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ABSTRACT

What do the small Murray Islands, in the Torres Strait off the Queensland coast have in common with Namibia? Unlike the bloody German/Herero and Nama wars, no shot was fired when Her Majesty's administration in Queensland declared the Murray Islands a crown colony. Yet, the two peoples had a common history of submission to a colonial power; and although allowed to remain on their ancestral lands, they were not informed that they'd been colonized. One of the oldest justifications for the occupation of inhabited land, the so-called *terra nullius* rule, was abandoned due to a lawsuit brought by the Meriam people, the Mabo case. The example of the Mabo case provides an opportunity to approach the land reform program in Namibia from a different perspective, at least in the central and southern regions of the country. The Namibian Constitution guarantees private property rights. However, the idea that more than one right can exist over a farm is not unknown to both common law and statutory law in the country. In this article the author proposes a process where several strategies are used to obtain the final goal: a just distribution of land to all the peoples of Namibia in such a way that it contributes to peace, prosperity and stability. [Original article in English.]

KEYWORDS

Land rights – Colonial rights – *Res nullius* – Namibian land issue – Herero genocide

EDDIE MABO AND NAMIBIA: LAND REFORM AND PRE-COLONIAL LAND RIGHTS

Nico Horn

> The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to re-examine the two propositions. For the reasons which we have explained, that re-examination compels their rejection. The lands of this continent were not *terra nullius* or "practically unoccupied" in 1788. The Crown's property in the lands of the Colony of New South Wales was, under the common law which became applicable upon the establishment of the Colony in 1788, reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans to the particular areas of land on which they lived or which they used for traditional purposes.[1]

What do the small Murray Islands (Mer, for the natives), which have a total land area of hardly nine square kilometers in the Torres Strait off the Queensland coast (Australia) have in common with Namibia? Surely not geography, nor even the history of their occupation. Unlike the bloody German/Herero and Nama wars, not a shot was fired when Her Majesty's administration in Queensland declared the Murray Islands a Crown colony of the British Empire, in 1879.

The governor of Queenstown had exercised some power over the islands from 1870 even though it they weren't part of the colony. In 1878 Queen Victoria

1. Judges Deane and Gaudron in Eddie Mabo and Others v. The State of Queensland, decision of the High Court of Australia, FC 92/014, delivered on 2 June 1992, point 9.

signed Letters Patent to include the Murray Islands (with others in the Torres Straight), thereby annexing them in the colony of Queenstown. The inhabitants were informed of their new status as British subjects in September 1879.

In terms of understanding the colonial law of that time, when a territory became part of the Crown's dominions, the law of England (so far as applicable to colonial conditions) became the law of the Murray Islands and their inhabitants – the Meriam people. Her Majesty acquired absolute ownership of all land in the islands. Neither the Meriam people nor the individuals on the islands had any right or interest to any land in the territory, only the Crown could grant possession or ownership to anyone.[2]

The Namibian occupation was a bloody affair, unlike that of the Murray Islands. The boundaries of Namibia were, like most African countries, drawn by the European colonial powers at the end of the 19th century. Before the arrival of the German occupation forces, Namibia was populated by some twelve tribes with very different customs, and had vaguely demarcated areas over which the tribal kings had jurisdiction.

Between 1884 and 1890 Namibia stretched from the Orange River at the southern border with South Africa to the Kunene and Okavango Rivers in the north, and from the Atlantic Ocean in the west to the 21st parallel in the east. The German colonial authorities later obtained a finger of land next to the Zambezi River. Walvis Bay was not included in Namibia, since it was occupied by Britain.

European mission societies started working in Namibia in 1840. In 1890 German forces in Namibia started a vigorous crusade to make subjects of the native tribes. This resulted in the extermination of 75% of the Herero population and 50% of the Nama and Damara populations.

The two peoples had a common history of submission to a colonial power. The British authority over the Meriam people in Queensland, while allowing them to remain on their ancestral land, had not informed them that they had been colonized. Instead they pretended they were there to advance the Meriam people.[3] The German colonial authority over the Namibians, however, was

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2. This principle was confirmed by the Crown courts for more than hundred years, beginning with the case of Attorney-General v. Brown (1847) 1 Legge 312 and confirmed on a regular basis over the years. See R. v. Kidman (1915) 20 CLR 425; Liquidators of Maritime Bank of Canada v. Receiver-General (New Brunswick) (1892); AC 437, The Commonwealth v. New South Wales (1923) 33 CLR 1.

3. See Mabo and Others (n. 2, 1992) 175 CLR 1 F.C. 92/014, point 20: "Without pausing to enquire into the legal support for the 'system of self-government' instituted by Douglas or for the jurisdiction of the Island Court, it appears that the Meriam people came peacefully to accept a large measure of control by Queensland authorities and that officials of the Queensland Government became accustomed to exercise administrative authority over the Murray Islands. Formal annexation had been followed by an effective exercise of administrative power by the Government of Queensland".

determined to either drive the Herero people out of their motherland, or kill them.[4]

The two peoples also shared the effects of Western law, commonly interpreted as denying their rights to their ancestral land. In determining property rights, it didn't really matter whether the land had been occupied, or if it had been ceded or conquered.[5] In 19th and early 20th century colonial legal thought, all "undiscovered land", that is to say lands where no Europeans had settled, were considered as *res nullius*. It was immaterial whether or not the natives had previously occupied the land.

While one may resent the arrogance of 19th century colonial mentality, it nevertheless made sense to classify uninhabited land as *res nullius*, at least in legal terms. However, to classify land that had been inhabited for centuries as *res nullius*, had no logical sense. To make sense of this nonsense, jurists had to give the term a definition other than its clear, logical meaning. Initially the term was widened to include land not cultivated by native inhabitants.[6] But even this definition did not fit the Namibian or the Meriam people, as in both cases the land had been cultivated.[7]

Other philosophers worked within a theory of supremacy of European nations over the territories of backward nations.[8] This theory was clothed in morality by legal theorists who pointed out the benefits that would be brought to the backward people through Christianity, and through European culture and civilization.[9]

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4. The decree of General Lothar von Trotha is well-known: "The Herero people will have to leave the country. Otherwise I shall force them to do so by means of guns. Within German boundaries, every Herero, whether found armed or unarmed, with or without cattle, will be shot. I shall not accept any more women or children. I shall drive them back to their people – otherwise I shall order them to be shot. Signed: the Great General of the Mighty Kaiser, von Trotha".

5. E. Evatt, "The Acquisition of Territory in Australia and New Zealand", in *Grotian Society Papers* (1968), p 16.

6. See E. de Vattel, *The Law of Nations* [original edition, 1797], Book I, pp. 100-101. See also Castles, *An Australian Legal History* (1982), pp. 16-17, quoted in the Mabo case, point 33.

7. This argument is often raised in Namibia. See Horn, *Land Claims and History* (Unpublished lecture before the Seis Farmers Community), March 2003. However, while the land was not developed in a Western sense of the word, the Herero and Nama people were known to be cattle farmers and they were extremely successful in it.

8. See Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), chapters III and IV, quoted by Justice Brennan in Mabo case, point 47.

9. Johnson v. McIntosh (1823) 8 Wheat 543, at p. 573 (21 US 240, at p. 253).

In the first half of the 19th century legal philosophers were already questioning the morality of killing, massacring and destroying local communities and then classifying the land as *res nullius*.[10] It was not possible to reconcile the moral ideals of Christianizing and civilizing the backward people of Africa with the vicious, sadistic edict of General von Trotha.

However, no matter how illogical the theory may have sounded, it gave rise to another legal fiction in British colonial law: all the colonial land acquired by subjects of colonial powers in Europe belonged to the sovereign or Crown of the colonial power. The courts further ruled that this possession included both the land title and sovereign government. In other words, after colonization, in whatever form, the European sovereign became the political sovereign and the *de facto* owner of all the lands of the country. It further meant that the representative of the sovereign started with a clean slate, as if the land he'd taken over was indeed *res nullius*. Consequently, only the property rights acknowledged by him were valid. As a rule, the representatives of the sovereign gave title only to European settlers.[11]

British and colonial courts followed the fiction of the supreme power and title over property in colonized countries for more than hundred years.[12] Although England occupied Walvis Bay and administered it as part of the South African colonies, no indigenous land claims by Namibians were ever made against England in Southern African courts.[13] The closest case to Namibia was possibly the Rhodesian case of 1919.[14] In that case the court,

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10. J. Blackstone, *Commentaries on the Laws of England* (1830), 17th ed. Book II, chapter 1, p. 7: "... so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seising (sic) on countries already peopled, and driving out or massacring the innocent and defenseless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in color; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind".

11. See Attorney-General v. Brown (1847), for an example of how the British-controlled courts dealt with challenges to the Crown's authority over land in the colonies.

12. See New South Wales v. The Commonwealth (1975) 135 CLR 337; Wade v. New South Wales Rutile Mining Co. Pty. Ltd. (1969) 121 CLR 177; and Randwick Corporation v. Rutledge (1959) 102 CLR 54 for judgments appreciative of Attorney-General v. Brown, more than a hundred years later.

13. J. Sarkin, "The Coming of Age of Claims for Reparation for Human Rights Abuses Committed in the South", (in *SUR International Journal on Human Rights* n. 1, São Paulo: 2004), pp. 88-89, points out that only in 2001, eleven years after Namibia's independence, the Herero People's Corporation filed the first case relating back to colonial days, against Deutsche Bank, Terex Corporation and Woermann Line for the atrocities suffered under colonial rule.

14. *In re* Southern Rhodesia (1919) AC 211.

not unlike the courts in other parts of the Commonwealth, worked from the premise of irreconcilability between the tribal and colonial systems:

> *The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.*[15]

Consequently, the issue was not so much to determine if the indigenous people had land rights, but if those rights were close to the British legal understanding of land and possession. If the indigenous people failed the second part of this test for whatever reason, they had no entitlement to land. Especially detrimental to the applicants was the fact that their social organization was so low, "that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged".

The claim by the applicants that they "were the owners of the unalienated lands long before either the Company or the Crown became concerned with them, and from time immemorial ... and that the unalienated lands belonged to them still" was rejected by the Lords judges because the maintenance of those rights was inconsistent with the white settlement of the country and the system that caused the development in the country. As a result, another system replaced the aboriginal one. [16]

The irreconcilability of native rights with western legal understanding of title remained the standard, especially in British common law and the laws of the colonies for more than hundred years.

Forerunners of Mabo

While the courts of the Commonwealth virtually ignored the radical changes in the international community that had started with the formation of the United Nations after World War II, and gained momentum in the 1950's and '60's with the independence of the colonies of Africa and Asia, international law had taken the first steps to evaluate the meaning of decolonization.

The High Court of Australia took cognizance of the international law, especially of the advisory opinion of the International Court of Justice on Western Sahara.[17] There the majority judgment defined *terra nullius* as a territory not

15. Id., pp. 233-234.

16. Id.

17. International Criminal Justice Review (ICJR, 1975).

belonging to anyone.[18] The court stated that only then can a legal occupation take place, other than by cession or succession.[19]

Judge Brennan in the Mabo case (point 40) summarizes the Western Sahara opinion as follows:

> *Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as* terrae nullius. *It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of* terra nullius *by original title, but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a* "terra nullius" *in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not as original titles obtained by occupation of* terrae nullius.

The judges were unanimous in their ruling that Western Sahara was not a *res nullius* when it was occupied by Spain in 1884.[20]

The judgment in the Mabo case

The High Court bench of seven ruled in favor of the plaintiffs with one dissenting voice. Eddie Mabo had passed away before the judgment, but as part of the Meriam people the other two plaintiffs were granted a right to the Murray Islands, while their specific entitlements were to be determined by reference to traditional laws or customs.[21]

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18. See also Legal Status of Eastern Greenland, P.C.I.J., Series A/B, n.53, pp. 44 and 63.

19. ICJR, 1975, op. cit., p. 39.

20. ICJR, 1975, op. cit., p. 86.

21. The full text of the judgment reads as follows: "(1) that the land in the Murray Islands is not Crown land within the meaning of that term in S. 5 of the Land Act 1962-1988 (Q.); (2) that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer except for that parcel of land leased to the Trustees of the Australian Board of Missions and those parcels of land (if any) which have been validly appropriated for use for administrative purposes, the use of which is inconsistent with the continued enjoyment of the rights and privileges of Meriam people under native title; (3) that the title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers provided any exercise of those powers is not inconsistent with the laws of the Commonwealth".

It is not important for the purpose of this paper to go into all the details of the judgment. The essence of the judgment entails the acknowledgement of the High Court of Australia that pre-colonial land rights of the aboriginal people not only survived colonialism; but that those rights are enforceable by law. While judge Brennan who wrote the majority judgment relied strongly on developments in international law, the judgment made clear that those rights are enforceable in the municipal courts of Australia.

The Advisory Opinion of the International Court of Justice in the Western Sahara case played a decisive role in the argument of the court, as already stated. More interesting still is the fact that two judges took cognizance of the positive evaluation of Vice-President Ammoun in a separate opinion.[22] Vice-President Ammoun affirmatively referred to one of the parties' submissions that the essence of the rights of indigenous people to the land lies in the spiritual and "ancestral tie between the land, or 'mother nature', and the man who was born therefrom (sic), remains attached thereto, and must one day return thither to be united with his ancestors".[23]

The Vice President went on to say:

> *This amounts to a denial of the very concept of terra nullius in the sense of a land which is capable of being appropriated by someone who is not born therefrom (sic). It is a condemnation of the modern concept, as defined by Pasquale Fiore, which regards as terrae nullius territories inhabited by populations whose civilization, in the sense of the public law of Europe, is backward, and whose political organization is not conceived according to Western norms.*

The importance of the Western Sahara case is that it excludes the possibility of considering inhabited land as *terra nullius* based on technical terms or some test of civilization. Judge Brennan observed that if the concept of *terra nullius* or inhabited lands is no longer supported in international law, the doctrines developed by the court to defend it must also be rejected. The position of the Rhodesian case[24] that native peoples may be "so low in the scale of social organization" that it is impossible to grant them land title in terms of Western law is obviously out of line with international law. Since common law is not static, and has kept in step with international law in the past, there is no reason why it cannot now correct the illogical thinking of the past.[25]

Judges Deane and Gaudron pointed to the fact that even in conservative Commonwealth jurisprudence indications are that at least some property rights

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22. Points 40 and 41 of Judge Brennan and point 19 of Judge Toohey.

23. ICJR, 1975, op. cit., pp. 85-86.

24. *In re* Southern Rhodesia 1919, AC 211, at pp. 233-234.

25. Judgment of Judge Brennan, point 41.

of the native people were not only recognized, but also protected by the new colonial power.[26]

> *Thus, in In re Southern Rhodesia,[27] the Privy Council expressly affirmed that there are "rights of private property" such as a proprietary interest in land, of a category "such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them". Similarly, in Amodu Tijani v. Secretary, Southern Nigeria ("Amodu Tijani"),[28] the Privy Council affirmed and applied the "usual" principle "under British... law" that when territory is occupied by cession, "the rights of property of the inhabitants (are) to be fully respected".*

While these were never a full acknowledgement of the right to title, and often in the form of usufructuary occupation, the Crown nevertheless respected them. In Adeyinka Oyekan v. Musendiku Adele[29] the Privy Council stated that the courts in the colonies operate with the assumption that the Crown will respect indigenous property rights and pay compensation for land expropriated.

While the court discussed certain limitations to what it called native title, it is not necessary for this paper to go into the details. However, these rights vested in the indigenous peoples of British colonies meant little since it was practically impossible for them to defend their rights in courts of law.[30] The judges nevertheless do not see these rights as totally unimportant.[31]

> *The practical inability of the native inhabitants of a British Colony to vindicate any common law title by legal action in the event of threatened or actual wrongful conduct on the part of the Crown or its agents did not, however, mean that the common law's recognition of that title was unimportant from the practical point of view. The personal rights under the title were not illusory: they could, for example, be asserted by way of defense in both criminal and civil proceedings (e.g. alleged larceny of produce or trespass after a purported termination of the title by the Crown by mere notice as distinct from inconsistent grant or other dealing). More important, if the domestic law of a British Colony recognized and protected the legitimate claims of the native inhabitants to their traditional lands, that fact itself imposed some restraint upon the actions of the Crown and its agents even if the native inhabitants were essentially*

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26. Judges Deane and Gaudron, point 10.

27. (1919) AC 211, at p. 233.

28. (1921) 2 AC 399, at p. 407.

29. (1957) 1 WLR 876, at p. 880.

30. Judges Deane and Gaudron, point VI.

31. Id., point 30.

> *helpless, if their title was wrongfully extinguished or their possession or use was forcibly terminated.*

Deane and Gaudron evaluated what they called the Dispossession of the Original Inhabitants.[32] Their judgment, after looking at the historical dispossession of the aborigines and their exclusion from the Commonwealth Parliament, was based on the theory that legally New South Wales was a *terra nullius* when occupied in 1788, and was unaffected by native title.

The Mabo case is an important judgment for dispossessed native inhabitants of former European colonies all over the world. For one thing, the High Court of Australia not only acknowledged the important leaps in favor of justice taken by international law; it actually changed Australian common law to bring it in line with international principles of justice. In the process one of the oldest justifications for the occupation of inhabited land was abandoned. This was the so-called *terra nullius* rule.

Further, it not only recognized the existence of pre-colonial land rights, but made it possible for the dispossessed to defend their rights in courts of law. Consequently, the racist theories that had introduced Western legal questions and thought like the category of "rights of private property"; or that natives "are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society"[33] can no longer be justifications for not recognizing pre-colonial rights.

Criticism of the Mabo judgment[34]

The Mabo judgment was not left unchallenged, and the challenges are familiar to Namibian observers. Cooray calls it an edict rather than a judicial decision. Galligan also accuses the High Court of making law, but adds that it has always done so.[35]

Cooray compares the results of the Mabo case with apartheid:

> *This will be analogous to the notorious South African homelands. But it will be different from the South African experience, in that the inhabitants of territories in Australia will sit on vast mining and economic resources. The productive agricultural land and the rich mining areas were outside the South African homelands. The beneficiaries in Australia will be a tiny minority and the deprived will constitute the vast majority of*

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32. Id., point X.

33. See (1919) AC 211.

34. This section is based on an article of L. Cooray, "The High Court in Mabo – Legalist or L'égotiste" (1992), that appears on the internet: <www.users.bigpond.com/smartboard/mabo/index.htm>. Last access on 14 September 2005.

35. B. Galligan, "The Power of Seven" (*The Weekend Australian*, 17-18 July 1993).

> *the people. In South Africa under apartheid the beneficiaries were a tiny minority, and the deprived constituted the vast majority.*

Marchant criticizes the judges, and accuses them of being dishonest with history.[36] His main concern is that a decision on a group of farmers in the Murray Islands was made applicable to the Aborigine people of the Australian mainland.

Brunton echoes the typical paternalistic view that the indigenous people should be thankful for their dispossession, since the conquerors brought with them the advantages of Western civilization.[37]

> *How would Aborigines live if Australia had not been conquered? Would their economic standard of living be any better? Would their tribal law and customs be superior to the Common Law and statutory mix which prevail today? Would they have developed the land in the way it has been developed? A negative answer to the latter three questions springs to my mind from common sense and logic.*

Cooray complains that the constitutional approach as envisaged by Judge Brennan[38] gives the judges a political rather than judicial function.

From the criticism it seems as if the opponents of the Mabo decision were concerned that the rights of the present title holders (and eventually all whites) will be affected by the decision, and that they will eventually be dispossessed. While the Aborigines are a poor minority in Australia the fears seem unfounded, and almost impossible to an observer from Namibia. However, if the Namibian Supreme Court arrives at a similar application the fears of an indiscrete land grab will undoubtedly grip the sons and daughters of the European colonists.

Namibia and Eddie Mabo

The Namibian Constitution guarantees private property rights.[39] The government has always vowed to abide by the Constitution in any land reform program.

However, the debate has not always been conducted on a level of mutual acceptance of *bona fides.* One of the main reasons for this is possibly the fact that

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36. L. Marchant, *Law of Nations and European Annexation of Australia* (1993), from unpublished manuscript of book, which is in the press, quoted in Galligan, op. cit. (not seen by the author).

37. R. Brunton, "Mabo and Reconciliation" (*IPA Review,* vol. 46, n. 2, 1993).

38. Judge F. Brennan, "The High Court of Australia in Mabo AMEC Leederville" (unpublished paper delivered in Canberra on 16 July 1992 to a Human Rights Conference and referred to in P. Connolly & S. Hulme, 1993, quoted in Cooray, 1992, op. cit.). The judge allegedly stated that a Bill of Rights would bring the courts into the political process as a new and dominant force. "Once the right is defined, the Court must weigh the collective interest against the right of the individual. This is the stuff of politics, but a Bill of Rights purports to convert political into legal debate, and to judicialize questions of politics and morality".

the government works from the very specific premise that land reform should be aimed at returning land presently in the hands of whites to the original inhabitants of the land. A case in point is the Namibian President's interview with Baffour Ankomah, editor of the magazine *New African*. Nujoma states that the Constitutional Principles were introduced by Americans and the British "to favor the interests of individual white settlers who had, 'by hook or by crook' acquired and occupied Namibian land during the colonial era". The President went on to make it clear that the willing buyer-willing seller clause in the Constitution was never in line with SWAPO's policy plan to address the land issue.

On the other side of the issue, the white farmers have emphasized the Constitutional rights in terms of Article 16. However, none of the parties have thus far attempted to place their points of departure in a historical context. For the government, the original inhabitants of the land are synonymous with the previously disadvantaged; on the other hand, the white farmers have thus far not made an effort to consider the possibility of the other rights that may exist on their farms.

The idea that more than one right can exist over a farm is not unknown in both common law and statutory law in Namibia. For example, the rights of a farmer on his or her land can be restricted by a lease contract that is in place at the time of the purchase.[40] Mining rights are not included in the rights of an agricultural landowner.

The example of the Mabo case provides an opportunity to approach the land reform program from a different perspective, at least in the central and southern regions of the country. I shall not deal with the question of whether the German/Herero war constituted an act of genocide.[41] For the purposes of this paper it is adequate to accept that Namibia, like Western Sahara, did not constitute a *terra nullius* at the time of the German occupation. I shall further

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39. Article 16. The text reads: "(1) All persons shall have the right in any part on Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens". (2) The State or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament".

40. The common law dictum "*huur gaat voor koop*" (lease takes preference to purchase) is enforced by the Namibian courts on a regular basis.

41. I generally agree with J. Sarkin in an as yet unpublished paper, that although the term genocide was not known in 1904, it is possible to evaluate the acts of the German forces and the communications of their commander, General L. von Trotha, with the definition that became part of international law. See also his earlier article (2004, op. cit.), pp. 67-126; and M. Hinz, "One Hundred Years Later: Germany on Trial in the USA – The Herero Reparations Claim for Genocide" (*Namibian Human Rights Online Journal*, vol. 1, n. 1, 2003).

accept at this stage *prima facie* evidence that confirms the property rights of the Herero and Nama people at the time of the German occupation.[42]

If the rights of the Herero and Nama people can be substantiated for at least certain parts of the land, the debate can be lifted to a new level. Those people who suffered under colonial rule can then be identified. In the words of Vice President Ammoun of the International Court of Justice, they can become known to the white farmers presently owning the land as well as to the government which will ultimately decide the future of the land as the people who have ancestral "ties with the land, or 'mother nature', and the people who were born therefrom (sic), remain attached thereto, and must one day return thither to be united with their ancestors".[43]

A tribunal can be set up to hear the specific land claims of people or peoples. The Land Reform Act already provides for a tribunal. Small amendments to the Act will make it possible for the tribunal to deal with claims emanating from the 1904 wars. The South African Lands Claims Court has been in operation for several years and can also serve as a helpful example.

Once a claim has been proven, the government can take the process over and deal with it in terms of a pre-determined program, while simultaneously acknowledging the Constitutional rights of the present owners. It must be emphasized that pre-colonial rights, while surviving colonialism, can nevertheless not destroy the present property rights guaranteed by the Constitution, just as colonization could not destroy the property rights of the indigenous peoples.

The proof of indigenous land rights, however, is not without meaning. Government (or even the tribunal) can begin to negotiate with the present owner on the basis of willing buyer-willing seller.

If government and the present owner can reach an agreement, the only issue remaining will be the amount of money to pay for the farm. Since the claims will be of an individual or sometimes tribal nature, they will possibly fall outside the present budget provisions of government (50 million Namibian dollars for the last financial year).

Several donor countries and even the European Union, however, can be requested to assist in the financing at that part of the process. In the past both the European Union and Germany have expressed their willingness to assist Namibia with the financing of the programmed land reform.

It is granted that the process may not go as smoothly as it may appear on paper. What if the present owner is no longer a white person, someone from a previously disadvantaged group? What will the government do if the present owner refuses to negotiate, or if after negotiations refuses to sell his or her farm? What will

42. The presumptions are based on preliminary discussions with traditional authorities from the Nama and Herero people at workshops in Windhoek and Keetmanshoop (2004).

43. ICJR, 1975, op. cit., note 17, pp. 85-86.

the consequences be when more than one group lays claim to the same land?

It is not possible to go into detailed discussions on each of the above questions. Suffice to say that under certain circumstances the government may be convinced that expropriation is in the best national interest, while aggrieved parties will always have the right to take the matter to a court of law. The legislator may want to establish an appeal to a higher tribunal, or simply determine the High or Supreme Court as the body to hear appeals. If no donor can be found, government may decide to divert some of the money budgeted for land reform to this project.

Conclusion

The principles of the Mabo case are surely not the only process that will take land reform forward. The acknowledgement of pre-colonial rights will offer several advantages. For one, it will create a mechanism to deal with one of the saddest pages in the history of Namibia. It will also bring justice to peoples who almost suffered extinction at the hands of their European colonizers. And it will restore the land rights of second and third generation descendants of the pre-colonial owners of the land.

Obviously, no program can remedy all the injustices of the past. Opponents of the restoration of pre-colonial land rights may object to the fact that it will not treat equally all the people of the country who have suffered under South African occupation and apartheid.[44] Unfortunately, this program does not deal with the second big injustice committed against the people of Namibia. But it does negate the fact that it can deal with the injustices of 1904 in an effective manner.

Others will complain that it does not deal with the injustices of the pre-colonial wars between the different groups in the southern and central parts of the country. And yet others would want to know how a tribunal could deal with the injustices committed against nomadic groups such as the San and the Himbas before, during, and after colonization.

But it is not the intention of this paper to recommend the restoration of pre-colonial rights as the best or only possible option for land reform in Namibia. I would rather propose a process which would include several strategies to achieve the final goal: A just distribution of land to all the peoples of Namibia, so that land distribution contributes to Namibian peace, prosperity and stability.

Consequently, the willing buyer-willing seller program can go on, while the government simultaneously proceeds with its programs to expropriate the farms of foreign absentee farmers and other farms, if that is in the national interest.[45]

A land tribunal on rights lost through the German colonization can assist in bringing a new dimension to land reform.

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44. See Sarkin, op. cit., pp. 92-93.

45. Since the program is still in a planning stage, one will have to wait until government has either defined national interest or start with the process before commenting on the pros and cons thereof.