

# Chapter 1

## Access to land in affected Southern African Development Community (SADC) States

### 1.1. Introduction

Resolution of past and continuing social injustices that are rooted in colonial or some such other similar experience of States has captured international imagination since the land issue erupted in Zimbabwe in 2000. It has exposed lacuna in scholarship on the matter and condemned the half-measures adopted by the United Nations in tackling colonialism, world debt and poverty. This study has one target - to formulate and recommend a juridical model for the resolution of past and continuing social injustices that are linked to colonial or some such other similar experience of States. It uses the inequitable land distribution in the SADC as a typical example of past and continuing social injustices that are rooted in colonial experience of States.

But just how should examination of this problem begin, and proceed? Because the study uses the SADC land situation as a typical example of past and continuing social injustices that originate in colonial or some such other similar experience of States, I suggest that we begin with a foregrounding of the SADC itself. Following on from that, this chapter of the book examines first why the land issue has risen to the top of the agenda in SADC States. Secondly, it analyses the dynamics that the land issue has unleashed. The purpose of this exercise is to try and establish how best to manage the dynamics that surround the tensions associated with past and continuing injustices, towards a successful resolution of the injustice in question.

Land ownership confers social, economic, and even political status for everyone in every community. When we talk about the “homeless people” in the West or “squatters” in developing countries, we are continually referring in coded language to the consequences of landlessness or of land policy of particular nations. Instead of saying that that person’s situation suggests that he needs to own land or property, we conveniently label them “homeless” or “squatter”, pity them for a while before casually

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moving our thoughts or conversations onto something else more serious, like “a game of golf” or “the new coffee that a neighbour brought us from their recent visit to the far East”.

The formation of the SADC was informed as much by futuristic, even ephemeral social and political objectives as by the quest to affirm civil and political rights of the dispossessed and disenfranchised majority in the region. The SADC has a hybrid of functions that are interconnected and collectively linked to the overarching aim of creating a welfarist regional community similar perhaps to the European Union (EU). However, the declared functions of the SADC raise issues whose combined dynamic makes paramount the realisation of particular outcomes for the viability of the community. In turn this necessitates establishment of a *hierarchy of preferences* among the organization’s goals. Collective assertion of political independence of Member States evidenced in the SADC’s acquiescence with President Mugabe’s campaign equitably to redistribute land in Zimbabwe appears to have shot in recent times to the top of that hierarchy.

The strategies adopted to resolve the apparent problem of inequitable land distribution in the predominantly agrarian economies of the SADC States, the outcomes that they obtain, and the reaction of stakeholders will impact both the political stability and human resource and skill base of the SADC. Consequently, at least in the medium to short terms, the question whether SADC States will progress to realise their ultimate goal of harnessing the community’s inertia to establish an effective political and economical bloc depends in large part on the measures adopted now to resolve the land issue in affected States because inevitably, that will cast a model of how the region reacts to similar crises. Therefore, the strategies employed by the Community to resolve this problem will present to the international communities of commerce, business and others a barometer with which to determine the future risk of committing themselves in the region. That could hurt or hail the region’s developmental prospects. So far, South Africa’s approach of criminalising landless peasants<sup>1</sup> whenever they make physical claims of ownership of land against commercial farmers who appear to hold it in excess; and Zimbabwe’s encouragement of unconstitutional appropriation<sup>2</sup> by landless

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See National Land Committee (2001) “Criminalising the poor will not solve the land question”, <http://www.nlc.co.za/pubs/press0114aug.html> (visited 3/03/01)

<sup>2</sup> See *The Commercial Farmers Union v. Comrade Border Gezi and others*, Case No. H.C. 3544/2000 <http://www.samara.co.zw/cfu/courtorder.htm> (visited 3/3/01)

peasants of commercial farmland represent extreme responses to the problem of land ownership and its use in the SADC whose economy is predominantly agrarian.

Inter-State agreements that create regional organizations and agencies are commonplace. Chapter VIII of the United Nations Charter<sup>3</sup> (UNC) authorises States to set up regional institutions for the promotion and protection of peace, subject to the requirement that such arrangements are consistent with the purposes and principles of the United Nations<sup>4</sup> (UN). The UNC enjoins the Security Council – the UN organ with primary responsibility for the maintenance of international peace and security<sup>5</sup> - to encourage pacific settlement of local disputes through such regional arrangements or by such regional agencies<sup>6</sup> as States already may have established. The Security Council (SC) may utilise these regional organizations and agencies to enforce its decisions.<sup>7</sup> Security Council Resolution 1279 (1999) on the civil strife in the Democratic Republic of Congo called upon all Congolese parties concerned to participate in the national dialogue to be organized by the Organization of African Unity (OAU) (renamed African Union-AU) and called upon them and the OAU to finalize agreement on a facilitator for the national dialogue.<sup>8</sup> In its practice statement of 31 August 1998<sup>9</sup> the Security Council acknowledged the increasingly important role of regional arrangements and agencies, and of coalitions of Member States in the promotion of peace and security, and stated that, all such activity shall be carried out in accordance with Articles 52, 53 and 54 of Chapter VIII of the UNC, and that, all such activity shall be guided by the principles of sovereignty, political independence and territorial integrity of all States, and by the operational principles for UN peacekeeping operations set out in the statement of its President of 28 May 1993.<sup>10</sup>

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<sup>3</sup> United Nations Charter, 26 June 1945, San Francisco, UKTS 67 (1946), Cmd.7015; 1 United NationsTS xvi.

<sup>4</sup> Article 52(1).

<sup>5</sup> Article 24.

<sup>6</sup> Article 52(3).

<sup>7</sup> Article 53(1).

<sup>8</sup> Adopted at the 4076<sup>th</sup> meeting of the Security Council.

<http://www.un.org/News/Press/docs/2000/20000118.sc6784.doc.html> (visited 3/3/00) In this connection see also Security Council Resolutions 1273 (1999) of 5 November adopted at the 4060<sup>th</sup> meeting of the Security Council, 1258 (1999) of 6 August adopted at the 4032<sup>nd</sup> meeting of the Security Council, and 1234 (1999) of 9 April adopted at the 3993<sup>rd</sup> meeting of the Security Council.

<sup>9</sup> See Statement by the President of the Security Council, S/PRST/1998/35.

<sup>10</sup> S/25859.

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The SADC is one of several examples of exercise by States of their collective UNC conferred discretionary right to enter into regional agreements that create organizations that are intended to service regional concerns of participating States. By a treaty signed on 17 August 1992 at Windhoek by heads of States of Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe at the 12<sup>th</sup> summit of the SADCC, the SADC was formed. It succeeded the Southern African Coordination Conference (SADCC) established in 1980 by Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe as a forum for economic liberation. When it was formed, it was largely seen as a tool for reducing economic dependence on apartheid South Africa because on paper this new regional organization targeted economic integration of economies of Member States. It sought also to promote collective self-reliance of the member countries, and to secure international understanding and practical support for the SADCC strategy.

The SADC has a membership of 14 historically diverse States. Angola and Mozambique shared the yoke of Portuguese occupation as colonies of the latter. Namibia, which in 1884 became a German protectorate until the end of the First World War when Germany forfeited her interests in Africa, became the tenth Member State at its independence from South Africa in 1990. South Africa, which like ten other Member States of the organization is a former United Kingdom colony took up membership of the organization in August of 1994, making it the eleventh member state of the SADC. Subsequently Mauritius, the Seychelles, and the only Member State of the organization to have been colonised by Belgium - the Democratic Republic of Congo have also become members. This diversity in terms of colonial experience is critical to the land issue in the sub-region because besides maintaining arbitrary borders drawn up by their colonial masters according to the customary international law principle of *uti possidetis*, SADC Member States have generally maintained the institutions of the State set up by their colonial masters, including the judicial system, sometimes with cosmetic changes that do nothing to affect the fundamental utility of the institution. The organization lists among its primary objectives acceleration of economic growth of the region and improvement of living conditions of its citizens through regional cooperation in different fields, and harmonisation of economic development of the region.<sup>11</sup> Article 5(1) of the treaty establishing the SADC<sup>12</sup> lists as the organization's objectives:

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<sup>11</sup> See The Lusaka Declaration, 1 April 1980: "Southern Africa: Toward Economic Liberation."

<sup>12</sup> Treaty of the Southern African development Community, Windhoek 1992.

- 1) pursuit of development and economic growth, alleviation of poverty, enhancement of the standard and quality of life of its citizens and the support of the socially disadvantaged through regional integration;
- 2) evolution of common political values, systems and institutions;
- 3) promotion and defence of peace and security;
- 4) promotion of self-sustaining development on the basis of collective self-reliance, and the interdependence of member States;
- 5) pursuit of complementarity between national and regional strategies and programmes;
- 6) pursuit and maximisation of productive employment and utilisation of regional resources;
- 7) pursuit of sustainable use of natural resources and the effective protection of the environment;
- 8) strengthening and consolidation of longstanding historical, social and cultural affinities and links among the peoples of the region;

Article 5(2) states that in order to achieve the objectives set out in Article 5(1) the SADC shall:

- a) harmonise political and socio-economic policies and plans of Members States;
- b) encourage the peoples of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region and to participate fully in the implementation of programmes and projects of the organization;
- c) create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of the organization and its institutions;
- d) develop policies aimed at progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally among member States;
- e) promote the development of human resources;
- f) promote the development, transfer and mastery of technology;
- g) improve economic management and performance through regional cooperation;
- h) promote the coordination and harmonisation of the international relations of Member States;

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- i) secure international understanding, cooperation and support, and mobilise the inflow of public and private resources into the region;
- j) develop such other activities as member States may decide in the furtherance of the objectives of this treaty.

In spite of the elegance of this list of aspirations, their realization is dependant on not just the political will of SADC Member States themselves, but also, and to a large extent on the will of older, stronger and more powerful regional entities such as the European Union (EU), and on charitable consideration of international financial institutions such as the World Bank and the International Monetary Fund (IMF).<sup>13</sup> As an example, by the Agreement on Trade, Development and Cooperation between the European Community (a supranational organization) and the Republic of South Africa (a Member State of the SADC) of 11 October 1999 signed in Pretoria, the European Community placated from the SADC in so far as trade is concerned the Republic of South Africa - which previously contributed sixty percent of the total SADC exports to the European Community - and placed it in direct competition with the remaining SADC Member States. Preliminary studies on this development suggest that the economies of many of the remaining SADC States will severely be tested and others ruined.<sup>14</sup> Further, IMF economic structural adjustment programmes (ESAPs) have become infamous for shifting target governments' policies away from the welfare of their citizens to universalistic-monocultural economic activity that breeds poverty and hardship. Kampfner writes that when the experiment in neo-liberal economic theory began in Africa, Ghana was hailed as a model pupil. But after two decades of IMF and World Bank structural adjustment, "... the poor are poorer and the government is more dependent than ever on outside help".<sup>15</sup> Nonetheless, the constitutionality and functionality of the SADC

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<sup>13</sup> For a detailed discussion see Chigara, B. (2001-202) "Trade Liberalisation: Saviour or Scourge of SADC Economies", University of Miami International and Comparative Law Review, vol.10 No.1 pp.7-21.

<sup>14</sup> See Akinkugbe, O. (2000) "The European Union-South Africa Free Trade Agreements and the SADC Region", The South African Journal of Economics, Vol.68 No.4 pp.639-661; Valentine, N. and Krasnik, G. (2000) "SADC Trade with the rest of the World: Winning Export Sectors and Revealed Comparative Advantage Ratios", The South African Journal of Economics, Volume 68 No.2 pp.266-85; Roberst, S. (2000) "Understanding the Effects of Trade Policy Reform: The Case of South Africa", The South African journal of Economics, Vol. 68 No.4 p.607 at pp.609-10.

<sup>15</sup> Kampfner, J. (2001) "Profits of doom" Friday, 2 November, 2001, 18:29 GMT@ [www.bbc.co.uk/correspondent](http://www.bbc.co.uk/correspondent) (visited 3/3/01)

sub-regional organization is settled. The Security Council has previously commended efforts of the now defunct SADC organ on conflict prevention management and resolution to restore order in the Democratic Republic of Congo<sup>16</sup> and other SADC Member States.<sup>17</sup> However, the prevalence within Member States of the SADC of a variety of titles to property that are based often on conflicting legal and conceptual premises is a surrogate of both colonial experience of the region, and international law's response to that experience both during and after colonization. That, in part is the reason why land disputes have become topical in both the SADC and other regions of the world. Irreconcilable heterogeneous approaches to land ownership in most SADC Member States are at the heart of fierce civil strife that has rocked Zimbabwe's transition from white domination to democracy and threatens to do the same in the rest of the Member States of the SADC because of shared historical experiences. The historical element in this problem is perhaps the single biggest influence on other SADC Member States' acquiescence with carnage in the name of land redistribution of Zimbabwe's social, economic and legal fabrics and as a consequence of that, erosion of the rule of law. By rule of law is meant those institutional restraints that prevent governmental agents from oppressing the rest of society. This chapter examines first, the justiciability of the problem from a historical and legal context of both the SADC States themselves, and the international legal system. Secondly, it analyses the emergence in SADC States of titles to land that created binary oppositions of race (black and white), class (haves and have nots), and status (elite and impoverished) that sustained and perpetuated inequitable land distribution among peoples of the region. This development gave the impression that the law served to privilege the political agendas of the minority over those of the majority, resulting in a morally and practically unsustainable outcome. Understanding of this delegitimation of the law informs our determination of what role if any, should the law play in resolving past and continuing injustices rooted in colonial or some such other similar historical experience of transitional States.

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<sup>16</sup> See Statement by the President of the Security Council, S/PRST/1998/36.

<sup>17</sup> Discussing the legality under international law of the intervention of South African forces under the banner of the SADC, see Chigara, B. (1999) "The SAD Community – A Litmus Test for the UN's Resolve to Banish Oppression", *African Journal of International and Comparative Law*, Vol.11 No.3 pp.522-528.

## 1.2. Emergence of Opposable Heterogeneous Titles to Land in SADC States

The elemental qualities of land are beyond dispute. Because man has not yet mastered the divine art of creating it, land remains permanently out of production. In a world obsessed with size and constantly under pressure from both population increase and inter-State mobility of citizens, land's enhanced qualities of utility and indestructibility continue to distinguish it from other more perishable forms of property – a fact acknowledged by Lord Browne Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994]<sup>18</sup> where he stated that, "... in the case of real property there is a defined and limited supply of the commodity". In the relations between States title to territory helps to signify sovereign status of a State in that it demonstrates independence in regard to a portion of the globe to exercise therein, and to the exclusion of any other State, the functions of a State.<sup>19</sup>

The main reason for the relative importance of land distribution in the SADC derives from the fact that a large majority of the population is directly dependent upon the land for their livelihood. The colonial and post independent history of SADC States shows that unequal access to agricultural land has resulted in a situation where a handful of families own and farm vast acreages of the most agriculturally productive land, while the vast majority farm very small plots in the least agriculturally favourable zones. There is evidence of both unused and underused land under the ownership of commercial farmers and land scarcity and growing landlessness among the peasants who often live on the outskirts of white commercial farmland. Commercial farming is the biggest labour employer and foreign exchange earner; supplier of food for domestic consumption; and provider of inputs for the manufacturing sector. Access to land and its use demonstrably illustrates racial policies of the empire powers that dominated the SADC. "Landlessness, land scarcity, and overpopulation directly affect the majority of the rural African population who remain poor while the European rural population is the major contributor to commercial agricultural production and is rich in comparison."<sup>20</sup>

<sup>18</sup> 1 AC 85 at 107D.

<sup>19</sup> Per Judge Huber, *Island of Palmers case* (Netherlands v. US) (1928) 2 R.I.A.A. p.829. See also Harris, D.J. (5<sup>th</sup> ed. 1998) *Cases and Materials on International Law*, Sweet and Maxwell, London, pp.190-200.

<sup>20</sup> See Adu-Asare, R.Y. (2000), "Pre-Independence Economic, Political Realities of Zimbabwe's Race-based Land Tenure Debacle", <http://www.africanewscast.com/Regional%20News/Zimbabwe%20Pre-Colonial%20land%20problem.htm> (visited 19/11/02)

Gray and Gray<sup>21</sup> write that life begins and ends with land because land is the essential base of all social and commercial interaction. Empirical studies show that as in pre-independence Zimbabwe and apartheid South Africa access to land in colonial Namibia determined the supply and cost of African labour to the colonial economy. "... large scale dispossession of black Namibians was as much intended to provide white settlers with land, as it was to deny black pastoralists access to the same land, thereby denying them access to commercial pastoral production and forcing them into wage labour."<sup>22</sup> In a sense land policy formed the bedrock of governmental policies and shaped all economic activity in SADC States particularly as they were, and remain largely agrarian. This was the case regardless of who the colonial authority was. Therefore, the significance of land in human affairs is incalculable. It is not surprising that few States if any have completely avoided in their history conflicts that are based on land rights.<sup>23</sup> Empires were built between the 16<sup>th</sup> and 19<sup>th</sup> centuries in part to extend kingdoms and land rights. Particularly in Africa, liberation wars were fought in the 20<sup>th</sup> century in part to restore land rights to dispossessed native peoples. Land's political dimension resides in the fact that power over matter begets personal power.<sup>24</sup> Because land forms the basic substratum for all political relationships between persons, it is inevitable that property law should in this way serve as a vehicle for ideology.

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<sup>21</sup> Gray, K. and Gray S.F.G. (3<sup>rd</sup> ed. 2001) *Elements of Land Law*, Butterworths, London/Edinburgh/Dublin, p.1.

<sup>22</sup> (1990) *The Land Issue in Namibia: An Inquiry*, Namibia Institute for Social and Economic Research, University of Namibia – Windhoek, p.7.

<sup>23</sup> On Aboriginal land rights see *Mabo and Others v. State of Queensland*, Australian Law Reports, 107 (1992), p.1; Regarding Latin American examples, see Smith, L. (1992) "Indigenous Land Rights in Ecuador", *Race and Class*, 33 No.3 p.102; Bartlett, R. (1991) "The Affirmation of Aboriginal Rights in Canada: *Delgamuukw and Bear Island*" *Aboriginal Law Bulletin*, 2, 53 p.7; and Brennan, F. (1991) *Sharing the Country: The case for an Agreement between Black and White Australians*, Penguin, Ringwood. Regarding Southern Africa, see Sjaastad, E. and Bromley, D. W. "Indigenous Land Rights in Sub-Saharan Africa: Appropriation, Security and Investment Demand", *World Development*, 25 No.4, p.549; and Platteau, J. (1996) "The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment", *Development and Change*, 27 p.29. See also Cleary, M. C. (1992) "Plantation Agriculture and the Formulation of Native Land Rights in British North Borneo c.1880-1930", *The Geographical Journal*, 158 No.2 p.170.

<sup>24</sup> See Renner, K. (1949) "*The Development of Capitalist Property and the Legal Institutions Complimentary to the Property Norm*" in Kahn-Freund, O., ed. *The Institutions of Private Law and their Social Functions*, Routledge and Kegan Paul, London, p.107.

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“Property” has commonly been the epithet used to identify that which people most greatly value in all cultures.<sup>25</sup> In American legal writing, land has been appreciated as a vehicle for creating wealth through market exchange, and as a mechanism for establishing a well-ordered society.<sup>26</sup>

Legal appreciation of land in post-colonial SADC States is the one issue that if not properly addressed, threatens violence and disruption that may for its resolution require the setting up of a *ad hoc* United Nations International Criminal Tribunals to investigate and prosecute crimes against humanity in the sub-region.<sup>27</sup> This situation follows directly from the *tabula rasa* approach to African territories adopted by imperial nations in the nineteenth century. Native populations were presumed to be cultureless, orderless and also the lowest species of mankind - a position aggregated in the practice of slavery.<sup>28</sup> Tully writes that these assumptions misrecognized property and political organization of native populations and classified them as people in a pre-political “state of nature” while European societies represented the most civilized stage of historical development.<sup>29</sup> Thus, imperial forces took no notice of well-established native kingdoms - their structures of governance, cultures or their religions. Civilizing of natives became the excuse for superimposing Western structures of governance, culture and religion over those of the natives. Regarding land, this gave way to what Smith describes as two highly distinct systems of land tenure

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<sup>25</sup> Gray, K. (1987) *Elements of Land Law*, Butterworths, London, p.7.

<sup>26</sup> See Wahl, J.B. (1998) “Concepts of Property in American Law: Confused Vision?” *Reviews in American History*, vol. 26.4 pp. 674-680.

<sup>27</sup> Examples include the International Criminal Tribunal for the territory of the former Yugoslavia (ICTY) established by United Nations Security Council Resolution 827, *International Legal Materials* 32 (1993) p.1203 and charged with prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991; and the International Tribunal for Rwanda (ICTR) established by United Nations Security Council Resolution 955, *International Legal Materials*, 33 (1994) p. 1600 and with jurisdiction that is comparable to the ICTY.

<sup>28</sup> Judd writes that: “Britain’s late-nineteenth-century imperial mission, however, could not accommodate such niceties. Missionaries, colonial administrators, settlers, traders, observers of all sorts undoubtedly exaggerated the defects of African self-rule in order to justify their own activities. The massive ancient ruins of Zimbabwe were thought to be beyond the capacities of local Africans, and eventually it was speculated that visitors from outer space were responsible for them. The substantial achievements of West African civilization also tended to be written off and ignored”. Judd, D. (1996) *Empire: The British Imperial Experience, From 1765 to the Present*, Fontana Press, London, p.129.

<sup>29</sup> Tully, J.(1994) “Aboriginal Property and Western Theory: Recovering a Middle Ground”, *Social Philosophy and Policy*, 11 No.2 p.153 at p.159.

existing side by side in many British colonial societies - all but two SADC States, namely Angola and Mozambique which fell under Portuguese occupation.

One system is defined by statute and common law, and guides official policy in relation to land. The other system is of a customary and traditional character which neither observes the forms nor directly invites the sanctions of law. These differing systems of tenure are normally practised by different social sections, and for holdings of disparate value.<sup>30</sup>

### *1.2.1. Southern Rhodesia (Zimbabwe)*

Perhaps what was portrayed in 2000/2002 as Zimbabwe's land crisis characterises best the need to develop in international law effective strategies that can be applied to resolve past and continuing injustices attributable fully to prior domination of one State by another - particularly colonial domination. Because such domination alters permanently the social, political and economic landscape of the dominated country through the discriminatory opportunities and possibilities that it offers different groups, fairness – including its redistributive ethos must become the hallmark of the strategy adopted to reverse the social injustices of domination that resulted in a skewed distribution of property. This is because from the moment of freedom from domination, both the formerly privileged and the ostracised groups become equal heirs to their country's legacy of social, economic and political injustices of a prior era. Failure at that moment adequately to resolve equitably and justiciably fundamental injustices of a prior era breeds and feeds anarchy and the possibility of a new rush of social injustices.

The discriminatory systems of tenure that are the legacy of colonial injustice in Zimbabwe, South Africa, Namibia and other member-States of the SADC resulted in classification of land into white land and black land, the former comprising mostly land with the most agricultural potential and the latter comprising land with the least agricultural potential. This had legal, economic, and socially devastating consequences. The former was given exclusive legal title while the latter was communally owned, and without rights of exclusive ownership. Communal rights to land are understood as general rights to use land which fail to include the right to deprive others of access to it, except by prior and continuing use.<sup>31</sup> Communal title does not confer the standard attributes of exclusivity and

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<sup>30</sup> Smith, M. G. (1956) "The Transformation of Land Rights by Transmission in Carriacou", *Social and Economic Studies*, p. 103.

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free transferability, but merely trust authority to use the land as long as another is not using it. Allocation of land into *privately owned zones* (commercial farming area) and *communally owned zones* - tribal trust lands (TTLs) was as far as possible determined on agro-ecological values, with privately owned commercial zones situated in the fertile, high rainfall areas with the greatest agricultural potential and the TTLs situated in infertile, low rainfall areas with the least agricultural potential. Table 1 shows the disproportionate distribution of land per person on ethnic grounds in Southern Rhodesia as at February 1962. Table 2 shows approximate distribution of land according to its agricultural potential in Southern Rhodesia before 1961. This table illustrates the systematic empowerment of one ethnic group and disempowerment of another by the allocation of land with prime agricultural potential to one group and land with the least agricultural potential to another. Table 3 shows the type of farming in relation to commercial and communal zones. It makes clear the economic empowerment of whites and the economic impoverishment of blacks.

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<sup>31</sup> Platteau, J. (1996) "The Evolutionary Theory of Land Rights as Applied to Sub Saharan Africa: A Critical Assessment", *Development and Change*, 27 p.29 at p.31.

**Table 1.1 The Apportionment of Land in Southern Rhodesia as at February 1962. (Broad distribution by categories)**

	<i>Acres</i>	<i>Acres</i>
<b>European Area</b> .. .. .		
36,784,000		
<b>Tribal Trust Land</b>		
Native Reserves .. .. .	21,020,000	
Special Native Area (SNA) .. .. .	15,017,000	
Communally occupied Native Area to be transferred to SNA . . . . .	3,694,000*	
39,731,000		
Native Purchase Area (excluding commu- nally occupied land proposed to be transferred to the SNA, but includ- ing Kariba Lake Shore Area 660,000 acres) .. .. .		4,043,000*
<b>National Land</b>		
National Parks .. .. .	4,208,000	
Forest Area .. .. .	1,830,000	
Forest Reserves .. .. .	478,000	
Non-Hunting reserves .. .. .	4,276,000	
10,792,000		
<b>Unreserved Land</b> .. .. .		
<u>5,260,000</u>		
Total .. .. .		
<u>96,610,000</u>		

The population as at 31<sup>st</sup> December, 1961, was as follows:-

African .. .. .	2,960,000
European .. .. .	221,000
Coloured .. .. .	10,700
Asian .. .. .	<u>7,100</u>
	<u>3,198,800</u>

**Source:** Adapted from “The Development of the Economic Resources of Southern Rhodesia with Particular reference to the role of African Agriculture”, Report of the Advisory Committee (1962) Table 45.

**Table 1.2 Approximate acreage of each natural region occurring within the European Area and the African Areas before November 1961**

Natural Area	European Area		African Areas		Totals	
	Acreage	% of S. Rhodesia	Acreage	% of S. Rhodesia	Acreage	% of S. Rhodesia
	<i>,000 acres</i>		<i>,000 acres</i>		<i>000,acres</i>	
I A	322.0	0.33	28.0	0.03	350.0	0.36
I B	913.0	0.94	252.3	0.26	1,165.3	1.20
	1,235.0	1.27	280.3	0.29	2,515.3	1.56
II A	2,009.0	2.07	161.2	0.17	2,170.2	2.24
II B	8,504.0	8.75	3,729.5	3.83	12,233.5	12.58
II C	1,717.0	1.76	88.0	0.09	1,805.0	1.85
II D	263.0	0.27	55.0	0.06	318.0	0.33
II E	103.0	0.11	40.0	0.04	143.0	0.15
II F	487.0	0.50	76.0	0.08	563.0	0.58
II G	92.0	0.10	-	-	92.0	0.10
II H	346.0	0.36	8.0	0.01	354.0	0.37
II J	466.0	0.48	-	-	466.0	0.48
	13,987.0	14.40	4,157.7	4.28	18,144.7	18.68
III A	1,881.0	1.94	308.6	0.32	2,189.6	2.26
III B	7,178.0	7.38	5,160.0	5.30	12,338.0	12.68
III C	881.0	0.91	21.0	0.02	902.0	0.93
III D	570.0	0.59	206.0	0.21	776.0	0.80
III E	280.0	0.29	453.0	0.47	733.0	0.76
	10,790.0	11.11	6,148.6	6.32	16,938.6	17.43
IV A	2,591.0	2.66	862.3	0.89	3,453.3	3.55
IV B	9,791.0	10.03	11,742.0	12.10	21,533.0	22.13
IV C	557.0	0.57	471.0	0.48	1,028.0	1.05
IV D	3,836.0	3.94	2,297.5	2.36	6,133.5	6.30
	16,775.0	17.20	15,372.8	15.83	32,147.8	33.03
V A	11,417.0	11.75	14,006.0	14.45	25,423.0	26.20
XX	1,030.0	1.06	1,985.0	2.04	3,015.0	3.10
Total	55,234.0	56.79	41,950.4	43.21	97,184.4	100.0
Less National Parks	10,200.0	10.45	-	-	-	10.45

etc						
European and National Land minus National Parks	45,034.0	46.34	41,950.4	43.21	97,184.4	89.55

*Source:* Adapted from “The Development of the Economic Resources of Southern Rhodesia with Particular reference to the role of African Agriculture”, Report of the Advisory Committee (1962) Table 46

**Table 1.3 Type of Farming in Relation to the European and African Zones**

Farming Region	European Area		African Area	
	% of Southern Rhodesia	% of total European Area	% of Southern Rhodesia	% of total African Area
Based on livestock production (Natural Regions IV and V)	28.95	50.98	30.28	70.07
Based on crop production (Natural Regions I and II)	15.67	27.59	4.57	10.58
Based on livestock and cash crops (Natural Region III)	11.11	19.56	6.32	14.63
Unsuitable for farming	1.06	1.87	2.04	4.72
Totals	59.79	100.00	43.21	100.00

*Source:* Adapted from “The Development of the Economic Resources of Southern Rhodesia with Particular reference to the role of African Agriculture”, Report of the Advisory Committee (1962) Table 48.

This set up was achieved by forcible movement of black populations from land that they had owned and lived on from time immemorial. The force lay in legislation. By Royal Charter granted in 1889, the British South Africa Company (the Company) had obtained from the British Government authority to settle and administer “... an unspecified area known as

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Southern Rhodesia”.<sup>32</sup> Shortly after hoisting of the Union Jack at Salisbury in September of 1890, the Company obtained further authority from the British Government, to acquire, cultivate, develop and improve any lands within the territory under its jurisdiction. New patterns of property rights began to emerge in 1895, when the Company identified 2.2 million acres for native occupation “... according to their tribal custom”.<sup>33</sup> By the Matabeleland Order in Council of 1894, an agreement was reached between the Company and the British Government, entitling native Africans to acquire, hold, encumber and dispose of land on conditions identical with those of non-Africans. This did not affect the Company’s policy of isolating agro-economic efficient zones for Europeans. The Morris Carter Commission of 1925 reported that, Africans had acquired only 45,000 acres while Europeans had acquired 31,000,000 acres. The Commission’s Report led to the passing by the Southern Rhodesia Legislature, and with the blessing of the British Government, of the Land Apportionment Act (1930) by which the constitutional entitlement of Africans to purchase land anywhere outside the area already reserved for them was rescinded. Further, Africans were forbidden to hold land in areas that were:

officially termed the European Area, the designation of the several other classes of land then being Native Reserve, the Native, the Undetermined, the Forest and the Unassigned Areas. He could purchase land in the Native Area, under certain conditions. The Native Area was, indeed, what is known today as the Native Purchase Area, a title not embodied in the Legislation until the 1950 amendment to the Land Apportionment Act.<sup>34</sup>

The result was that by 1960 no fewer than 25,000 families were *squatting* in the Purchase Area on a “communal basis”. Writes the Advisory Committee (1962) “... This set acute problems of satisfactory re-settlement of the *squatters* and the finding of sufficient suitable land for the more than 3,000 applicants...”.<sup>35</sup> Thus, introduction of formal recorded governance by the British in Southern Africa, and with it, private property arrangements aided successive minority governments to preside over landless natives who had previously earned their living from working the land. As recently as April 2000, landless native Zimbabweans were labeled as “*squatters*.”

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<sup>32</sup> Ibid. p.144.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid. p.145.

<sup>35</sup> Ibid.

The 1962 Advisory Committee had also labeled as “squatters” people forcibly removed from their land because they had nowhere else to go.<sup>36</sup> The commercial and TTL zones have hardly co-existed<sup>37</sup> alongside each other inasmuch as they reflect the physical, economic and social dominance of one group - mainly white families, over black families living on the fringes of their farms and beyond. That this situation has led to what is arguably Zimbabwe’s worst crisis twenty years after independence from Britain in 1980 begs the question whether transitional justice is preferable to established notions of justice.<sup>38</sup>

This is the inheritance that history has conferred upon contemporary Zimbabwe. It is an inheritance shared by all Zimbabweans and one that challenges all Zimbabweans to respond in favour of equity and social justice. Contemporary Zimbabwe is a multiracial society. More than a century after the first Europeans settled in Zimbabwe, today’s native Zimbabweans are black, white, coloured and Asian. Moreover, Zimbabwe is a party to the 1951 United Nations Refugee Convention, its 1967 Protocol and the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa. The Zimbabwe Refugee Act (1983) and Regulations of 1985 effect international law of refugees into Zimbabwean law.<sup>39</sup> It is difficult to see how any State that has ratified this number of international conventions can refuse the

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<sup>36</sup> *Supra*. fn. 11.

<sup>37</sup> Co-existence implies harmony and acceptance. The Collins English Dictionary defines it as existing “... together in peace”. (4<sup>th</sup> ed. 1998) Harper Publishers, Glasgow, p.312.

<sup>38</sup> On 18 April 1980, independent Zimbabwe’s, first Prime Minister, Robert Mugabe proclaimed that reconciliation was the policy that would guide the new independent Zimbabwe. On amnesties see McAdams, A. J. (1997) *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, London, p. 1; Kritz, N. J. (ed. 1995) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United States Institute of Peace Press, Vol. 1. p.1; Roht-Arriaza, N. (ed. 1995) *Impunity and Human Rights in International Law and Practice*, p.1; Welscher, L. (1991) *A Miracle, A Universe: Settling Accounts with Torturers*, Penguin Books, London, Chapter 1; Stotzky, I. P. (ed. 1993) *Transition to Democracy in Latin America: The Role of the Judiciary*, Westview Press, Boulder Co., Chapter 1; Brysk, A. (1994) *The Politics of Human Rights in Argentina: Protest, Change, and Democratization*, Stanford University Press, Stanford CA, Chapter 1.

<sup>39</sup> At the time of writing Zimbabwe had a caseload of 1,200 applications for asylum, the majority of applicants coming from the Great Lakes region as well as Somalia and Ethiopia. See <http://www.unhcr.ch/world/Fafri/Fzimbabwe.htm> (visited 3/3/00)

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armband of a “multi-racial society” or not act like a truly multiracial community.

*1.2.2. South Africa*

To varying degrees – some more intense and others less so – Zimbabwe’s experience of inequitable land distribution is typical of all former British colonies in the SADC. Unless juristic models are developed that can be applied justiciably to resolve conflicting claims to land in SADC States, the land disputes through which Zimbabwe’s failing political, economic and social institutions are being vocalised threaten to set ablaze the whole community. Absence of such models appears to have polarized positions among both the SADC Heads of States and Commonwealth Foreign Ministers whenever these bodies have gathered to consider the Zimbabwe situation.

The stakes are much higher than anywhere else in the SADC’s wealthiest nation - South Africa – well known for its exceptional natural resources as for the successive notorious apartheid governments that, until installation in 1994 of the first majority government challenged the international community’s prohibition on apartheid as a crime against all of humanity by engineering and entrenching in all institutions and sectors of its society extreme hierarchical oppositions of dominance and subservience based only on race. Some in South Africa are already considering adopting Zimbabwe style land invasion in order to speed up land reform. The Land Access Movement of South Africa (LAMOSA) - an affiliate of the National Land Committee (NLC), describes itself as is a community-based movement of rural communities from Gauteng, Northwest and Limpopo that were forcibly dispossessed of their land by the apartheid regime and subsequent Bantustan governments, as well as farm workers who have been ruthlessly evicted from white-owned farms. In May 2002 LAMOSA expressed its disappointment with the performance of the land reform programme and stated that because barely 1.3% of white-owned land had been redistributed to landless peasants in the first eight years of democratic governance of South Africa, “LAMOSA considered land reform processes in other countries and agreed that the recent developments in Zimbabwe were an ideal way to speed up land reform processes in South Africa”.<sup>40</sup>

Under successive apartheid governments in South Africa, legislation was passed that ensured and consolidated social, cultural, residential, economic and political segregation of blacks from whites

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<sup>40</sup> See “The SA government and WSSD need a wake-up call about land”, at <http://www.nlc.co.za/wssd/press0220maylamosawakeup.htm> (visited 21/11/2002)

through classification of the whole population into White, Black, and Coloured.<sup>41</sup> Evidence of the harshness and cruelty of the practice of apartheid with regard to coercive alienation of natives to their land and creation of titles of land that served capitalist agrarian production is commonplace. In his international award winning *Cry the Beloved Country* Alan Paton<sup>42</sup> indicts apartheid through the images and metaphors of South Africa's landscape and the corresponding demographic allocation of it. The book opens with a symbolic and deliberate description of a desirable, beautiful, holy, life-sustaining land, which is conspicuous for its sparse human population, and the beautiful singing of the *titihoya* – one of the birds of the veld. Here the grass is rich and matted, you cannot see the soil. It holds the rain and the mist, and they seep into the ground, feeding the streams in every *kloof*. Not too many cattle feed upon it. It keeps men, guards men, cares for men. But the hills break down and change their nature. For they grow red and bare and cannot hold the rain and mist. The streams are dry in the *kloofs*. It is over-populated, too many cattle feed upon the grass. It is coarse and sharp, and the stones cut under the feet. It no longer keeps men, guards men, cares for men. The *titihoya* does not cry here any more.

The great red hills stand desolate, and the earth has torn away like flesh. The lightning flashes over them, the clouds pour down upon them, the dead streams come to life, full of the red blood of the earth. *Down in the valleys women scratch the soil that is left, and the maize hardly reaches the height of a man. They are valleys of old men and old women, of mothers and children. The men are away, the young men and girls are away. The soil cannot keep them any more.*

Paton then engages a narrative that challenges the unjustifiable exclusive allocation of the former to a minority supreme white race and the latter to a majority underclass black race, thereby determining for all time the opportunities that can be enjoyed by the different races and classes of the population. Evidence of application of this strategy to allocate life-enabling resources in South Africa is commonplace because the force of laws fashioned under apartheid rule backed it also. These laws were vigorously enforced with devastating effect by agencies of the State. Beinart and

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<sup>41</sup> See Hopkins, K. (2001-2002) "Assessing the World's Response to Apartheid: A Historical Account of International Law and its part in the South African Transformation", *University of Miami International and Comparative Law Review*, vol. 10 No.1 pp.241-255.

<sup>42</sup> Alan Paton, (1948) *Cry the Beloved Country*, Jonathan Cape, Bedford Square London, pp.11-12. Emphasis added.

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Delius<sup>43</sup> write that no other country on the African continent has experienced the systematic and comprehensive displacement of the native population, which has been effected in South Africa, and which has reduced the native population into wage labourers that work directly under the control of settler farm landowners and capitalist mining organizations.

... white owned farmlands have stood, for over three quarters of a century, in stark juxtaposition to overcrowded and impoverished African reserves. The latter, which came to comprise roughly thirteen per cent of the country, became primarily reservoirs of migrant labour in which even those with plots rarely scraped more from the land than an inadequate supplement to migrants' wages.

Commercial farming in South Africa is almost exclusively white. Sixty thousand whites own eighty-five percent of South Africa's agricultural farmland. This amounts to approximately one hundred and twenty-three million hectares of which only ten million is under cultivation or other use. The National Land Committee (NLC) a section 21 non-governmental organization that actively assists poor black rural people across eight of nine provinces in South Africa to access land rights and development resources writes that from 1860 onwards, following the creation of a unified South African Republic out of land acquired by conquest and treaty in, governmental intervention increased concentration of land under settler control.

As farming activities grew, an increasing shortage of available African labour resulted. In response to the crisis the Republican Parliament pursued a tax policy designed to force Africans into wage labour by heavily taxing independent African tenants on farmland, as opposed to those who were providing labour for farmers. The tax laws were the defining feature of the Boer land and labour "tradition" - all rural Africans, regardless of whether or not they resided on white-owned land, were to be coerced into wage labour for the benefit of Boer farmers.<sup>44</sup>

Thus, the native population was not only forcibly removed from their land, but also compelled to legitimate their alienation from it by being placed in

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<sup>43</sup> Beinart, W. et al. (eds. 1986) *Putting a Plough to the Ground: Accumulation and Dispossession in Rural South Africa 1850 – 1930*, Ravan Press, Johannesburg, p.1.

<sup>44</sup> <http://www.nlc.co.za/mddisp.htm> (visited 03/10/02)

a situation where they had to earn a wage from the new masters of their own land. Further in the development of apartheid, legislation<sup>45</sup> was passed to prevent and stop the development of an African peasantry. This introduced also the idea of private property in land, which was contrary to the Africans' own, which regarded land as a communal resource. Two developments in the last decade of the nineteenth century compelled the Government to disenfranchise the native communities even further. One was the expansion of the agricultural markets in South Africa, and the other was the development of deep level mining. Together, they pushed up demand for native labour. In 1894, the Government introduced the Glen Grey Act. The purpose of this and other subsidiary<sup>46</sup> legislation introduced in 1899 was "to force African peasants into wage labour in two ways: firstly, through limiting access to land, and secondly, by imposing a labour tax."<sup>47</sup> Commentators commonly attribute to the Glen Grey Act development in its immediate aftermath and also under apartheid, the land and labour policy in South Africa. In particular it perceived Africans only as a sitting source of labour and not as entrepreneurs and land title holders. Thus, they were to be pooled in "reserve" or Glen Grey areas and await their call to service either on privately owned farms or in the developing mines. The Native Land Act (1913) is often cited as one of the critical instruments in achieving that. It provided for the creation of a number of African "reserves" for the settlement of black South Africans and the elimination of independent tenancy in "white" rural areas and abolished sharecropping and rental tenancy arrangements. The authors of the Act unashamedly and effectively assured the unequal distribution of a power resource in agrarian economies – land, based only on the distinction of race, and sanctified the pursuit by subsequent apartheid South African governments of a harsh disempowerment of blacks and convenient empowerment of whites. The NLC<sup>48</sup> writes that the newly formed African National Congress (ANC) raised its voice in protest, and many individual tenants resisted eviction and resettlement. There was also a great deal of resistance to the Land Act by successful white farmers, who wanted tenants on white-owned farmland evicted and redistributed among them to alleviate growing labour shortages. Less successful white farmers wanted sharecroppers and rent-paying tenants to remain on white-occupied farms, as they were an important source of income for white landowners at the time. While the process impacted on thousands of farm tenants in the

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<sup>45</sup> Key in this effort was the Native Land Act (1913).

<sup>46</sup> See Cape Private Locations Act (1899).

<sup>47</sup> <http://www.nlc.co.za/mddisp.htm> (visited 03/10/02)

<sup>48</sup> *ibid.*

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Orange Free State, the status quo in other areas largely remained.

Several pieces of legislation that were passed during the PACT government of Hertzog reinforced the alienation and subjugation of blacks by whites. By the Native Service Contracts Act (1932) all Africans not already confined to reserves were drawn into the agricultural economy through extension of existing labour controls that on the one hand prohibited the growth of an African peasantry and on the other, fostered Africans' dependency on wage earning for the discharge of government taxes. The Act enabled the farmer:

- 1) to expel the entire family if any one member defaulted on his/her labour obligation, and
- 2) to whip tenants as well as compel farm tenants to carry legal passes.

This legislation not only eroded the inherent dignity of Africans, but also resulted in approximately two million people being tied down to white farms in servitude. Nearly all the human rights treaties and conventions that have established the current culture of respect for individual human rights implore, require and insist that States recognise the "inherent dignity" of mankind.

The Native Trust and Land Act (1936) formalised separation of black and white rural areas. It established a South African Native Trust (SANT) which purchased all reserve land not yet owned by the State and also took responsibility for administering African Reserve areas. It labelled "black spots" for State takeover, and the occupants dumped into reserves areas in white South Africa where blacks still owned land. For the next fifty years, subsequent governments relied on this Act and secondary legislation to evict tenants into reserves – the equivalent of the modern day act of ethnic cleansing. In a bid to quicken the removal of "squatters" from farms, the Nationalist government transformed labour tenancy into waged labour through unrivalled enforcement of the 1936 Act and introduction in 1951 of the Prevention of Illegal Squatting Act of 1951. This legislation empowered white farmers and local authorities to evict tenants with relative impunity. Complemented by the Bantu Laws Amendment Act (1964) which sought the quick eviction and removal of tenants and black spot residents, this legislation had the combined effect of denying black involvement in the economic, cultural, social and political life of South Africa. South Africa is the wealthiest country in the region. In fact it is so wealthy that European Union rejected to deal with it as a developing

country under the Lome agreement.<sup>49</sup> Nonetheless, black involvement in the economy, particularly the agricultural economy is compromised since the establishment of the idea of private title to land, by the rejection in this region of the principle of equitable access to a human rights and economic power resource – land. Organizations such as “The Landless People’s Movement” would not exist today in South Africa if people had equal access to land, and slogans such as “Landlessness = Racism” would have no place in South Africa if ethnic origin did not determine one’s possibility to own a piece of land from which to eke a living in this predominantly agrarian economy.

This reality makes urgent the need to end the continuing injustices of apartheid rule in the new South Africa. Nonetheless, international legal imperatives arising from general international law, *jus cogens* and treaty law require that this occurs without substituting new injustices against the minority, for apartheid’s injustices against the majority. This appears to be the foremost challenge confronting the new South Africa following installation of its first majority rule government in 1994. For over twenty-three years now, the Zimbabwe government has been attempting to achieve such a balance. However, recent events suggest that for some reason that effort has not gone very well.<sup>50</sup> This is evident in civil strife and unrest premised on that all-important life enabling resource: land. South Africa cannot afford failure in this crucial effort particularly as it has determined to spearhead what it has named as the “African Renaissance”. By Act No.51, (2000) on African renaissance and International Co-operation Fund Act, the government committed itself to “... enhance co-operation between the Republic and other countries, in particular African countries, through promotion of democracy, good governance, the prevention and resolution of conflict, socio-economic development and integration, humanitarian assistance and human resource development”.<sup>51</sup> Justiciable resolution of the land problem in South Africa will demonstrate *good governance* and prevent costly civil strife that may take decades to correct.

### *1.2.3. Tanganyika (Tanzania)*

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<sup>49</sup> For discussion see Chigara, B. (2001-202) “Trade Liberalisation: Saviour or Scourge of SADC Economies”, University of Miami International and Comparative Law Review, vol.10 No.1 pp.7-21.

<sup>50</sup> Examining the relationship in Zimbabwe between the land question and the civil strife that occurred in March 2000, see Chigara, B. (2001) “From Oral to Recorded Governance: Reconstructing Title to Real Property in 21<sup>st</sup> Century Zimbabwe”, Common Law World Review, Vol. 30 No.1 pp.36-65.

<sup>51</sup> Government Gazette, 24 November 2000.

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But there are other SADC States whose land problems are rooted in ideological battles nothing to do with colonial injustices. Tanganyika, which formerly comprised the major part of German East Africa, became a mandated territory under British Colonial Administration after the First World War. By an Imperial Decree of 26 November 1895 all land in Tanganyika – as it was called then – was declared to be Crown land owned by the German Empire. Nonetheless, the right of the Crown to ownership of that land was made subject to the right of private persons and of chiefs and native communities. Meek<sup>52</sup> writes that Land Commissions were established that ascertained unencumbered land that the Crown could freely dispose of, and land that it could not because it had been set aside for present and future needs of the native population. Because of the practice of shifting cultivation, the commissions were mandated to reserve at least four times the quantity of land that was actually under cultivation. Nonetheless, nearly 2,000,000 acres of land with the most agricultural potential were alienated even to the dismay of some Germans who felt that insufficient regard had been had of the land needs of the natives. Under international law this meant first, that the German authorities had by their legislation introduced new land rights that overrode the previous land structure and were therefore legally binding. Secondly, that by putting beyond the Crown's right of ownership those lands reserved for natives' the new administration had formally and legally recognised natives' title to land. Therefore, in spite of the establishment of a new land rights regime, native claims to land subsisted through and beyond colonization.<sup>53</sup> However, had the new land rights regime not formally recognised natives' rights to land, then under international law any native claims to title to land would have come to an end. Thus, four different titles to land based on patronage, capitalist model of exchange and exploitation, and welfarism began to emerge in Tanganyika under German rule. The first was the communal title that lacked the standard attributes of exclusivity and exchange. The second was freehold. The third was leasehold. Meek<sup>54</sup> writes that the leases were for an indefinite period though the lessee could terminate his lease by giving three months' notice, but the Government could not terminate a lease until the end of a period of twenty-five years

<sup>52</sup> Meek, C.K. (1949) *Land Law and Custom in the Colonies*, Oxford University Press, London/New York/Toronto, p.101.

<sup>53</sup> For a fuller discussion of the dilemmas created by international law's attitude, see Chigara, B. (2001) "From Oral to Recorded Governance: Reconstructing Title to Real Property in 21<sup>st</sup> Century Zimbabwe", *Common Law World Review*, Vol. 30 No.1 pp.36 at pp.51-4.

<sup>54</sup> Meek, C.K. (1949) *Land Law and Custom in the Colonies*, Oxford University Press, London/New York/Toronto, p.101.

from the date of the lease. The second and third titles were linked in that a lessee could exercise his right to purchase the freehold of his farm upon fulfilment of certain development conditions. Between 1936 and 1938, 369 German leaseholds were converted into freehold, and by 1938, 85 German leaseholds, representing 99,336 acres had been surrendered for non-fulfilment of development conditions. The fourth which was similar to Western notions of freehold, applied mainly in the coastal belt. It demonstrated recognition by the Crown of individual ownership rights of land that had developed among natives as a result of Indian and Arab influence.

After World War I ended in 1918, certain colonies and territories were taken from the defeated nations and placed under the administration of one or more of the victorious nations with a view to improving living conditions in the territories, and to prepare the people for self-government. The purpose and goal of the intervening Western nations was very different to that of the enterprising coloniser, a fact borne out by differing practice by the United Kingdom in its land policies in colonised States and in territories placed under its mandate. Governing of all mandated territories was supervised by the League of Nations - the UN's predecessor. The United Kingdom received mandates for Mesopotamia (later renamed Iraq); Tanganyika (now part of Tanzania); and Palestine. Palestine was later divided into Palestine and Transjordan (later renamed Jordan). France got responsibility for Syria, which was later divided into Syria and Lebanon. Both Britain and France were given parts of the Cameroons and Togoland. Belgium received Ruanda-Urundi. Japan was given German islands in the North Pacific Ocean. Australia received German islands in the South Pacific, including the northeastern section of New Guinea and Nauru. New Zealand received Western Samoa, and the Union of South Africa (now called South Africa) got German Southwest Africa (now called Namibia). The mandate system ended in 1947. By that time, several mandated territories, including Iraq, Syria, Lebanon, and Jordan, had become independent countries. The remaining territories, except Namibia, were placed under the stronger United Nations trusteeship system. The same countries continued to administer the territories, but they were under the control of the UN. Namibia became independent in 1990.

Between 1918 and the enactment of the Land Ordinance of 1923 in Tanganyika, the only alienation of land to non-natives was in the form of yearly licences for the growing of annual crops - cotton as a rule. In 1923 the Land Tenure Ordinance was enacted. It privileged above all else native customary right and usage of land and ruled out freehold tenure, thereby leaving as the only means of obtaining land, leaseholds that gave right of

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occupancy for a period which may not exceed ninety-nine years. Whereas granting of a freehold interest entails the prior extinction of community rights, ninety-nine year leaseholds do not because at the end of each term, or any succeeding term, the Governor could restore the land to the community. The Ordinance declared:

- 1) the customary right of the natives to use and enjoy the land and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves, their families, and their posterity. In fact it stated that this was paramount to the extent that it should constantly be assured, protected and preserved.
- 2) that, the existing native customs with regard to the use and occupation of land should, as far as possible, be preserved.
- 3) the whole of the lands of the Territory, whether occupied or unoccupied, are public lands. However, nothing in the Ordinance shall affect the validity of any title to land or any interest therein lawfully acquired before the date of the commencement of the Ordinance and that all such titles shall have the same effects and validity as they had before. Subject to this proviso all public lands and all rights over them are declared to be under the control and subject to the disposition of the Governor and shall be held for the use and common benefit, direct and indirect, of the natives of the Territory, and no title to the occupation and use of any such lands shall be valid without the consent of the Governor.
- 4) in the exercise of these powers over land, regard must be had to the native laws and customs existing in the district in which the land is situated.
- 5) the Governor may grant rights of occupancy both to natives and to non-natives, for terms not exceeding ninety-nine years, to demand a rental, and to revise the rental at intervals of not more than thirty-three years.
- 6) rights of occupancy would not be alienated by natives to non-natives and would be revoked for attempted alienation. They may be revoked for various other reasons, among which is abandonment or non-use of land for a period of five years. However, where a native is using or occupying land in accordance with native law or custom and without having otherwise obtained a right of occupancy under the Ordinance, the devolution of his rights upon death is regulated by the native law or custom existing in the locality in which the land is situated.

- 7) except with the approval of the Secretary of State, no single right of occupancy shall be granted to a non-native in respect of any area exceeding 5,000 acres.
- 8) under the Land Regulations it is declared to be Un- lawful for any occupier to alienate his right of occupancy by sale, mortgage, charge, transfer, sub-lease, bequest or otherwise, without the consent of the Governor. However, this regulation does not apply to transfers between natives.

Although it was criticised as a confused piece of legislation by those that for various reasons preferred to see alienation of land to non-native settlers, and by jurists that saw conflicts in the form that the Ordinance took it nevertheless served its purpose of ensuring and securing native occupation and enjoyment of their lands, while at the same time making it possible for individuals to acquire private rights through the formal grant of Certificates of occupancy.<sup>55</sup> The Ordinance, which formed the bedrock of land rights in Tanganyika arrested the freehold practice created but not extensively applied under German rule. Because Western intervention in the territory after the First World War was targeted specifically at achieving self-governance, and because Tanganyika had the good fortune of being governed by a number of Administrative officers who took a keen interest in native systems of tenure, including Messrs A.T. Culwick, J.L. Fairclough and D.W. Malcom,<sup>56</sup> native Tanganyikans did not suffer the humiliation of widespread alienation to settler farmers of their native lands as did for instance native Rhodesians that were forced to become squatters on that part of the globe that their maker had placed them. Thus, Tanzania does not belong to that category of SADC States that appear to be mired up in the exacting difficulties of dealing with past and continuing injustices of native subjugation and alienation to land sponsored by the colonial experience that this study examines. However, land disputes are not the preserve and monopoly of dynamics of colonization and decolonization. Even countries that never became colonies have or have had land disputes of their own to address. For its part, Tanzania still has to address the question whether freehold occupancy is mutually compatible with customary notions of land occupation in a “Tanzanian sense” and whether it should be abolished in favour of leasehold occupancy. The much loved and influential leader of Tanzania, Julius Nyerere argued for a restoration of what he called the traditional African custom of land holding by which he meant that, “... a member of society will be entitled to a piece of land on condition that he

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<sup>55</sup> See *ibid.* pp.104-16.

<sup>56</sup> *Ibid.* p.108

uses it. Unconditional, or “freehold”, ownership of land (which leads to speculation and parasitism) must be abolished”.<sup>57</sup> In fact in 1991, the Presidential Commission of Inquiry into Land Matters was established to address the issue of land conflicts in Tanzania. Its recommendations on Land Policy and Land Tenure Structure are published in Volume I of the Commission’s Report and its recommendations for the possible resolution of certain land conflicts are published in Volume II of the Commission’s Report.

### **1.3. Balancing the need to eradicate continuing social injustices rooted in practice of colonial or ethnic domination in the SADC with 21<sup>st</sup> century universal human rights standards**

SADC States started to regain political independence through UN sponsored initiatives when in 1960 the Democratic Republic of Congo became independent from France on 15 August. Shortly after that Tanganyika became independent on 9 December 1961 and Nyerere became its first Prime Minister. Malawi achieved similar status on 6 July 1964, Zambia on 24 October 1964, Botswana on 30 September 1966, Lesotho on 4 October 1966, Swaziland on 6 September 1968, Mozambique in June 1975 and Angola and others followed suit. But Zimbabwe had to wait exactly twenty years after the Democratic Republic of Congo to achieve independence on 18 April 1980. Namibia remained under South African domination until March 1990 when it became independent. 1993 marked the end of nearly three centuries of white minority rule of South Africa. A 32-member multiparty transitional government council was formed with blacks in the majority. In April 1994 the Republic’s first multiracial election was held. The ANC won an overwhelming victory, and Nelson Mandela became President. That at the start of the twenty-first century SADC States should still be grappling with the shackles of injustice born out of colonial experience is an indictment in the first instance of the UN’s halfway house approach to the question of colonization and domination, and the process of decolonization and self-determination particularly in Africa. *Utī poidetis*, the rule that territorial boundaries of former colonies are not to be redrafted following independence from colonial rule appears laterally to have been transferred and infused into the socio-economic condition of post-colonial SADC States regardless of the imperative of change. The result was that the socio-economic structures that privileged

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<sup>57</sup> Nyerere, J. (1967) Freedom and Unity, cited in Report of the Presidential Commission of Inquiry into Land Matters, (1992) Vol. I p.17.

the few and marginalized the majority were upheld. Empowerment never occurred of the politically independent majority through the restoration of land and economic rights divested from them by successive colonial regimes. The legal rules that established and protected these structures remained unchanged. What this meant also was that when the status quo became a legitimate target of revision by whatever social process, the law would also be targeted. Secondly, that at the start of the twenty-first century SADC States should still be thoroughly immersed in the effort to wipe out their colonial signature points to the need to develop transparent and efficient strategies for putting to an end manifest continuing injustices that are the result of the region's colonial experience. Effectual application of such strategies would address the question whether and how the evils of a foregone era could be addressed without transferring to another or other sections of society similar injustice. Transferring social injustice from one section of a community onto another serves only to compound the problem and to put asunder sections of a society that stand to gain from convergence and to lose from pursuing policies of reverse domination and subservience. Injustice enthroned could never preside over justice forever. Therefore, reconciliation of injustices of a foregone era with the present era's requirements of justice is efficient only when the outcome is sustainable. Sustainable outcomes in such situations are characterised by both national and international imprimaturs. Sustainable outcomes bind further sections of society into a more coherent whole, enhancing both the previously unjustly subordinated and his former subduer. In this sense, liberation of the subservient from his oppressor is restorative in that it liberates also the oppressor from participating in conduct that dehumanises both himself and his victim in that as equals, their behaviour falls under governance of equity and open contract. Secondly, sustainable outcomes declare equitable principles of citizenship that determine what rights all citizens have. Therefore, to be sustainable, the choices made by States must evidence consistency with universal notions of citizenship and human rights. They must also be compatible with international law's requirement of "official function"<sup>58</sup> of States, that is, that they must not be illegal under international law. The official functions of a State properly construed exclude the commission of crimes prohibited under customary international law, multilateral treaties or *jus cogens*.

The requirement of sustainability is critical to effective resolution of past and continuing injustices that are rooted in SADC member-States' colonial experience. However, the requirement of sustainability described

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<sup>58</sup> Per Lord Browne-Wilkinson, *ex parte Pinochet Ugarte*, [1999] H.L. 2 Weekly Law Reports, p.827, at p.846.

above is problematic in that in the psychodynamics of victimology it appears to patronise and dehumanise the victim in that the aggressor appears in both the oppression and the liberation stages, to set the agenda while the victim is made to passively observe proceedings and to harvest whatever the process at hand determines as his. This threatens whatever outcome results from the resolution stage in that the passive victim may indeed refuse to take ownership of the process and its outcome as his own because he perceives it as alien to his unsolicited and yet paramount agendas in both the setting up and delivery of these agendas. To be credible, this process must not only appear to empower the victim by making him the co-author of the agenda and co-worker in the delivery of the reform process, but actually empower him so that he appropriates as his own, the reform outcome. However, to pass the test of fairness, this process should not disempower the beneficiaries of the social injustice that is being undone either because they too must appropriate as their own, the reform process and its outcome. This is achievable only when both parties accept that their historical inheritance which neither of them elected, requires their mutual appraisal and mutual reformulation guided only by the *humwe principle*.<sup>59</sup>

Ultimately, in agrarian economies, land issues are human rights issues because they almost permanently determine allocation, utilisation and preservation of power among those that have it and those that do not. This is most troublesome where access to land is determined by a regime whose political agenda is racist. Equitable sharing of that power becomes a justiceable issue that no responsible State should ignore particularly because it determines the expectations and quality of life of the majority of the population.

#### 1.4. Conclusion

This chapter examined first, the justiciability of the problem of inequitable access to land in the SADC from historical and legal contexts of both SADC States themselves and that of international law. Secondly, it analysed the emergence in SADC States of titles to land that create binary oppositions of race (black and white), class (haves and have nots), and status (elite and impoverished) that sustains and perpetuates inequitable land distribution among peoples of the region with the result that the law is

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<sup>59</sup> See Chigara, B. (2001) "From Oral to Recorded Governance:Reconstructing Title to Real Property in 21<sup>st</sup> Century Zimbabwe", *Common Law World Review*, vol. 30 No.1 pp.36-65.

made to appear to work against the aspirations of the native population whose own perspective of land was contrary to that of the settler community. It showed that hetero-legal titles to land that bequeath correspondingly ability to participate and compete in the market favoured those with private title to land and penalised those that held communal title because fertile land with the most potential for agricultural production was designated private title commercial farming land while the least fertile land with the least potential for agricultural production was reserved for native peoples. This resulted in an inequitable distribution of the one resource in these predominantly agrarian economies that empowers whoever has it and subjugates one without. Policies pursued by white minority governments had resulted in one minority settler ethnic group possessing more than ninety-five percent of commercial farming area with the most potential for agricultural production, while the majority native population was crowded onto semi-desert land with the least potential for agricultural production. This contrasted sharply with the fact that whites represented no more than five percent of the total population in Zimbabwe, and ten percent in South Africa. This adds weight to claims of some None Governmental Organizations that:

## **Landlessness = Racism**

All the major International Human Rights treaties and conventions reject the discrimination against anyone solely on the basis of their race or sex. The fact that one ethnic group has ended up possessing all the land with the most agricultural potential in affected SADC countries while other groups agitate without any real success to show for the right to possess similar land shows that access to land has generally not been equitably enjoyed in these territories. Affected SADC States need urgently to resolve this gigantic problem. We explore in the next few chapters the constraints that international law imposes on national effort to resolve past and continuing injustices like the land crisis in several States of the SADC.