacy of Namibia's colonial and apartheid past.<sup>42</sup> Through the creation of its conservancy program, the post-colonial Namibian government expressly sought to empower rural communities that had long been denied economic and administrative opportunities under German and South African rule.<sup>43</sup>

A. *Pre-Colonial Governance in Namibia and Germany*

1. Namibia: A Patchwork System of Governance and the Impact of Rinderpest

Little is written on pre-colonial environmental management in Namibia. Nevertheless, a limited number of writings provide an idea of what environmental governance in Namibia may have looked like prior to European colonization.<sup>44</sup> Across Sub-Saharan Africa generally, societies used social, rather than ecological, management systems.<sup>45</sup> These systems restricted access to natural resources through hierarchical social structures, often based on clanship, families, or religious authority, and sometimes imposed hunting limits on certain types of game species or young or pregnant animals.<sup>46</sup> Hunting limitations were not driven by ecological

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<sup>40</sup> NAMIB. TOURISM BD., *supra* note 39.

<sup>41</sup> WILDERNESS SAFARIS, *supra* note 39.

<sup>42</sup> Paul DeGeorges & Brian Reilly, *The Realities of Community Based Natural Resource Management and Biodiversity Conservation in Sub-Saharan Africa*, 1 SUSTAINABILITY 734, 735 (2009).

<sup>43</sup> *Id.* at 734.

<sup>44</sup> *Id.* at 735.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 736.

concerns, but rather considerations such as the need to conserve game resources for future hunting, personal or societal preferences or taboos, or limits in hunting technology.<sup>47</sup> In highly centralized societies, ruling families sometimes imposed hunting restrictions through the demarcation of their own personal hunting grounds.<sup>48</sup> On the other hand, hunting was also a tool used by pastoral and agricultural communities to protect their livestock and crops by limiting populations of certain wildlife species.<sup>49</sup>

It appears that the governance approaches used throughout Sub-Saharan Africa were also present in at least some of the pre-colonial areas of Namibia.<sup>50</sup> The Ovambos, located in northern Namibia and present-day south Angola, were organized into chiefdoms in which royal families held a degree of ownership over land and resources.<sup>51</sup> As such, the Ovambo chiefs had the capacity to implement some degree of limitations on wildlife utilization.<sup>52</sup> For instance, an Ovambo chiefdom established a traditional royal hunting ground that encompassed parts of the current Etosha National Park.<sup>53</sup> In many Ovambo kingdoms, subjects were forbidden from hunting until after the conclusion of the king's ceremonial hunt at the beginning of the dry season, at which point the wildlife had already given birth.<sup>54</sup> Large game such as elephants were often regarded as belonging to the Ovambo kings, who hunted the species in order to elevate their status.<sup>55</sup>

The Nama and the San, lacking the strong chiefdoms of the Ovambo, instead appear to have had more informal restrictions on hunting in the form of taboos and norms regarding the consumption of certain wildlife species.<sup>56</sup> In a 1928 account of the Nama, the German missionary Heinrich Vedder noted, "a real Nama never eats the flesh of a wild dog, a monkey, a hyena, jackal, a lion or a hare. He believes the meat of these

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<sup>47</sup> *Id.*; Munyardzi Manyanga & George Pangeti, *Precolonial Hunting in Southern Africa: A Changing Paradigm*, in ARCHIVES, OBJECTS, PLACES AND LANDSCAPES: MULTIDISCIPLINARY APPROACHES TO DECOLONISED ZIMBABWEAN PAST 277, 284 (Munyaradzi Manyanga & Shadreck Chirikure eds., 2017).

<sup>48</sup> Manyanga & Pangeti, *supra* note 47, at 285.

<sup>49</sup> *Id.*

<sup>50</sup> C. H. L. HAHN ET AL., THE NATIVE TRIBES OF SOUTH WEST AFRICA 18–19 (1928).

<sup>51</sup> *Id.*; MARTII EIROLA, THE OVAMBOGEFAHR: THE OVAMBOLAND RESERVATION IN THE MAKING 45–50 (1992).

<sup>52</sup> HAHN ET AL., *supra* note 50, at 34–35.

<sup>53</sup> M. LINDEQUE, ELEPHANT CONSERVATION AND MANAGEMENT PLAN (Conservation Ministry of Wildlife & Tourism ed., 1991).

<sup>54</sup> HARRI OLAVI SIISKONEN, TRADE AND SOCIOECONOMIC CHANGE IN OVAMBOLAND 1850–1906 58–59 (1990); MANFRED HINZ, WITHOUT CHIEFS THERE WOULD BE NO GAME: CUSTOMARY LAW AND NATURE CONSERVATION 16 (2003).

<sup>55</sup> SIISKONEN, *supra* note 54, at 60.

<sup>56</sup> HAHN ET AL., *supra* note 50, at 127–29, 143–44.

animals to be impure and injurious to health. But this custom is also slowly disappearing.”<sup>57</sup> Similarly, in an ethnographic study conducted over a series of expeditions between 1950 and 1961, Marshall observed that the San people in Namibia’s Nyae Nyae region did not eat many species of wildlife found in the area.<sup>58</sup> Some (such as foxes, shrews, genets, some small wildcats, gerbils, bats, and a variety of snakes, birds and insects) were apparently not ordinarily considered to be food.<sup>59</sup> Other animals were viewed as repugnant, and the people whom Marshall interviewed stated that they would rather die of starvation than eat them.<sup>60</sup> The latter category of animals consisted primarily of predators and scavengers (lion, leopard, cheetah, hyena, aardwolf, wild dog, and vulture) but also included flamingo, chameleon, mongoose, meerkat, and squirrel.<sup>61</sup>

As a result of human activity, including hunting and livestock grazing, Africa was not generally dominated by wildlife as is often depicted in popular imagery today.<sup>62</sup> Rather, the landscape in many places was dominated by cattle and goats, with minimal bush cover.<sup>63</sup> The arrival of rinderpest in Africa drastically reduced the impact of human activity on wildlife populations.<sup>64</sup>

In 1891, an outbreak of rinderpest occurred among cattle on Kilimanjaro.<sup>65</sup> Six years later, in 1897, the disease reached Namibia, spreading across the area within a matter of weeks.<sup>66</sup> Rinderpest had a devastating impact on native African populations, including those in Namibia, and a profound impact on its landscape.<sup>67</sup> Namibia’s Herero people lost as many as ninety-five percent of their cattle—a number that mirrors the percentage of cattle losses across Africa as a whole.<sup>68</sup> It also decimated other types of livestock, as well as wildlife populations of buffalo, giraffe, eland, small antelopes, and warthogs.<sup>69</sup>

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<sup>57</sup> *Id.* at 129.

<sup>58</sup> LORNA MARSHALL, *THE !KUNG OF NYAE NYAE* 124 (1976).

<sup>59</sup> *Id.* at 126.

<sup>60</sup> *Id.* at 127.

<sup>61</sup> *Id.* at 127.

<sup>62</sup> Robert Nelson, *Environmental Colonialism: “Saving” Africa from Africans*, 8 INDEP. REV. 65, 65 (2003).

<sup>63</sup> *Id.* at 72, 74–75; DeGeorges & Reilly, *supra* note 42, at 752.

<sup>64</sup> Nelson, *supra* note 62, at 72.

<sup>65</sup> Thomas Ofcansky, *The 1889–97 Rinderpest Epidemic and the Rise of British and German Colonialism in Eastern and Southern Africa*, 8 J. AFR. STUD. 31, 31 (1981).

<sup>66</sup> *Id.* at 31–32.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 36; DeGeorges & Reilly, *supra* note 42, at 737.

<sup>69</sup> Nelson, *supra* note 62, at 72.

Whereas the presence of livestock and herbivorous wildlife had previously encouraged the growth of grassland, the lack of grazing in the aftermath of rinderpest allowed for the encroachment of bush which, in turn, provided habitat for the tsetse fly.<sup>70</sup> The resulting outbreaks of sleeping sickness limited the recovery of livestock but not of wildlife, which were immune to the disease.<sup>71</sup> Absent competition from livestock, wildlife populations quickly rebounded.<sup>72</sup> A countryside predominated by bush and wildlife was a marked departure from the historical status quo but, “[f]or European conservationists, typically ignorant of the recent ecological history of the continent, this landscape appeared to be the ‘true Africa’ of wild game.”<sup>73</sup>

## 2. Germany: From Royal Hunting to the Conservation of Nature

During the time of the Roman Empire, no known widespread formal legal restrictions on hunting existed within the territories that comprise current-day Germany, with hunting being allowed even on private lands.<sup>74</sup> However, the hunting of certain species was considered an elite pastime, and there is evidence that imperial hunting grounds were created in which general hunting was prohibited.<sup>75</sup> For example, the city of Trier is believed to have had an imperial hunting grounds that encompassed an area of approximately 220 square kilometers.<sup>76</sup>

The Germanic tribes gained hegemony in western Europe in the late fourth century.<sup>77</sup> Wolfe provides a detailed account of the development of wildlife governance among the Germanic people.<sup>78</sup> Initially, the tribes likely lacked any restrictions on wildlife use other than those related to religious taboos.<sup>79</sup> The Germanic Codes from the sixth century contained some limited restrictions on wildlife capture, but the Codes largely addressed the methods used for hunting rather than imposing any seasonal restrictions or species protections.<sup>80</sup> Further, under the

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<sup>70</sup> *Id.* at 73.

<sup>71</sup> *Id.* at 72.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* See also JONATHAN ADAMS & THOMAS O. MCSHANE, THE MYTH OF WILD AFRICA: CONSERVATION WITHOUT ILLUSION 73 (1992).

<sup>74</sup> Fischer, *supra* note 2, at 259.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 262.

<sup>77</sup> Wolfe, *supra* note 3, at 7.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 10.

Codes, wildlife was considered ownerless (regardless of where it was found) until it was wounded, at which point it belonged to the hunter that inflicted the wound.<sup>81</sup>

The seventh century saw the first establishment of *bannforste*, or royal forest preserves.<sup>82</sup> Within these preserves, kings employed a practice of “inforestation” that reserved to them the exclusive right to hunt—a marked departure from the right of free chase codified in the Germanic Codes.<sup>83</sup> Over the course of the next 600 years, German sovereigns extended their control over wildlife to include the hunting of game on vacant and captured lands.<sup>84</sup> Additionally, landowners seeking the protection of Germanic sovereigns often had to cede to them the hunting rights on their lands.<sup>85</sup> Many of the *bannforste* created during this period now form the core of national parks and other formal protected areas.<sup>86</sup> In addition to the *bannforste*, German kings also established private royal hunting preserves around their various seats of power.<sup>87</sup> In 1640, for instance, Frederick III, Duke of Holstein-Gottorp, created a new game park next to Gottorf castle in Schleswig, complementing a pre-existing smaller one.<sup>88</sup>

In 1232, the Sicily-based Holy Roman Emperor Frederick II responded to unrest in the German principalities by confirming the *Statutum in favorem principum* (statutes in favor of the princes), which had the effect of conferring much of the Emperor’s rights and privileges, including the right of inforestation, to the individual German sovereigns.<sup>89</sup> These sovereignties eventually used their inforestation powers to preempt all hunting rights throughout the entirety of their territories, preventing hunting

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<sup>81</sup> *Id.* at 8.

<sup>82</sup> *Id.*

<sup>83</sup> Wolfe, *supra* note 3, at 9.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Ingo Mose & Norbert Weixlbaumer, *A New Paradigm for Protected Areas in Europe?*, in *PROTECTED AREAS AND REGIONAL DEVELOPMENT IN EUROPE: TOWARDS A NEW MODEL FOR THE 21ST CENTURY* 3, 241, 243 (Ingo Mose ed., 2007).

<sup>87</sup> Martina Giese, *Continental Royal Seats, Royal Hunting Lodges and Deer Parks Seen in the Mirror of Medieval Written Sources*, in *HUNTING IN NORTHERN EUROPE UNTIL 1500 AD: OLD TRADITIONS AND REGIONAL DEVELOPMENTS, CONTINENTAL SOURCES AND CONTINENTAL INFLUENCES* 387, 387 (Oliver Grimm & Ulrich Schmölcke eds., 2011).

<sup>88</sup> Christian Radtke, *Lordship and Hunting in Schleswig—A Sketch*, in *HUNTING IN NORTHERN EUROPE UNTIL 1500 AD: OLD TRADITIONS AND REGIONAL DEVELOPMENTS, CONTINENTAL SOURCES AND CONTINENTAL INFLUENCES* 419, 428 (Oliver Grimm & Ulrich Schmölcke eds., 2011).

<sup>89</sup> Wolfe, *supra* note 3, at 10.

without express permission.<sup>90</sup> This expansion of hunting restrictions led to the establishment of the *Jagdregal*, a legal institution consisting of two executive powers: (1) the right of the provincial sovereigns to make any laws “necessary for the welfare of the state” with regard to wild game and hunting; and (2) “the *jus venandi*, the exclusive right to hunt anywhere within the province.”<sup>91</sup>

Individual German sovereignties began imposing seasonal hunting restrictions starting at the beginning of the sixteenth century.<sup>92</sup> Even in season, hunting was considered a noble pastime, with peasants forbidden from participating or owning firearms.<sup>93</sup> The sovereignties also continued the tradition of creating royal forests, one example of which is a 4,633-hectare private hunting ground created by Maximilian II Emanuel, the elector of Bavaria from 1679–1726.<sup>94</sup>

The *Jagdregal* period ended after Germany’s 1848 Revolution, at which time all landowners were granted the express right to hunt game on their own property.<sup>95</sup> The resultant overhunting, however, led the German states to later reinstitute restrictions on hunting, a process that accelerated after the creation of the German Empire in 1871.<sup>96</sup> Among other things, these restrictions limited who had the right to hunt, instituted seasonal bans on hunting, and created hunting districts.<sup>97</sup>

The 1800s witnessed a growing environmental concern within Germany. In 1819, Alexander von Humboldt, having previously observed British informal landscape design, coined the term *naturdenkmal*, or “nature monument.”<sup>98</sup> The concepts of ecology and nature conservation later appeared in Germany in 1866 and the 1880s, respectively.<sup>99</sup> However, despite the growing interest in nature conservation, in 1898 the German government rejected the idea of creating Yellowstone-style national parks

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 12.

<sup>93</sup> *Id.*

<sup>94</sup> Martin Knoll, *Hunting in the Eighteenth Century. An Environmental History Perspective*, 29 HIST. SOC. RSCH. 1, 13 (2004).

<sup>95</sup> Wolfe, *supra* note 3, at 14–15.

<sup>96</sup> *Id.* at 15.

<sup>97</sup> *Id.* at 16–17.

<sup>98</sup> Lawrence Jones-Walters & Kristijan Čivić, *European Protected Areas: Past, Present and Future*, 21 J. FOR NATURE CONSERVATION 122 (2013).

<sup>99</sup> Jens Brüggemann, *National Parks and Protected Area Management in Costa Rica and Germany: A Comparative Analysis*, in SOCIAL CHANGE AND CONSERVATION 71, 77 (Krishna Ghimire & Michel Pimbert eds., 1997).

within Germany because of the perception that the country lacked sufficiently large remaining wild areas and concerns over the removal of large areas of land from productive use.<sup>100</sup>

*B. 1884–1915: The Creation of a German Colony in Namibia and the Systematic Disenfranchisement of Native Namibians*

Lacking viable natural harbors on much of its coastline, and further insulated by the inhospitable coastal Namib Desert, large swaths of Namibia remained largely untouched by European exploration until the mid-nineteenth century.<sup>101</sup> England displayed an early interest in the region, annexing Walvis Bay (the primary port on Namibia's coastline) in 1878.<sup>102</sup> However, in 1883, Germany began aggressively pursuing a colonization effort, beginning with the purchase of approximately 345 square kilometers of land around Angra Pequena in southern Namibia (subsequently renamed by the Germans as Lüderitzbucht, or Lüderitz Bay).<sup>103</sup> By the next year, Germany had declared as its protectorate the coastline of Namibia extending nearly 1,000 kilometers northward from Angra Pequena to Cape Fria near the Angolan border, excluding only the English territory in Walvis Bay.<sup>104</sup> In 1885, Germany also claimed hegemony over inland areas occupied by the Herero, Nama, and Baster tribes.<sup>105</sup>

South Africa's Cape Parliament also claimed control over the region during this period, voting unanimously in 1884 to annex the lands south of those controlled by Portuguese in current-day Angola.<sup>106</sup> To resolve its territorial disputes with the region's other colonizers, Germany entered into treaties with Portugal in 1866 and, via the Anglo-German Agreement, with England and South Africa in 1890 which, together, established Namibia's present boundaries, including a 20 mile (32.2 kilometers) wide strip that granted Namibia access to the Zambezi River.<sup>107</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> Michael Bollig & Heike Heinemann, *Nomadic Savages, Ochre People and Heroic Herders: Visual Presentations of the Himba of Namibia's Kaokoland*, 15 *VISUAL ANTHROPOLOGY* 267, 270–71 (2002); Harri Olavi Siiskonen, *The Concept of Climate Improvement: Colonialism and Environment in German South West Africa*, 21 *ENV'T & HIST.* 281, 285–86 (2015).

<sup>102</sup> MARION O'CALLAGHAN, *NAMIBIA: THE EFFECTS OF APARTHEID ON CULTURE AND EDUCATION* 16–17 (1977); Siiskonen, *supra* note 101, at 287.

<sup>103</sup> O'CALLAGHAN, *supra* note 102, at 17.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

Germany sought to establish control over Namibia's native populations by entering into agreements with tribal leaders in which Germany offered protection in exchange for promises of allegiance.<sup>108</sup> While these agreements were technically treaties between individual sovereigns, international law at that time permitted European Powers to acquire full sovereignty over any indigenous lands the Powers occupied, as it was assumed that native Africans were incapable of fashioning a government that could adequately protect or meet the needs of Europeans.<sup>109</sup> As such, after the 1890 treaty, Germany effectively had the *de jure* capacity under international law to claim sovereignty over the whole of Namibia.<sup>110</sup>

For purposes of this Article, Germany's colonial interactions with native Namibians were shaped by two central policies: land allocation and environmental governance.<sup>111</sup> As discussed below, the former policy focused on the removal of Black Namibians from much of the country's commercially viable land and the creation of a subjugated labor pool.<sup>112</sup> The latter policy focused on warding off a perceived environmental crisis while providing Germans with a conceptual justification for their take-over of lands utilized by Black Namibians.<sup>113</sup>

#### 1. Land Policy: Confiscation for White Settlers

German colonial land policy was guided largely by the singular idea that indigenous populations should relinquish their grazing and farmlands for use by white settlers.<sup>114</sup> In 1890, a member of the German Colonial Office made clear the colonizing country's intent:

The decision to colonise in South-West Africa could after all mean nothing else but this, namely, that the native tribes would have to give up their lands on which they had

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<sup>108</sup> See GIORGIO MIESCHER, *NAMIBIA'S RED LINE: THE HISTORY OF A VETERINARY AND SETTLEMENT BORDER* 20 (2012).

<sup>109</sup> O'CALLAGHAN, *supra* note 102, at 17.

<sup>110</sup> *Id.*

<sup>111</sup> Siiskonen, *supra* note 101, at 287.

<sup>112</sup> Martina Schwikowski, *Nambia: Who Owns the Land?*, DW (Mar. 10, 2018), <https://www.dw.com/en/namibia-who-owns-the-land/a-45740852> [<https://perma.cc/HDH3-49SW>].

<sup>113</sup> Siiskonen, *supra* note 101, at 298–99.

<sup>114</sup> Carlos Tapia, *Land Reform in Namibia: Economic Versus Socio-political*, 2 J. LAND REFORM, LAND SETTLEMENT & COOP. 41, 43–44 (2004).

previously grazed their stock in order that the white man might have the land for the grazing of his stock.<sup>115</sup>

The German desire for land was particularly acute given that Theodor Leutwein (who served as colonial administrator of Namibia from 1894–1904) envisioned the development of the country as a global beef exporter.<sup>116</sup> In order to accomplish this goal, Leutwein called for the development of livestock ranches, 5,000 to 10,000 hectares in size, managed exclusively by European settlers.<sup>117</sup>

Germany initially acquired land in Namibia using a divide-and-rule approach, employing a combination of force, trade, trickery, and exploitation (for example, during the rinderpest outbreak in 1897, German authorities provided vaccinations for the livestock of white settlers, but provided vaccinations for indigenous livestock only in return for payment, often in the form of livestock or land).<sup>118</sup> In 1898, to facilitate the provision of land to the continuing influx of white settlers into southern Namibia, the German Government issued a decree establishing “reserves” for the resettlement of the country’s Black population.<sup>119</sup> By 1903, over thirty percent of Namibia’s surface area fell under the control of white settlers.<sup>120</sup>

The arrival of rinderpest south of the Zambezi River in 1896 led to a conference of the colonial powers in the British Cape Colony, the outcome of which was an agreement to prevent livestock and wildlife from crossing colonial borders and to strictly control the movement of native Africans.<sup>121</sup> Germany, however, lacked the resources to seal off the entirety of Namibia’s boundaries, and instead focused on cordoning off only the colony’s north and east.<sup>122</sup> The largest of the north’s ethnic groups, the Ovambo, were armed, organized, and outnumbered the entire population of the area of the country under German control.<sup>123</sup> Consequently,

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<sup>115</sup> Michael Scott, *The International Status of South West Africa*, 34 INT’L AFF. 318, 321 (1958).

<sup>116</sup> Siiskonen, *supra* note 101, at 290.

<sup>117</sup> *Id.*

<sup>118</sup> Anna Rosenberg, *Namibia: ‘Let’s Die Fighting Rather than Die of Maltreatment’*, 470 NEW AFRICAN 54, 55–56 (2008); ALLAN COOPER, *THE OCCUPATION OF NAMIBIA: AFRIKANER-DOM’S ATTACK ON THE BRITISH EMPIRE* 22 (1991).

<sup>119</sup> COOPER, *supra* note 118, at 21; Tapia, *supra* note 114, at 43–44.

<sup>120</sup> Tapia, *supra* note 114, at 43–44.

<sup>121</sup> MIESCHER, *supra* note 108, at 21.

<sup>122</sup> *Id.* at 23.

<sup>123</sup> DAVID SOGGOT, *NAMIBIA: THE VIOLENT HERITAGE* 19 (1986).

the colonial government chose to treat the area outside of its de facto control as a “foreign territory” for purposes of establishing the rinderpest fence, a decision that resulted in one half of Namibia’s population living north of the cordon.<sup>124</sup> The fence ultimately proved ineffective at preventing the spread of rinderpest, but its construction nevertheless established a physical demarcation of the edge of Germany’s sphere of influence within the Namibian colony.<sup>125</sup>

At the turn of the century, Germany faced a series of armed rebellions by its Black ethnic groups.<sup>126</sup> These uprisings occurred, in part, in response to Germany’s repressive colonial policies, such as the taxing and confiscation of livestock and horses, and its generally inequitable treatment of indigenous populations and leaders.<sup>127</sup> However, the uprisings were also the result of increasing resource degradation and scarcity on the native reserves that served to exacerbate the poverty of their residents.<sup>128</sup>

The Grootfontein launched a short-lived rebellion in 1901.<sup>129</sup> The Bondelwart subsequently rose up in 1903, and their early success caused Germany to transfer its Namibian-based troops southward to combat the rebellion.<sup>130</sup> The movement of German troops away from Herero lands spurred them to start their own uprising in January of 1904.<sup>131</sup> Unprepared for the Herero rebellion, the German military suffered multiple defeats in the first half of 1904.<sup>132</sup> Germany responded, however, by sending additional troops to Namibia under the command of General Lothar von Trotha.<sup>133</sup>

On October 2, 1904, von Trotha issued the now-infamous “extermination order,” which stated that any Herero, including women or children, found in German territory “with or without a gun, with or without cattle, [would] be shot.”<sup>134</sup> By the conclusion of the Herero rebellion, Germany had slaughtered approximately eighty percent of the Herero population, leaving only 15,000–16,000 survivors from an estimated pre-rebellion

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<sup>124</sup> MIESCHER, *supra* note 108, at 23.

<sup>125</sup> *Id.*

<sup>126</sup> Rosenberg, *supra* note 118, at 55.

<sup>127</sup> *Id.*

<sup>128</sup> Siiskonen, *supra* note 101, at 297.

<sup>129</sup> Rosenberg, *supra* note 118, at 56.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 57.

<sup>133</sup> *Id.*

<sup>134</sup> Uazuva Kaumbi, *Namibia Official Support for Herero Reparation Struggle*, 457 NEW AFRICAN 46, 47 (2006).

population of 80,000.<sup>135</sup> Of those survivors, 14,000 were sent to concentration camps where they worked in hard labor.<sup>136</sup>

A number of Nama tribes started their own rebellions in October 1904, each being met with a similarly ruthless response.<sup>137</sup> By the end of the hostilities, the Nama's numbers were reduced by half, from approximately 20,000 to 10,000, with thousands also sent to concentration camps.<sup>138</sup> Caught in the middle of the fighting, the Damara also lost 17,000 individuals,<sup>139</sup> roughly a third of their population.<sup>140</sup>

In 1907, the lands occupied by the various rebelling tribes were officially confiscated as German crown lands.<sup>141</sup> The result of that confiscation, combined with Germany's prior land acquisitions, was that, by the end of German rule, south and central Namibia (the area under German control) was "almost devoid of visible settlements, ordered into neatly fenced-in farms."<sup>142</sup>

Because of the costs associated with suppressing the rebellions, in 1905, Germany instructed Namibia's colonial government to restrict its police protection to the smallest possible area.<sup>143</sup> In response to this order, the colonial government established a "police zone," the northern boundary of which generally tracked the rinderpest cordon, subsequently referred to as the "red line."<sup>144</sup> The northern thirty percent of current-day Namibia remained largely free of German control, with the colonial governor issuing a 1906 order restricting travel and trade in the Ovambo region by anyone other than "indigenous" tribes.<sup>145</sup> Despite their subsequent attempts to do so, the German colonial authorities simply lacked the necessary military might to subjugate the Ovambo, who retained a level of autonomy throughout the remainder of German rule.<sup>146</sup>

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<sup>135</sup> PETER KATJAVIVI, *A HISTORY OF RESISTANCE IN NAMIBIA* 10 (1988); *see generally* COOPER, *supra* note 118, at 10.

<sup>136</sup> KATJAVIVI, *supra* note 135, at 10.

<sup>137</sup> Rosenberg, *supra* note 118, at 57.

<sup>138</sup> SOGGOT, *supra* note 123, at 11.

<sup>139</sup> *See generally* COOPER, *supra* note 118.

<sup>140</sup> TONY EMMETT, *POPULAR RESISTANCE AND THE ROOTS OF NATIONALISM IN NAMIBIA, 1915–1966*, at 59 (1999).

<sup>141</sup> Reinhart Kössler, *Entangled History and Politics: Negotiating the Past between Namibia and Germany*, 26 *J. CONTEMPORARY AFRICAN STUD.* 313, 314 (2008); KATJAVIVI, *supra* note 135, at 11; SOGGOT, *supra* note 123, at 11.

<sup>142</sup> Kössler, *supra* note 141, at 315.

<sup>143</sup> MIESCHER, *supra* note 108, at 44.

<sup>144</sup> *Id.* at 49; Tapia, *supra* note 114, at 43–44.

<sup>145</sup> HARRI SIISKONEN, *TRADE AND SOCIOECONOMIC CHANGE IN OVAMBOLAND 1850–1906*, at 187 (1990); MIESCHER, *supra* note 108, at 49.

<sup>146</sup> SOGGOT, *supra* note 123, at 19.

## 2. Environmental Policy: Justifying Indigenous Disenfranchisement

Compared to the more capitalist approach found in Germany's domestic policymaking, its colonial decision-making was highly influenced by a "state and science" collaboration between administrators and scientists, permitting the development of an autocratic, scientific approach to policy development.<sup>147</sup> Beginning in the late 1800s, policymakers in Namibia focused on two perceived environmental problems: desiccation and the overharvesting of wildlife.<sup>148</sup> Regarding the former problem, policymakers were concerned that the misuse of land would lead to altered rainfall and the drying up of surface water.<sup>149</sup> Regarding the latter, colonial administrators, along with interested parties in Germany such as hunters and members of the *Deutsche Kolonialgesellschaft* (German Colonial Society), were worried that Namibia's wildlife (or, at least, those species of wildlife the Germans considered worth preserving) were at risk of extinction from overhunting.<sup>150</sup> Wildlife was viewed as an important economic resource within the colony, particularly given Namibia's limited capacity for agricultural development.<sup>151</sup>

Policymakers placed the onus for both issues primarily on native Namibians.<sup>152</sup> Colonial authorities blamed, at least in part, variations in rainfall and water availability on the lack of any environmental ethos among the Herero and Nama.<sup>153</sup> Native Namibians were also viewed as endangering wildlife by hunting in a manner that was profligate, ignorant, and unsporting.<sup>154</sup> Engaging in what William Rollins describes as "environmental chauvinism," the perceived excesses of native Africans were seen as a stark contrast with the environmental ethos and unique scientific and economic capacity of the German settlers.<sup>155</sup> This disparity

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<sup>147</sup> William Rollins, *Imperial Shades of Green: Conservation and Environmental Chauvinism in the German Colonial Project*, 22 GER. STUD. REV. 187, 187 (1999).

<sup>148</sup> Siiskonen, *supra* note 101, at 281, 283.

<sup>149</sup> *Id.*

<sup>150</sup> Rollins, *supra* note 147, at 195.

<sup>151</sup> Moritz Wenning, *The Evolution of the NNP*, 4 GOBABEB TIMES 1, 1 (2008).

<sup>152</sup> Siiskonen, *supra* note 101, at 298.

<sup>153</sup> *Id.*

<sup>154</sup> DeGeorges & Reilly, *supra* note 42, at 736; Rollins, *supra* note 147, at 196; MIESCHER, *supra* note 108, at 80–82.

<sup>155</sup> Rollins, *supra* note 147, at 187; Christo Botha, *People and the Environment in Colonial Namibia*, 52 S. AFR. HIST. J. 170, 170 (2005).

provided a reason that “the land itself would be turned against its native inhabitants: it would cry out in the language of environmentalism to be relieved from their incompetence, and thereafter would gratefully bear witness to the care of the colonial masters.”<sup>156</sup>

The German colonial government sought to control the hunting of Namibia’s wildlife through the introduction of a regulatory system of hunting bans and licenses.<sup>157</sup> Hunting regulations first appeared in 1892, requiring would-be hunters to first seek the permission of the colonial governor, and imposing a total ban on the hunting of elephant cows and calves and a seasonal ban on the hunting of ostriches.<sup>158</sup> The first hunting ordinance entered into force in 1902, prohibiting the use of traps or snares (two hunting approaches traditionally favored by native Namibians), closing large areas off to hunting altogether, and requiring a permit by all hunters (both African and European) on lands under government control.<sup>159</sup> The German-controlled area of Namibia was divided into districts, each under the authority of its own district chief who was granted the authority to establish and enforce seasonal hunting restrictions for particular game species.<sup>160</sup>

In 1907, the German government established three expansive game reserves incorporating land protected under the 1902 ordinance.<sup>161</sup> The largest of those reserves, which included the modern day Etosha National Park and was known simply as “*Wildschutzgebiet Nr. 2*” (Game Reserve No. 2), covered approximately 80,000 square kilometers—an area roughly the size of modern-day Austria.<sup>162</sup> At the time of its creation, this reserve was the largest game reserve in the world, although it was subsequently reduced in size by over seventy percent.<sup>163</sup> The other game reserves encompassed 10,000 square kilometers of the Namib Desert, and an area in the northeast of the country, respectively.<sup>164</sup>

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<sup>156</sup> Rollins, *supra* note 147, at 196.

<sup>157</sup> H.H. Berry, *A Historical Review of the Etosha Region and Its Subsequent Administration as a National Park*, 20 MADOQUA 3, 4 (1997); MARK CIOC, *THE GAME OF CONSERVATION: INTERNATIONAL TREATIES TO PROTECT THE WORLD’S MIGRATORY ANIMALS* 4 (2009); Wenning, *supra* note 151, at 7.

<sup>158</sup> Eugene Joubert, *The Development of Wildlife Utilization in South West Africa*, 4 J. S. AFR. WILDLIFE ASS’N 35, 35 (1974).

<sup>159</sup> MIESCHER, *supra* note 108, at 49; Joubert, *supra* note 158, at 35.

<sup>160</sup> Joubert, *supra* note 158, at 35.

<sup>161</sup> *Id.*

<sup>162</sup> Berry, *supra* note 157, at 4, fig. 1.

<sup>163</sup> *Id.*

<sup>164</sup> Wenning, *supra* note 151, at 1.

Similar nature reserves in East Africa were purposefully designed to harken back to *Jagdregal* hunting estates, conveying “the idealized picture of . . . an untamed wilderness” where the wildlife was referred to as “imperial game.”<sup>165</sup> It is unclear whether the Namibian reserves were generated with the same nostalgia in mind but, nevertheless, they instituted the same sorts of restrictions as found on Germany’s historical royal reserves by banning all hunting by German and Bantu-speaking Africans.<sup>166</sup> Only groups such as the Hai//om San were allowed to remain and hunt within the reserves, as they were viewed as being part of the natural environment.<sup>167</sup>

In 1909, the German government adopted a hunting statute that prohibited hunting without a permit anywhere other than in enclosed, privately owned lands, and this statute included hunting on native reserves by Black Namibians.<sup>168</sup> The statute also prohibited many forms of hunting traditionally favored by native Namibians: snares, traps, and pits.<sup>169</sup> Thus, by the end of its rule, Germany effectively removed the capacity of Black Namibians within the police zone to engage in any form of legal wildlife governance through land dispossession and the enactment of restrictions on hunting in the areas within which they lived.<sup>170</sup>

C. *South African Occupation (1915–89): Subjugation, Apartheid, and the Roots of Community-Based Conservation*

After the First World War, South Africa governed Namibia as a League of Nations mandate.<sup>171</sup> However, while the formal colonial ruler changed, little else did from the standpoint of most Black Namibians.<sup>172</sup> For most of its rule, South Africa continued and expanded the German policy of land disenfranchisement and exclusionary wildlife protection.<sup>173</sup>

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<sup>165</sup> Bernhard Gißibl, *German Colonialism and the Beginnings of International Wildlife Preservation in Africa*, 3 G.H.I. BULL. SUPPLEMENT 121, 126–27 (2006).

<sup>166</sup> See generally *id.*

<sup>167</sup> James Suzman, *Etosha Dreams: An Historical Account of the Hai//om Predicament*, 42 J. MODERN AFR. STUD. 221, 221 (2004).

<sup>168</sup> HINZ, *supra* note 54, at 22–23.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Karol Boudreaux, *A New Call of the Wild: Community-Based Resource Management in Namibia*, 20 GEO. INT’L ENV’T L.R. 297, 301 (2008).

<sup>172</sup> *Namibia*, S. AFR. HIST. ONLINE, <https://www.sahistory.org.za/place/Namibia> [https://perma.cc/H4QQ-M3XT] (last visited Jan. 12, 2022).

<sup>173</sup> *Id.*

1. Land Policy: A Continuation of Germany's Policy of Dispossession and Relocation, and the Development of Traditional Authorities

Like Germany before it, South Africa removed indigenous residents from their land and allocated it to white settlers.<sup>174</sup> Further, South Africa continued Germany's policy of relocating ethnic groups within Namibia to reservations.<sup>175</sup> In 1923, South Africa allocated two million hectares in southern and central Namibia as native reserves<sup>176</sup> and forcibly relocated Black residents found in crown lands to those reserves.<sup>177</sup> In addition to representing only 3.5% of the available land (allocated to ninety percent of the population), the native reserves were located in the region's most barren and least productive locations.<sup>178</sup> By 1937, nearly the entire Black population of the police zone was confined to the reserves, and the movement of Black individuals was strictly controlled by a combination of curfews and travel, vagrancy, labor, and identification laws.<sup>179</sup>

South Africa pushed the German-established red line further north and, in 1915, gained a degree of control over the Ovambo kingdoms in northern Namibia.<sup>180</sup> Unlike with the Germans, however, the focus of South Africa within the northern region was not land expropriation; instead, its residents were viewed as a source of labor for the white population to the south.<sup>181</sup> Consequently, South Africa never opened the land above the red line to white settlers, and land governance in that region continued largely in accordance with traditional rules.<sup>182</sup>

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<sup>174</sup> UNESCO, *RACISM AND APARTHEID IN SOUTHERN AFRICA: SOUTH AFRICA AND NAMIBIA* 142 (1974).

<sup>175</sup> *Id.*

<sup>176</sup> KATJAVIVI, *supra* note 135, at 14.

<sup>177</sup> JEREMY SILVESTER ET AL., *"Trees Never Meet": Mobility and Containment, an Overview 1915–1946*, in *NAMIBIA UNDER SOUTH AFRICAN RULE: MOBILITY AND CONTAINMENT, 1915–46*, at 19 (Patricia Hayes et al. eds., 1998).

<sup>178</sup> KATJAVIVI, *supra* note 135, at 14.

<sup>179</sup> *Id.* at 15; SOGGOT, *supra* note 123, at 18.

<sup>180</sup> KATJAVIVI, *supra* note 135, at 11–12; SILVESTER ET AL., *supra* note 177, at 3–4.

<sup>181</sup> KATJAVIVI, *supra* note 135, at 17; SILVESTER ET AL., *supra* note 177, at 3–4; EMMETT, *supra* note 140, at 3–4; JEREMY SARKIN, *COLONIAL GENOCIDE AND REPARATIONS CLAIMS IN THE 21ST CENTURY* 176–77 (2009).

<sup>182</sup> Emmett observes that the system of land allocation by tribal kings and headmen evolved over the course of the early 20th century to become more of a rent-based system. EMMETT, *supra* note 140, at 188–91.

Meanwhile, forced removals of Black Namibians from land in the police zone continued.<sup>183</sup> In 1958, for example, South Africa relocated four hundred Damara living near Windhoek to a reserve farther north, with part of the newly vacated land designated as a game reserve and the remainder allocated to white settlers.<sup>184</sup> In the 1960s, South Africa began implementing its Odendaal Plan, which envisioned the creation of separate, semi-self-governing “homelands” for each of the Black ethnic groups within Namibia.<sup>185</sup> The conceptualization of ethnic homelands marked a departure from South Africa’s previous stance, which viewed the reserves as being open to Black Namibians of all ethnicities.<sup>186</sup> South Africa never fully implemented the Odendaal Plan, and it appears unsettled how many people were ultimately relocated as a result of the plan.<sup>187</sup>

These policies (representing the completion of the dispossession efforts begun by Germany) resulted in a grossly inequitable land distribution.<sup>188</sup> In the middle of the twentieth century, white farmers in Namibia possessed roughly fifty percent of the country’s agricultural land, while Black farmers (who made up the vast majority of Namibia’s population) were formally allotted only twenty-five percent, mostly above the red line in the north.<sup>189</sup> At the time of Namibia’s independence in 1990, the percentage of farmland owned by whites—who made up six percent of Namibia’s population at that time—had increased slightly to fifty-two percent of all agricultural farmland, while Black residents had access to the remaining forty-eight percent.<sup>190</sup> In total, an estimated 4,205 mostly white-owned southern freehold estates held forty-four percent of

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<sup>183</sup> *Forced Removals in South Africa*, S. AFR. HIST. ONLINE, <https://www.sahistory.org.za/article/forced-removals-south-africa> [<https://perma.cc/M65J-6HFK>] (last visited Jan. 12, 2022).

<sup>184</sup> KATJAVIVI, *supra* note 135, at 47.

<sup>185</sup> See generally LAURENT KAELA, *THE QUESTION OF NAMIBIA* (1996).

<sup>186</sup> Reinhart Kössler & Henning Melber, *Germany-Namibia Landmark Accord: Negotiating the Price Tag of Redemption for Colonial Genocide*, DAILY MAVERICK (June 2, 2021), <https://www.dailymaverick.co.za/article/2021-06-02-germany-namibia-landmark-accord-negotiating-the-price-tag-of-redemption-for-colonial-genocide/> [<https://perma.cc/F7RQ-EQGL>].

<sup>187</sup> Silvester et al. noted that the Odendaal Plan “remains to be researched in depth,” and this Article is unable to identify any work that discusses in any depth South Africa’s attempts to implement the plan. SILVESTER ET AL., *supra* note 177, at 46.

<sup>188</sup> See generally *id.* at 65.

<sup>189</sup> Lloyd Sachikonye, *Land Reform in Namibia and Zimbabwe: A Comparative Perspective*, in WHO SHOULD OWN THE LAND? ANALYSES AND VIEWS ON LAND REFORM AND THE LAND QUESTION IN NAMIBIA AND SOUTHERN AFRICA 64, 65 (Justine Hunter ed., 2004).

<sup>190</sup> Justine Hunter, *Who Should Own the Land? An Introduction*, in WHO SHOULD OWN THE LAND? ANALYSES AND VIEWS ON LAND REFORM AND THE LAND QUESTION IN NAMIBIA AND SOUTHERN AFRICA 1, 1 (Justine Hunter ed., 2004).

all available land in Namibia (regardless of suitability for agriculture) while roughly 160,000 northern Black households occupied forty-three percent of available land.<sup>191</sup>

Much of the land occupied by Black households fell under common-property ownership, where the allocation of usufruct rights often occurred outside of any formally sanctioned legal procedure.<sup>192</sup> South Africa employed a system of indirect administration that relied on local tribal authorities, variously referred to as “leaders,” “headmen,” “chiefs,” and “councilors” (depending, in part, on the esteem in which South African officials held the particular tribe or group).<sup>193</sup> While there may be some question as to how “traditional” the chosen headmen were within Namibia’s various tribes, their role as subordinate officials in the political process was clearly entrenched by the time the country gained its independence.<sup>194</sup>

In addition to their limited formal de jure powers, the traditional authorities frequently had much more expansive de facto power within their communities. For instance, despite the law expressly prohibiting headmen from allocating land, by reserving that power solely for magistrates and superintendents within the colonial administration, the traditional authorities effectively did just that.<sup>195</sup> Thus, when a resident in a communal area applied for permission to occupy communal land, the magistrate or superintendent would seek out and defer to the advice of the relevant traditional authority.<sup>196</sup> Some traditional authorities also had their own tribal court systems that resolved disputes separately from the formal South African courts.<sup>197</sup>

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<sup>191</sup> Sachikonye, *supra* note 189, at 66.

<sup>192</sup> Ben Fuller, *Improving Tenure Security for the Rural Poor*, at iv–viii (Food & Agric. Org. of the U.N., Working Paper No. 6, 2006).

<sup>193</sup> John T. Friedman, *Making Politics, Making History: Chiefship and the Post-Apartheid State in Namibia*, 31 J.S. AFR. STUDS. 23, 28 (2005).

<sup>194</sup> ANDREW CORBETT & CLEMENT DANIELS, UNIV. OF NAMIB. SOC. SCI. DIV., LEGISLATION AND POLICIES AFFECTING COMMUNITY-BASED NATURAL RESOURCE MANAGEMENT IN NAMIBIA, 14–15 (1996); Friedman, *supra* note 193, at 32, 34–35.

<sup>195</sup> CORBETT & DANIELS, *supra* note 194, at 5, 11; WOLFGANG WERNER, “WHAT HAS HAPPENED HAS HAPPENED”: THE COMPLEXITY OF FENCING IN NAMIBIA’S COMMUNITY AREAS 17–20 (2011).

<sup>196</sup> CORBETT & DANIELS, *supra* note 194, at 5, 11; WERNER, *supra* note 195, at 9, 15, 17.

<sup>197</sup> BRIAN T.B. JONES & SIMA LUIPERT, BEST PRACTICES FOR THE CBNRM PROGRAM TO WORK WITH REGIONAL AND LOCAL AUTHORITIES, TRADITIONAL AUTHORITIES AND LINE MINISTRIES TO FACILITATE INTEGRATED AND COLLABORATIVE SUPPORT TO COMMUNITY-BASED CBOs WORKING ON COMMON-PROPERTY NATURAL RESOURCE MANAGEMENT 8 (2002).

2. Environmental Policy: The Increased Consolidation of Governmental Control Over Wildlife and the Beginnings of CBC

South Africa continued to apply the environmental laws enacted by Germany, including keeping the nature reserves enacted under the previous regime in 1902.<sup>198</sup> However, in place of an absolute ban on hunting, South Africa allowed the purchase of special hunting licenses within the reserves.<sup>199</sup> During the 1920s, South Africa expanded the scope of existing import and export regulations on wildlife and placed protections on certain plant and animal species.<sup>200</sup> In 1933, South Africa participated in the International Conference for the Protection of Flora and Fauna of Africa.<sup>201</sup> Among other things, the parties agreed to establish national parks and "strict natural reserves" and to afford protection to species identified in two lists (Class A and B).<sup>202</sup> Regarding the listed animals, the hunting of Class A animals was to be completely banned except for "special circumstances, solely in order to further important scientific purposes, or when essential for the administration of the territory."<sup>203</sup> Class B species were afforded a lower level of protection, but still could not be "hunted, killed, or captured, *even by natives*, except under special license granted by the competent authorities".<sup>204</sup> The parties also reserved the ability to extend the Class A and B protections to additional species within their respective territories.<sup>205</sup>

The parties to the 1933 London Convention clarified that the prohibitions regarding the hunting of the identified species did not, as a matter of course, extinguish hunting rights already possessed by native Africans pursuant to a treaty, concession, or administrative permission in "those areas in which such rights [had] already been definitively recognised by the authorities of the territory."<sup>206</sup> The plain language of the document, however, made no such exception for traditional hunting rights that had not previously been recognized by the colonial powers (such as

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<sup>198</sup> Joubert, *supra* note 158, at 35.

<sup>199</sup> Carpenter, *supra* note 1, at 12.

<sup>200</sup> *Id.*

<sup>201</sup> Convention Relative to the Preservation of Fauna and Flora in their Natural State, art. 1 §§ 3–4, Nov. 8, 1933, 172 L.N.T.S. 241.

<sup>202</sup> *Id.* art. 8, § 1.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* (emphasis added)

<sup>205</sup> *Id.* art. 8, § 3.

<sup>206</sup> *Id.* art. 8, § 2.

in previously unconquered territory), or in any way prevented parties from revoking existing native hunting rights.<sup>207</sup>

Despite its participation in the 1933 London Convention, South Africa made few substantive changes to its existing conservation policy.<sup>208</sup> Eugene Joubert sums up the period from 1915 to the early 1950s as a “period of stagnation . . . during which time virtually no progress was made regarding conservation as a whole.”<sup>209</sup> He describes Namibia as simply being too expansive to allow for effective governmental enforcement of hunting restrictions, particularly given that South Africa did not dedicate any full-time officials to the issue of nature conservation.<sup>210</sup> Nevertheless, one seemingly minor policy change is worth discussing here. In 1919, the colonial government enacted taxes on the ownership of dogs, although an exception allowed rural white residents to keep one dog as a watchdog without paying the tax (no such exemption existed for Black Namibians).<sup>211</sup> Black Namibians traditionally used dogs in hunting, and so this seemingly innocuous tax may well have had a significant and disproportionate impact on the livelihoods of those groups.<sup>212</sup>

Starting in the 1950s, South Africa began much more aggressively pursuing nature conservation.<sup>213</sup> The period from 1953 and 1972 saw dramatic increases in full-time staff associated with nature conservation and tourism (from 15 to 593), allocated budget (from R16,000 to R2,112,000), and formal conservation areas (from 3 to 12).<sup>214</sup> These efforts to protect wildlife coincided with increased restrictions on the utilization of wildlife by Black Namibians.<sup>215</sup> Despite the existence of Germany’s 1909 statute, the South African government had generally permitted (whether voluntarily or as the result of a lack of enforcement capacity) Black Namibians to use wildlife resources found on the native reserves.<sup>216</sup>

The 1950s saw a change to this status quo with the passage of an ordinance that strictly limited hunting across the country<sup>217</sup> and the

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<sup>207</sup> Convention Relative to the Preservation of Fauna and Flora in their Natural State, *supra* note 201, at art. 8, § 2.

<sup>208</sup> Joubert, *supra* note 158, at 36; Botha, *supra* note 155, at 174.

<sup>209</sup> Joubert, *supra* note 158, at 36.

<sup>210</sup> *Id.*

<sup>211</sup> Dog Tax Proclamation 4 of 1919 (South West Africa Protectorate) (S. Afr.).

<sup>212</sup> Botha, *supra* note 155, at 185.

<sup>213</sup> Joubert, *supra* note 158, at 36.

<sup>214</sup> *Id.*

<sup>215</sup> See *infra* notes 217–23 and accompanying text.

<sup>216</sup> Botha, *supra* note 155, at 179.

<sup>217</sup> See *id.* at 185 n.74.

eviction of San subsistence hunters from Etosha National Park in the first half of the decade.<sup>218</sup> The ordinance prohibited the hunting of all game between September and April and prohibited entirely the hunting of protected or big game without a hunting license (Game Preservation Ordinance 1951).<sup>219</sup> It contained some exceptions for private landowners and occupiers, providing them with the bounded ability to hunt some small game and kill game that threatened grazing, crops, or livestock.<sup>220</sup> If they had a fenced property, the landowners had unlimited ability to kill any or all of a number of game species, but no such exceptions existed for residents of native reserves or common property areas.<sup>221</sup> The Game Preservation Ordinance also explicitly banned the use of dogs in hunting and generally forbade hunting with anything other than a rifle—a hunting tool that was beyond the financial means of most Black Namibians.<sup>222</sup> The strict enforcement of this Proclamation had the effect of ending subsistence hunting on the native reserves.<sup>223</sup>

In 1962, the South African government declared all wild game to be protected, state-owned assets.<sup>224</sup> Six years later, in 1968, the government once again returned some rights to private landowners—granting them the ability to sustainably utilize the wildlife on their properties for tourism, meat, and trophy hunting.<sup>225</sup> Equivalent rights, however, were not granted to residents on communal lands, so wildlife remained the property of the state in the areas typically occupied by Black Namibians.<sup>226</sup>

The early 1970s saw a brief decentralization of wildlife governance to regional governments, with the Ovambo and Kavango regional assemblies passing their own legislation allowing traditional authorities the ability to hunt certain game and to issue limited hunting permits to

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<sup>218</sup> *Id.* at 186.

<sup>219</sup> Proclamation 33, 1951. Protected game included elephant, eland, giraffe, hippopotamus, impala, rhinoceros, sable antelope, and zebra. The following game were listed as big game: buffalo, oryx, hartebeest, kudu, ostrich, and tsessebe.

<sup>220</sup> *Id.*; Botha, *supra* note 155, at 181.

<sup>221</sup> Joubert, *supra* note 158, at 36.

<sup>222</sup> Botha, *supra* note 155, at 186.

<sup>223</sup> *See id.* at 184.

<sup>224</sup> Benedict Libanda & James Blignaut, *Tourism's Local Benefits for Namibia's Community Based Natural Resource Management Areas*, 10 INT'L J. ECOLOGICAL ECON. & STAT. 40, 41 (2008).

<sup>225</sup> Richard Summers, *Legal and Institutional Aspects of Community-Based Wildlife Conservation in South Africa, Zimbabwe and Namibia*, 1999 ACTA JURIDICA 188, 201 (1999).

<sup>226</sup> Peter Alpert, *Integrated Conservation and Development Projects: Examples from Africa*, 46 BIOSCIENCE 845, 850 (1996); Boudreaux, *supra* note 171, at 299.

their followers.<sup>227</sup> In 1986, however, the Nature Conservation Amendment Act reconsolidated decision-making and, in the process, repealed the Ovambo and Kavango legislation.<sup>228</sup> The next year, in 1987, the South African government passed an exemption that allowed the Nyae Nyae San to engage in “traditional” hunting without a permit.<sup>229</sup> Ironically, the same white apartheid government that granted that exemption also took great pains to specify what could legally be considered to be the San’s “traditional” practices—including specifying the length of their bows and design of their arrows, the materials from which they crafted their snares, and the method by which they could track down wounded animals (e.g., on foot).<sup>230</sup> Manfred Hinz astutely notes that this exemption both prohibited the natural evolution of traditions and conflated environmental and cultural conservation.<sup>231</sup>

In 1982, the Namibian Wildlife Trust (“NWT”) moved to address the rampant poaching of black rhinos in the Kunene region—only 66 rhinos remained from a population estimated to number from 250 to 350 in 1970.<sup>232</sup> At this time, the entire governmental staff tasked with patrolling the 9 million hectares of the Kaokoveld (part of the current-day Kunene region) consisted of two individuals: a government nature conservator and his Herero assistant.<sup>233</sup> The NWT, through Garth Owen-Smith, a former governmental agricultural extension officer and game ranger, began discussions with communities regarding issues of wildlife poaching in the area and the communities’ loss of livestock due to a severe drought.<sup>234</sup> The result of these meetings was the creation of a community game guard in which members of the local communities patrolled core rhino territory and whose salaries were paid by the NWT.<sup>235</sup> Incidents of rhino poaching dropped dramatically after the development of the community game guard, and the approach was subsequently expanded to communal lands

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<sup>227</sup> HINZ, *supra* note 54, at 34.

<sup>228</sup> *Id.*; Nature Conservation Amendment Act 5 of 1996, Amend. of § 28 of Ordinance 4 of 1975 (Namib.).

<sup>229</sup> HINZ, *supra* note 54, at 34.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Esmond Martin, *Rhino Poaching in Namibia from 1980 to 1990 and the Illegal Trade in the Horn*, 18 PACHYDERM 39, 40 (1994).

<sup>233</sup> *Id.* at 43.

<sup>234</sup> GARTH OWEN-SMITH, AN ARID EDEN 504–05 (2010).

<sup>235</sup> Martin, *supra* note 232, at 43; Brian T. B. Jones, *Policy Lessons from the Evolution of a Community-Based Approach to Wildlife Management, Kunene Region, Namibia*, 11 J. INT’L DEV. 295, 297 (1999); OWEN-SMITH, *supra* note 234, at 418.

in Namibia's northeast Caprivi region.<sup>236</sup> After the expansion of the community game guard system to the Caprivi, Owen-Smith and an anthropologist named Margaret Jacobsohn established an NGO, the Integrated Rural Development and Nature Conservation ("IRDNC"), dedicated to bringing wildlife benefits to residents in Namibia's communal areas.<sup>237</sup>

By the late 1980s, tourism had dramatically increased in the former Kaokoveld, which, until 1978, had been largely closed to white visitors.<sup>238</sup> In response to a rise in tension between the tourists and local residents, Owen-Smith and Jacobsohn met with stakeholders near Puros, a spring found in the lower Hoarusib River that served as both a tourist attraction and an important source of water to local residents.<sup>239</sup> As a consequence of those meetings, tourists were asked to pay a levy of R25 (approximately \$5 at the time) to enter the area.<sup>240</sup> The money was provided directly to the community at Puros, who were able to decide for themselves how it should be spent.<sup>241</sup> The success of this pilot "Puros project" in generating local support for conservation led to the creation of a second such project in the Caprivi in 1990.<sup>242</sup>

*D. Namibian Independence (1990–Present): The Adoption of CBC as a Conservation Tool and Redress for Inequality*

1. Land Policy: The Continuation of Communally Owned Property and the Codification of Land Allocation Rights of Traditional Authorities

Namibia gained its independence from South Africa in 1990.<sup>243</sup> While it has engaged in some land reforms, such as reallocating white freehold estates to Black Namibians, post-independence Namibia has retained the distinction between the freehold estates and the communal-property lands.<sup>244</sup> It also continues to observe and enforce the red line as an agricultural barrier.<sup>245</sup>

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<sup>236</sup> Martin, *supra* note 232, at 43; Jones, *supra* note 235, at 297; OWEN-SMITH, *supra* note 234, at 514.

<sup>237</sup> Jones, *supra* note 235, at 297.

<sup>238</sup> OWEN-SMITH, *supra* note 234, at 488–89.

<sup>239</sup> *Id.* at 498.

<sup>240</sup> *Id.*; Jones, *supra* note 235, at 297.

<sup>241</sup> OWEN-SMITH, *supra* note 234, at 498–99.

<sup>242</sup> *Id.* at 514.

<sup>243</sup> See Carpenter, *supra* note 1, at 13.

<sup>244</sup> See generally Agricultural (Commercial) Land Reform Act 6 of 1995 (Namib.).

<sup>245</sup> See SARKIN, *supra* note 181, at 50, 54.

In 1991, the newly independent Namibian government divided the country into administrative regions as part of an effort to undo South Africa's racially oriented "Bantustan" policy.<sup>246</sup> Each of these administrative regions is divided into six to twelve local authorities, which function at the municipality, town, and village level.<sup>247</sup> The local and regional authorities have elected councils, with the local authorities each electing one representative to the regional council.<sup>248</sup> The Namibian Constitution, however, continues to recognize the existence of "customary" law, and expressly provides that customary and common law is valid to the extent that it does not conflict with statutory or constitutional law.<sup>249</sup>

Customary law is determined and administered by "traditional authorities" which, as defined in the 2000 Traditional Authorities Act ("the TAA"), consist of a community chief and "senior traditional councilors."<sup>250</sup> Under the TAA, community chiefs are either a member of the royal family of the traditional community or, if no royal family exists, an individual selected from within the traditional community.<sup>251</sup> The senior traditional councilors are, at the discretion of the chief, either appointed by the chief or popularly elected by community members.<sup>252</sup> Traditional authorities are empowered to preside over disputes regarding "any customary matter" between members of the community and exercise other customary powers.<sup>253</sup> The Act limits the scope of the traditional authority's jurisdiction to members of that community and to non-members that voluntarily submit (either expressly or by conduct) to the customary law of the community.<sup>254</sup> While the Act differentiates traditional authorities from what it refers to as "government organs," it nevertheless provides

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<sup>246</sup> Gerhard Töttemeyer, *Decentralisation and State-Building at the Local Level*, in STATE, SOCIETY AND DEMOCRACY: A READER IN NAMIBIAN POLITICS 108, 123 (Christiaan Keulder ed., 2010).

<sup>247</sup> *Id.* at 124.

<sup>248</sup> *Id.*

<sup>249</sup> NAMIBIA'S CONSTITUTION OF 1990 WITH AMENDMENTS THROUGH 2010, art. 66, § 1.

<sup>250</sup> Traditional Authorities Act 25 of 2000, § 1 cl. 10(b) (Namib.).

<sup>251</sup> *Id.* § 1 cl. 17. The TAA defines a "traditional community" as being:

an indigenous homogenous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, who recognizes a common traditional authority and inhabits a common communal area and may include the members of that traditional community residing outside the common communal area.

<sup>252</sup> *Id.* § 10.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

for traditional authorities to be remunerated for their services from the State Revenue Fund.<sup>255</sup>

The TAA expressly bounds the powers of the traditional authority by statutory and constitutional law, governmental policies, and the authority vested in regional and local authority councils.<sup>256</sup> In practice, however, these boundaries are not always clear.<sup>257</sup> For example, the TAA (like its predecessor, the 1995 Traditional Authority Act)<sup>258</sup> requires that traditional authorities ensure that their members sustainably use natural resources, but it does not include land allocation amongst the enumerated powers granted to the traditional authorities.<sup>259</sup> Nevertheless, as they had done prior to independence, traditional authorities continued to allocate land for use by their members after the TAA's adoption.<sup>260</sup>

In 2002, Namibia passed the Communal Land Reform Act ("CLRA"), recognizing the role of traditional authorities in allocating and canceling customary land rights.<sup>261</sup> Yet, at the same time, the language of the CLRA also potentially constricted this power through the creation of regional boards to, inter alia, "exercise control" over the practice through the ratification and registration of land right determinations (and absent such ratification, the allocation or cancellation has no legally recognized effect).<sup>262</sup> In response to complaints by a number of traditional authorities over the language of the CLRA, the Minister of Lands of Resettlement affirmed that traditional authorities would retain their ability to allocate communal land.<sup>263</sup>

## 2. Environmental Policy: The Statutory Creation of Conservancies and the Involvement of Traditional Authorities in Conservancy Functions

After independence, Namibia's Ministry of Wildlife, Conservation and Tourism (the predecessor to the current Ministry of Environment and

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<sup>255</sup> *Id.*

<sup>256</sup> Traditional Authorities Act 25 of 2000 (Namib.).

<sup>257</sup> WERNER, *supra* note 195, at 19.

<sup>258</sup> Traditional Authorities Act 17 of 1995 (Namib.).

<sup>259</sup> Traditional Authorities Act, *supra* note 256.

<sup>260</sup> WERNER, *supra* note 195, at 20, 22.

<sup>261</sup> Communal Land Reform Act 5 of 2002 (Namib.).

<sup>262</sup> *Id.*

<sup>263</sup> Mathias Haufiku, *Namibia: Traditional Authorities Wary of Land Boards*, NEW ERA (May 13, 2013), <https://allafrica.com/stories/201305131116.html> [<https://perma.cc/NLW6-D9T6>].

Tourism (“MET”)) worked with Owen-Smith and Jacobsohn to formalize the game guard and tourist levy approach first adopted in Puros.<sup>264</sup> In 1995, the Ministry issued a policy entitled “Promotion of Community Based Tourism” (“Conservancy Policy”).<sup>265</sup> The Conservancy Policy’s stated goal is to provide “a framework for ensuring that local communities have access to opportunities in tourism development and are able to share in the benefits of tourism activities that take place on their land.”<sup>266</sup> In particular, the Conservancy Policy notes the need to enhance the rights enjoyed by communities over tourism resources.<sup>267</sup> It proposes that conservancies are the key to redressing past inequalities and views conservancies as a key tool by which communal residents could gain rights over environmental resources—particularly wildlife rights—and therefore attract tourism-related income.<sup>268</sup> The Conservancy Policy states that the MET will support communities’ establishment of conservancies and tourism ventures.<sup>269</sup> It also provides for the channeling of a “substantial share” of funds for investment in Namibian tourism to communal areas.<sup>270</sup>

The next year, the Namibian government enacted the Nature Conservation Amendment Act of 1996 (“Conservancy Act”), granting conservancies the same rights enjoyed by the freehold commercial farmers.<sup>271</sup> The Conservancy Act provides that any group of people residing on communal land can apply for conservancy status.<sup>272</sup> To be recognized as a conservancy, applicants must have a registered membership, a legal constitution, a representative management committee, an outline of a benefit distribution plan, and defined geographic boundaries.<sup>273</sup> Once a community is granted conservancy status, it possesses the same de jure rights as commercial farmers to hunt, capture, cull, and sell huntable game (oryx, springbok, kudu, warthog, buffalo, and bush pig).<sup>274</sup> Furthermore, the

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<sup>264</sup> Jones, *supra* note 235, at 297.

<sup>265</sup> MINISTRY OF ENV’T & TOURISM NAMIB., POL’Y DOCUMENT NO. 9: PROMOTION OF CMTY. BASED TOURISM 8 (1995).

<sup>266</sup> *Id.* at 2.

<sup>267</sup> *Id.* at 7.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 5.

<sup>270</sup> *Id.* at 7.

<sup>271</sup> Nature Conservation Amendment Act 5 of 1996 (Namib.).

<sup>272</sup> *Id.*

<sup>273</sup> Susan Snyman, *Ecotourism Joint Ventures Between the Private Sector and Communities: An Updated Analysis of the Torra Conservancy and Damaraland Camp Partnership, Namibia*, 4 TOURISM MGMT. PERSP. 127, 127 (2012).

<sup>274</sup> WORLD RES. INST., WORLD RESOURCES 2005: THE WEALTH OF THE POOR—MANAGING ECOSYSTEMS TO FIGHT POVERTY 115 (2005).

community has the right to apply to the MET for permits to use quotas of protected game for trophy hunting.<sup>275</sup> The Conservancy Act does not confer any additional rights to the conservancy land itself or to mineral, fishery, or forest resources located within the conservancy's territory,<sup>276</sup> and the conservancies' hunting rights are revocable by the MET Minister.<sup>277</sup>

As written, the Conservancy Act would appear to allow the conservancies to set their own quotas regarding huntable game.<sup>278</sup> However, based on interviews with traditional authorities and conservancy representatives in the Anabeb, Omatendeka, Puros, and Sesfontein conservancies (conducted in April 2017)<sup>279</sup> and informal conversations with Namibian conservation practitioners (across several visits in 2016–17) it appears that this is no longer the case.<sup>280</sup> It seems that there were concerns within the Namibian government that the conservancies were overharvesting wildlife, often by hunting wildlife (or selling wildlife hunting rights to outsiders) to send to meat processors in cities to the south.<sup>281</sup> Consequently, Namibia's Ministry of Environment and Tourism now generates quotas for huntable game for each of the conservancies.<sup>282</sup>

The Conservancy Act does not expressly provide for the involvement of traditional authorities in the creation or management of the conservancies.<sup>283</sup> Nevertheless, the role of the traditional authorities in land allocation and dispute resolution means that, in practice, they have a substantial degree of jurisdictional overlap with the conservancy administration.<sup>284</sup> In recognition of this fact, guidelines promulgated by the Ministry of Environment and Tourism call for the involvement of traditional authorities in key areas of the conservancies' formation and management.<sup>285</sup> Of note, the guidelines observe that “[a]lthough the conservancy legislation and regulations do not prescribe the role of Traditional Authorities in conservancies, in practice it is important for them to play

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<sup>275</sup> *Id.*

<sup>276</sup> SIDNEY L. HARRING & WILLEM ODENDAAL, “GOD STOPPED MAKING LAND!” LAND RIGHTS, CONFLICT AND LAW IN NAMIBIA’S CAPRIVI REGION 14 (2012).

<sup>277</sup> Nature Conservation Amendment Act (1996).

<sup>278</sup> *Id.*

<sup>279</sup> Interviews with traditional authorities and conservancy officials (May 2017) (on file with author) [hereinafter Interviews].

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> Nature Conservation Amendment Act 1996 § 24A(1).

<sup>284</sup> *Id.*

<sup>285</sup> NAMIB. MINISTRY OF ENV'T AND TOURISM, GUIDELINES FOR MANAGEMENT OF CONSERVANCIES AND STANDARD OPERATING PROCEDURES 18–19 (2014).

a role because of their legal authority in land issues and their duty under the Traditional Authorities Act to play a role in conservation.”<sup>286</sup>

The guidelines specify the following roles for traditional authorities:

- Unless specified otherwise in the specific conservancies’ constitutions, individuals are eligible for conservancy membership only if, among other things, they have resided in the conservancy area for three years with the permission of the conservancy’s traditional authority.
- If a dispute arises that involves the conservancy committee as a party, the traditional authority is appointed as a mediator if the parties cannot agree on another intermediary.
- Traditional authorities should be represented on conservancy committees in an advisory role.
- Conservancies should consult with traditional authorities when determining zoning (such as grazing, tourism, or conservation areas) within the conservancies.
- Benefits to the traditional authorities from the conservancies should be stated in the conservancies’ benefit distribution plans.<sup>287</sup>

Namibia recognized its first conservancies in 1998: the Nyae Nyae and Salambala in the east of the country and the Torra and #Khoadi-//Hôas in the western Kunene region.<sup>288</sup> As of this writing, eighty-six conservancies have been gazetted, covering approximately 166,045 square kilometers and including an estimated 227,941 people (about twenty percent and nine percent of the country’s total land area and population, respectively).<sup>289</sup>

*E. Structural Challenges to the Success of the Conservancy Program*

The conservancy model is a notable departure from the highly centralized and exclusionary policies of the German and South African

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Registered Communal Conservancies*, NAMIBIAN ASSOCIATION OF C.B.N.R.M. SUPPORT ORGANIZATIONS, <http://www.nacso.org.na/conservancies> [<https://perma.cc/VZS6-TRPX>] (last visited Jan. 12, 2022).

<sup>289</sup> *Id.*

governments, but its devolution of authority is incomplete.<sup>290</sup> First, while it is subject to procedural limitations set out in the Conservancy Act, the MET retains the right to withdraw a conservancy's recognition.<sup>291</sup> As such, the conservancies lack permanent de jure rights to their wildlife resources.<sup>292</sup> Second, the conservancies also lack the de facto capacity to fully govern those resources, as the MET currently issues permits to the conservancies for both huntable and protected game.<sup>293</sup> Third, despite their formal recognition by the MET, the conservancies lack any easy means by which to regulate the entry of outsiders.<sup>294</sup>

Regarding the lack of permanent de jure rights, in interviews Carpenter conducted with multiple conservancy authorities and traditional leaders across four Namibian conservancies, no one mentioned the legal right of the MET to withdraw the recognition of the conservancies.<sup>295</sup> Further, no participants in a subsequently administered survey (involving those same four conservancies) made any reference to the possibility of revocation either.<sup>296</sup> Therefore, it may be that most conservancy residents are either unaware of the possibility or consider the revocation of their conservancy's status to be highly improbable.<sup>297</sup> The mere legal possibility of the withdrawal of conservancy recognition appears unlikely to have any real impact on the conservancies' governance function.<sup>298</sup>

The latter two limitations—the lack of governance privileges and the inability to regulate entry—are potentially more significant threats to the success of the conservancy program. Starting with the issue of governance rights, it appears that residents are very cognizant of the inability of their conservancies to make their own decisions about wildlife harvesting.<sup>299</sup> The topic frequently arose in interviews of conservancy representatives and traditional authorities.<sup>300</sup> And, in response to a survey question asking them to identify who owned a range of different species, less than one third of respondents answered that small herbivores and big

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<sup>290</sup> Boudreaux, *supra* note 171, at 297, 301.

<sup>291</sup> Nature Conservation Amendment Act (1996).

<sup>292</sup> *Id.*

<sup>293</sup> Jones, *supra* note 235, at 297.

<sup>294</sup> Boudreaux, *supra* note 171, at 308.

<sup>295</sup> Interviews, *supra* note 279; Surveys of Conservancy Residents (Sept.–Dec. 2017) [hereinafter Surveys] (on file with author).

<sup>296</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

<sup>297</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

<sup>298</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

<sup>299</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

<sup>300</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

herbivores (31.23% and 31.5% of respondents, respectively) were owned, at least in part, by their conservancy (these two sets of animals make up the “hunnable game” identified in the Conservancy Act).<sup>301</sup> By comparison, around forty-two percent of participants responded that the animals were not owned by anyone, approximately twenty-four percent felt that they belonged to the government, and less than three percent felt that the ownership was unknown or fell under a different category.<sup>302</sup>

Whether control over some or all game species *should* be fully devolved to the conservancies is a matter of debate (it is worth noting that even conservancy representatives and traditional authorities were split on this issue in their interviews).<sup>303</sup> And, CBC participants can be motivated to conserve wildlife by a multitude of considerations, including existence values and the belief that the presence of wildlife benefits the communities by attracting tourism.<sup>304</sup> Nevertheless, the fact that approximately two-thirds of survey respondents lack a sense of legal ownership over wildlife in the conservancies raises a concern that the conservancies fall short in fostering among their residents a sense of durable interests in wildlife—a core pillar on which the success of the CBC approach is predicated.<sup>305</sup>

The inability of the conservancies to exclude outsiders also poses a challenge to their long-term viability.<sup>306</sup> The economic incentives and self-policing at the heart of the CBC approach is unlikely to modify the behavior of outsiders who are not integrated into the local communities.<sup>307</sup> Absent the ability to regulate entry, the conservancies may struggle to prevent their wildlife from becoming an open access resource.<sup>308</sup> The conservancies can certainly organize patrols to monitor outsiders once they have entered but, at least in the four conservancies included in this

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<sup>301</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

<sup>302</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

<sup>303</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

<sup>304</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

<sup>305</sup> J. E. Mbaiwa, *The Success and Sustainability of Community-Based Natural Resource Management in the Okavango Delta, Botswana*, 86 S. AFR. GEOGRAPHICAL J. 44, 51 (2004); Joyce Lepetu et al., *Community-Based Natural Resource Management and Tourism Partnership in Botswana: Which Way Forward?*, 39 BOTS. NOTES AND REC. 113, 113 (2008); Brian T. B. Jones et al., *From Exploitation to Ownership: Wildlife-Based Tourism and Communal Area Conservancies in Namibia*, in INSTITUTIONAL ARRANGEMENTS FOR CONSERVATION, DEVELOPMENT AND TOURISM IN EASTERN AND SOUTHERN AFRICA 17, 36 (2015).

<sup>306</sup> Jones et al., *supra* note 305, at 33, 35.

<sup>307</sup> ELEPHANT ACTION LEAGUE & GLOBAL EYE, PUSHING IVORY OUT OF AFRICA: A CRIMINAL INTELLIGENCE ANALYSIS OF ELEPHANT POACHING AND IVORY TRAFFICKING IN EAST AFRICA 2, 5 (2015).

<sup>308</sup> ELINOR OSTROM, GOVERNING THE COMMONS 32 (1990); Cox et al., *supra* note 22, at 39.

fieldwork, the patrols are unarmed and lack the legal authority to apprehend suspected poachers.<sup>309</sup> As explained by one headman in the Anabeb conservancy, the patrols can only radio the police and hope they arrive in time to catch the suspects before they flee.<sup>310</sup>

The extended drought in Namibia's north has also caused a number of Himba pastoralists from the Epupa region to migrate southward into some of the Kunene conservancies.<sup>311</sup> While this Article was unable to independently verify their claims, conservancy officials, traditional authorities, and survey respondents (excepting the migrants themselves) all regularly complained about how the "illegal" settlers had moved their cattle into restricted areas of the conservancies and were competing for grazing.<sup>312</sup> These claims echo those made to other researchers working in northern conservancies.<sup>313</sup> Lacking any other more expedient means of removing the settlers, the conservancies included in this fieldwork were forced to turn to the courts, filing an action in 2015 seeking the settlers' eviction.<sup>314</sup> As of late 2019, this Article was not able to find any final determination of that lawsuit.

A fourth potential hurdle to the overall success of the conservancy model comes, not from the legal empowerment of the conservancies themselves, but from the symbolism attached to the conservancies as a post-apartheid form of empowerment.<sup>315</sup> For many communities, a significant draw behind forming a conservancy was the legal status that accompanied it—a sense that recognition as a conservancy represented a reclaiming of land ownership that had long been denied them by the German and South African governments.<sup>316</sup> As a result, despite its creation as means

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<sup>309</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

<sup>310</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

<sup>311</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

<sup>312</sup> Interviews, *supra* note 279; Surveys, *supra* note 295. These claims are admittedly quite murky. Bollig observes that the boundaries of the different usage zones in the conservancies can be ambiguous, disputed, and sometimes unknown even to registered conservancy members. Michael Bollig, *Towards an Arid Eden? Boundary Making, Governance and Benefit Sharing and the Political Ecology of the "New Commons" of Kunene Region, Northern Namibia*, 10 INT'L J. COMMONS 771, 776, 778 (2016). Further, based on Carpenter's informal conversations with conservation practitioners, it appears that at least some of the settlers may have received initial permission from one of the multiple traditional authorities in their respective conservancies. Nevertheless, the situation remains that the conservancy authorities lack the means to easily address issues involving encroachment by outsiders.

<sup>313</sup> Bollig, *supra* note 312, at 779–80.

<sup>314</sup> Interviews, *supra* note 279; Surveys, *supra* note 295.

<sup>315</sup> Bollig, *supra* note 312, at 776.

<sup>316</sup> *Id.* at 778.

for affording communal areas the same wildlife management rights as freehold estates, a number of Namibia's conservancies actually have marginal wildlife potential.<sup>317</sup>

The administration of a conservancy requires expenditures on, among other things, employee salaries and transportation, and it is unlikely that many conservancies will ever realize sufficient wildlife revenue to cover their administrative costs.<sup>318</sup> Of Namibia's eighty-six conservancies, less than half (forty-two) have entered into joint ventures with tourism lodges.<sup>319</sup> In 2017, only thirty-nine conservancies reported being able to cover their operational costs from their own income (out of fifty-four that provided this information).<sup>320</sup> The conservancy program has attracted a substantial amount of investment from NGOs and foreign agencies over its lifetime.<sup>321</sup> However, external funding is notoriously fickle, as donors are often tempted to switch their expenditures to support the next "cure-all" conservation approach.<sup>322</sup> If the conservancy program were to lose a significant amount of its non-governmental funding, the brunt of the costs for supporting the conservancies would fall squarely on the Namibian government.<sup>323</sup> At that point, the government would have to choose whether to continue subsidizing those conservancies that do not have the potential to become self-sufficient. W. M. Adams and D. Hulme identify this sort of scenario—where wildlife resources are insufficient to yield a sustainable revenue flow—as one in which community-based conservation is likely an inappropriate conservation policy.<sup>324</sup>

In short, the adoption of CBC in Namibia represents, in several important respects, a retreat from the paternalistic and increasingly rigid wildlife management policy utilized by Namibia's colonial governments. Residents of communal lands now have a legally recognized interest in their wildlife resources, can elect a committee to make zoning and governance decisions, and have the potential to profit from wildlife-based goods and services.<sup>325</sup> However, this retreat is incomplete and

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<sup>317</sup> NAMIBIAN ASSOCIATION OF C.B.N.R.M. SUPPORT ORGANIZATIONS, *supra* note 288, at 2.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> NAMIBIAN ASSOCIATION OF C.B.N.R.M. SUPPORT ORGANIZATIONS, THE STATE OF COMMUNITY CONSERVATION IN NAMIBIA: ANNUAL REPORT 2017 at 3, 56 (2018).

<sup>321</sup> *Id.*

<sup>322</sup> See Peter Lindsey et al., *Conserving Africa's Wildlife and Wildlands Through the COVID-19 Crisis and Beyond*, 4 NAT. ECOLOGY & EVOLUTION 1300, 1300 (2020).

<sup>323</sup> NAMIBIAN ASSOCIATION OF C.B.N.R.M. SUPPORT ORGANIZATIONS, *supra* note 320, at 23.

<sup>324</sup> Adams & Hulme, *supra* note 8, at 195–96.

<sup>325</sup> Bollig, *supra* note 312, at 778–79.

provides only a partial return to the pre-colonial autonomy enjoyed by those living in the communal areas.<sup>326</sup> This incomplete devolution of rights, and the marginal potential for many conservancies to realize sufficient wildlife-generated profits, represent an ongoing challenge to the long-term efficacy of Namibia's conservancy model.

### III. COMMON CRITICISMS OF THE CBC APPROACH AND LESSONS LEARNED

The challenges of the incomplete devolution of rights and the limited regional economic potential of wildlife are not limited to Namibia's CBC efforts,<sup>327</sup> and the inability of many CBC efforts to overcome these and other hurdles give rise to criticism that the approach simply does not promote either wildlife conservation or economic development.<sup>328</sup> For instance, Piers Blaikie asserts that "a generalized conclusion may be fairly confidently made that CBC programs in central and southern Africa have substantially failed to deliver the promises to both communities and the environment."<sup>329</sup> Skeptics of the approach also commonly contend that CBC relies on an unrealistic and romanticized concept of "traditional communities"; commercializes natural resources, which can motivate over-harvesting; encourages elite capture, corruption, nepotism, and inequity at the local level; and is based on unscientific postmodern logic.<sup>330</sup> These

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<sup>326</sup> See *id.* at 774, 780, 795.

<sup>327</sup> See, e.g., Arielle Levine & Geoffrey Wandesforde-Smith, *Wildlife, Markets, States, and Communities in Africa: Looking Beyond the Invisible Hand*, 7 J. INT'L WILDLIFE L. & POL'Y 135, 139–40 (2004); Peter J. Balint & Judith Mashinya, *The Decline of a Model Community-Based Conservation Project: Governance, Capacity, and Devolution in Mahenye, Zimbabwe*, 37 GEOFORUM 805, 806–07 (2006); Priya Shyamsundar, *Decentralization, Devolution, and Collective Action—A Review of International Experience*, in PROMISE, TRUST AND EVOLUTION: MANAGING THE COMMONS OF SOUTH ASIA 74, 75 (Rucha Ghate et al. eds., 2008); Nico Rozemeijer, *CBNRM in Botswana*, in EVOLUTION AND INNOVATION IN WILDLIFE CONSERVATION: PARKS AND GAME RANCHES TO TRANSFRONTIER CONSERVATION AREAS 251, 252 (Helen Suich et al. eds., 2009).

<sup>328</sup> See John Hutton et al., *Back to the Barriers? Changing Narratives in Biodiversity Conservation*, 32 F. FOR DEV. STUD. 341, 363 (2005); Fiona Nunan, *Empowerment and Institutions: Managing Fisheries in Uganda*, 34 WORLD DEV. 1316, 1316 (2006).

<sup>329</sup> Blaikie, *supra* note 9, at 1947.

<sup>330</sup> Child & Lyman, *supra* note 36, at 8, 12; Hutton et al., *supra* note 328, at 348, 358; Murphree, *supra* note 8, at 2555. Other common criticisms identified by these authors are that C.B.N.R.M. tries to fix fictitious problems; leads to chaotic governance; disenfranchises national constituents that also have an interest in the governed resource; devolves governance to less competent local communities that lack the capacity to compete in a market economy, leading to their reliance on monopoly players; fosters reliance on

perceived shortcomings have led some critics to call for a reemphasis on the creation and expansion of protected areas.<sup>331</sup> Without minimizing the critical role that protected areas can play in wildlife conservation, the history of wildlife governance in Namibia cautions against a rush to judgment about the efficacy of any particular wildlife conservation approach.

A. *Success Can Be Subjective and Both Policy “Failures” and “Successes” Are Valuable Learning Opportunities*

Policies are designed to address problems, and their development, adoption, and implementation can be labor, time, and resource-intensive. When the policy at issue involves the adoption or amendment of formal laws, policy failure may be seen as either a political liability<sup>332</sup> or a lost opportunity (given that a new opportunity for adoption may not arise any time soon).<sup>333</sup> For this reason, policymakers can (understandably) be failure-adverse, sticking to familiar approaches.

Compounding this issue for CBC programs (and many other policies) is the fact that the approach can have multiple, sometimes potentially incompatible, goals, and whether a CBC program is a success or a failure can often depend on the specific criteria by which it is judged.<sup>334</sup> Namibia’s eighty-six conservancies, for example, are expected to not only sustainably govern wildlife resources, but also to redress inequitable colonial legacies and provide economic opportunities to conservancy residents.<sup>335</sup> Residents and stakeholders in Namibia’s conservancies may

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tourism, which is an unstable and unreliable source of income; and, due to the presence of middleman actors, results in the local “producer” receiving only a small and inequitable portion of the wildlife-generated revenue.

<sup>331</sup> Thomas O. McShane et al., *Hard Choices: Making Trade-Offs Between Biodiversity Conservation and Human Well-Being*, 144 *BIOLOGICAL CONSERVATION* 966, 968 (2011).

<sup>332</sup> See, e.g., Richard Crespín, *CSR & The Cluster-Help: What Can Go Wrong (and Right) When NGOs, Government, and Corporations Try to Work Together*, *CORP. RESP. MAG.*, May/June 2014 38, 39.

<sup>333</sup> See *id.* at 39.

<sup>334</sup> Miller observes that underlying “ethical commitments” guide the selection of criteria by which policy success is measured. Thaddeus R. Miller et al., *The New Conservation Debate: The View from Practical Ethics*, 144 *BIOLOGICAL CONSERVATION* 948, 951 (2011). In addition to protection of species, governance approaches can also be evaluated on, among other outcomes, their economic or social impact on local communities or their preservation of overall biodiversity or habitat, and a vigorous debate exists regarding whether conservation efforts should primarily try to achieve anthropocentric or ecological goals. See also Allan McConnell, *Policy Success, Policy Failure and Grey Areas In-Between*, 30 *J. PUB. POL’Y* 345, 353, 359 (2010).

<sup>335</sup> Sian Sullivan, *How Sustainable is the Communalizing Discourse of ‘New’ Conservation?*,

also possess their own informal goals for the conservancies and the relative importance of these formal and informal goals can vary between and within stakeholder groups.<sup>336</sup> Thus, a conservancy might be considered a success by some stakeholders, perhaps because its creation correlates with a drop in recorded wildlife poaching, while being considered a failure by others because it fails to generate any material benefits to its residents. Or, similarly, a conservancy that contains virtually no wildlife and generates no economic benefits for its residents might still be considered a success by its residents because it provides a level of governmental autonomy that was previously unavailable.<sup>337</sup>

A policy implementation's lack of success, however, need not be viewed as a policy "failure." For instance, private industry also faces the risk of failure when innovating, and companies spend significant resources on the development of solutions to problems.<sup>338</sup> Yet failures in private industry attempts at innovation may not be celebrated, but they are nevertheless expected and accepted as learning opportunities.<sup>339</sup> Similarly, when the implementation of a policy fails to realize a particular goal, that lack of success provides guidance for the development or refinement of future policy.

Environmental problems are often referred to as "wicked problems" because of their complexity, and that complexity means that we should not expect to realize a uniform set of policy outcomes—either failure or success. A policy may not achieve the desired outcome on a particular metric because of any one of multiple natural, economic, or socio-political factors. Post-evaluation analysis can help to explain why a policy approach has succeeded or failed in a particular set of circumstances, and this information can be used to create new or modify existing policy that is better suited to situations on the ground.

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*in* CONSERVATION AND MOBILE INDIGENOUS PEOPLES: DISPLACEMENT, FORCED SETTLEMENT AND SUSTAINABLE DEVELOPMENT 158, 159, 173 (Dawn Chatty & Marcus Colchester, eds. 2008).

<sup>336</sup> See *id.* at 164.

<sup>337</sup> Karol C. Boudreaux, *Community Conservation in Namibia: Devolution as a Tool for the Legal Empowerment of the Poor* (Mercatus Cent. at GEO MASON UNIV., Working Paper No. 10-64, 2010).

<sup>338</sup> See Peder Inge Furseth & Richard Cuthberston, *The Right Way to Spend Your Innovation Budget*, HARV. BUS. REV. (Aug. 3, 2018), <https://hbr.org/2018/08/the-right-way-to-spend-your-innovation-budget> [<https://perma.cc/8GS4-2THV>].

<sup>339</sup> For instance, in 2014, then-Executive Director of the Intel Foundation said of failure: "when you're on the bleeding edge, the only way you can learn is from your mistakes." Crespin, *supra* note 332, at 38.

*B. All Wildlife Governance Approaches Have Mixed Records*

Namibia's history evidences the potential shortcomings of both the CBC and fortress-model approaches. Sub-Saharan governments established (and continue to establish) formal protected areas in modern times because of the perceived successes of that approach in North America and Europe.<sup>340</sup> However, the creation of protected areas in Namibia and elsewhere in Africa had profoundly negative impacts on populations residing in, and relying on the resources of, those territories and was part of a broader disenfranchisement of Black Africans.<sup>341</sup> Namibia adopted its conservancy program, in part, as a means of redressing more than a century of inequitable conservation policy.<sup>342</sup> But, the majority of Namibia's conservancies struggle to cover their own operating costs and few provide any meaningful economic benefits to their residents.<sup>343</sup> Further, conservancies are limited in their capacity to guard wildlife resources against the actions of outsiders.<sup>344</sup>

Yet both the CBC and fortress-model approaches in Namibia have also had notable successes. Wildlife poaching decreased dramatically in CBC areas, suggesting that, despite their limitations at excluding others, the approach may be effective at moderating the behavior of community residents.<sup>345</sup> As for its national parks, Etosha National Park is notable as having only experienced three incidents of illegal elephant kills (out of a total of 350 observed elephant deaths) between 2000–19.<sup>346</sup>

The successes and limitations of the approaches mirror those found elsewhere in Sub-Saharan Africa. Carpenter's study of southern, central, and eastern Africa found a wide range of successes and failures across both CBC and centralized governance approaches in protecting African

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<sup>340</sup> It is worth emphasizing that the creation of formal protected areas in North America, as in Africa, often resulted in or were facilitated by the displacement or restrictions to the livelihoods of indigenous populations and, therefore, the success of any given protected area is a topic that merits discussion.

<sup>341</sup> See Bernadus Swartbooi, *On the Land Question*, in COLONIAL REPERCUSSIONS: NAMIBIA 15, 15 (2019).

<sup>342</sup> MINISTRY OF ENV'T & TOURISM NAMIB., *supra* note 265, at 7.

<sup>343</sup> See Bollig, *supra* note 312, at 791.

<sup>344</sup> See Boudreaux, *supra* note 337.

<sup>345</sup> *Id.*

<sup>346</sup> *Monitoring the Illegal Killing of Elephants (MIKE)*, CITES, <https://cites.org/eng/prog/mike/index.php/portal#Access%20to%20MIKE%20Data> [<https://perma.cc/WU2S-FSUL>] (last visited Jan. 12, 2022). This date range represents the nineteen years of available data generated by the Convention on International Trade in Endangered Species' ("CITES") Monitoring Illegal Killing of Elephants ("MIKE") program.

elephants and other studies comparing governance approaches have generated equally ambiguous findings.<sup>347</sup> Governance approaches may also be more or less effective at combatting different poaching drivers.<sup>348</sup> For instance, CBC may struggle with dealing with organized cells of outside poachers seeking high value products (such as ivory or rhino horn), but it may have greater efficacy in deterring locals engaged in subsistence or small-scale poaching.<sup>349</sup> And the converse may also be true, in that the fortress model may be better at addressing commercial poachers while proving ineffective (or inappropriate) at addressing small-scale activities.<sup>350</sup>

C. *There Are No Panaceas in Wildlife Conservation*

Others have cautioned against the search for policy panaceas<sup>351</sup> and that warning bears repeating here. Policymakers, stakeholders, and advocates often chase or tout so-called “win-win” solutions: broadly applicable policy approaches that simultaneously achieve development and conservation goals.<sup>352</sup> However, Thomas O. McShane, et al., observe that implemented policies that actually achieve win-win outcomes are the exception rather than the rule.<sup>353</sup> More often, the development of such panacea-type policies involve an oversimplification of complex socioecological interactions and an under-provision of immediate development benefits.<sup>354</sup>

Namibia’s conservation history illustrates the potential pitfalls of this sort of thinking. Colonial governors stereotyped a complex form of indigenous governance by painting Black Namibians as engaging in profligate resource use and extraction and responded by nationalizing wildlife and enacting increasingly severe laws on its harvest.<sup>355</sup> But those laws negatively impacted rural Black Namibians and, by removing any sense

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<sup>347</sup> Stefan Carpenter, *A Cross-National Comparison of the Efficacy of Community-Based and National Governance Approaches on the Protection of the African Elephant*, 231 J. ENV'T MGMT. 336, 337 (2019).

<sup>348</sup> *Id.* at 340.

<sup>349</sup> ELEPHANT ACTION LEAGUE & GLOBAL EYE, *supra* note 307, at 6.

<sup>350</sup> *Id.*

<sup>351</sup> See, e.g., Krister Andersson & Elinor Ostrom, *Analyzing Decentralized Resource Regimes from a Polycentric Perspective*, 41 POL'Y SCI. 71, 71 (2008); McShane et al., *supra* note 331, at 969.

<sup>352</sup> McShane et al., *supra* note 331, at 967.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 970.

<sup>355</sup> See Paul DeGeorges & Brian Reilly, *The Realities of Community Based Natural Resource Management and Biodiversity Conservation in Sub-Saharan Africa*, 1 SUSTAINABILITY 734,736 (2009).

of ownership over or responsibility for wildlife, may have actually exacerbated the country's poaching issues.<sup>356</sup>

Namibia's CBC efforts were borne out of the early successes of domestic pilot programs, and the development of the country's conservancy program was motivated, in large part, by its potential to realize both conservation and development goals.<sup>357</sup> However, most of Namibia's established conservancies have not yet achieved both (or, for some, either) of those categories of goals.<sup>358</sup> For instance, the vast majority of conservancy residents included in Carpenter's fieldwork stated that the benefits they received from their conservancies failed to match or outweigh the economic costs associated with living with wildlife.<sup>359</sup>

Nevertheless, despite their shortcomings, it would be inappropriate to declare either Namibia's CBC or fortress-model policy approaches to be abject failures, as both have realized success based on certain metrics. Rather, it is unlikely that *any* policy approach could consistently realize win-win outcomes across the country. The appropriateness of new or existing policy approaches will likely depend on both the unique mix of variables in a particular situation and which outcomes policymakers prioritize. The continued search for win-win panaceas is likely to result in a discounting of existing policy achievements and repeated "failures" in the future.

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<sup>356</sup> *Id.* at 735.

<sup>357</sup> McShane et al., *supra* note 331, at 966.

<sup>358</sup> Carpenter, *supra* note 347, at 337.

<sup>359</sup> Surveys, *supra* note 295.