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**THE HUMAN RIGHT TO PROPERTY
AND
LAND REFORM IN ZIMBABWE
- IN AN AFRICAN CONTEXT**

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LIST OF ABBREVIATIONS

AC	African Commission on Human and Peoples' Rights
AU	African Union
ACHPR	African Charter of Human and Peoples' Rights
COPAC	Constitutional Committee
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
IMF	International Monetary Fund
MDC	Movement for Democratic Change
OAU	Organisation of African Unity
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations High Commissioner for Refugees
WVA	War Veterans Association
ZANU-PF	Zimbabwe African National Union-Patriotic Front

“Law is nothing but a set of tools, law itself cannot solve human problems; like any other tool, law may facilitate the solution of a given problem. But we cannot expect the law to tell us how the problem is ought to be resolved.”

- Anthony d’Amato

ABSTRACT

In this thesis we examine the ongoing land reform in Zimbabwe through a Minor Field Study conducted in Namibia. The common definition of land reform is that arable land is redistributed, usually through government action, and refers to the transfer of land ownership from a small number of wealthy owners to the landless people who were dispossessed of their land during the colonial-era in Zimbabwe. During our field study we have tried to investigate the emergence of land reform and how it functions in a legal manner. We have also tried to highlight the problems that arise when historic injustice permeates a country and legal instruments are used to try to remedy this injustice, its implications, the legal instruments involved and whether the national legislation in Zimbabwe complies with international law. The way that the land reform is carried out today is both unlawful and creates new disputes between the white and black population. As has been clearly stated throughout this thesis, the matter of land reform is an utterly sensible question and legal instruments can only provide the tools, but not give a certain answer for a solution.

PART I

1 INTRODUCTION

1.1 Background

“The land is ours. It's not European and we have taken it, we have given it to the rightful people, ... Those of white extraction who happen to be in the country and are farming are welcome to do so, but they must do so on the basis of equality.”

Robert Mugabe

Africa is characterized by a dark historical background marked by slavery and dominated by European colonial powers. Ever since the white colonists stepped ashore on the continent, discrimination of the indigenous people has been a fact. Zimbabwe is one of the countries that have been affected by the colonial era. A significant historical event that points to this discrimination is the adoption of the Land Apportionment Act in 1930, which aimed to exclude the African people from fertile land. Ownership of land can therefore be considered as part of the so-called discrimination system that has persevered in Zimbabwe for centuries.

In 1980, Southern Rhodesia declared independence from the United Kingdom and the country was renamed Zimbabwe. At the same time, Prime Minister Robert Mugabe came to power. The issue of land distribution between the white and black populations has been controversial ever since the colonial period because the white minority population has always, to a significant extent, owned the country's agricultural land.¹

During the late 1990s, this issue was close to Mugabe's heart and he portrayed it as a battle against past colonial wrongs.² In 2000, Mugabe introduced his major land reform program, the Fast Track Land Reform Programme, as one of the country's' biggest-ever issues of fairness. The definition of land reform is that arable land is re-distributed, usually through government action, and refers to the transfer of land ownership from a small number of wealthy owners to the landless. These transfers can be conducted with or without compensation.³ The reform's main objective of redistributing land is a very important opportunity for the black population of

¹ A significant extent, 40 %, is owned by the white population, *Blood and Soil*, p. 10

² International Crisis Group, *Blood and Soil*, p. 11 and Stendahl, E., *Jordreformen inifrån*

³ Zimbabwe Human Rights NGO Forum, *Land reform and property rights in Zimbabwe*, p. 3

Zimbabwe to obtain redress for the discrimination they have suffered throughout history. The statutory possibility, through legal means, to obtain land represents a milestone in terms of rights for Zimbabwe's black population. Rights imply not only the right to reclaim land but also function as an acknowledgment and an apology for the unfair way in which the black population has been treated.

In Zimbabwe, ownership is given a constitutional protection under Section 16 of the Constitution. This right is not absolute since many exemptions are enacted in the same Section and in the Sections 16A-16B. Furthermore, the ownership is explicitly enacted as a human right under Article 14 of The African Charter of Human and Peoples' Rights (ACHPR) and Article 17 of The Universal Declaration of Human Rights (UDHR) which state that this right shall be guaranteed. However, the Articles provide exceptions from the right to ownership which means that it therefore is not absolute. Such an exception may constitute expropriation due to society's general interests in accordance with the provisions of applicable laws. Thus, this kind of exception must be followed by compensation and a possibility to legally challenge the decision of the expropriation.⁴

On these points national and international law seem to be consistent. However, there are several existing national acts, related to the land reform, which do not appear to be in harmony with recently mentioned legal sources. This applies primarily to different national laws such as the Land Acquisition Act and the Rural Land Occupiers Act.⁵ These acts legalize illegal occupations and have been considered to conflict with the Constitution and human rights.⁶

The Zimbabweans claim that the underlying motives for land reform are justifiable. Simultaneously, they can be considered to conflict with property rights, as stipulated in Chapter 3 of the domestic Bill of Rights. Here they are stated as 'who has exclusive rights over property', and these rights are at the center stage of the Land Reform Programme.⁷

As indicated, conflicts arise when fundamental rights collide, in particular with regard to the ongoing land reform. On the one hand, there is a demand from the party that wants to obtain land while on the other hand; the current owner of the land who wants to keep it also has to be

⁴ Interview with Professor Sam K. Amoo, 2011-09-15

⁵ Ruswa, G., *Too fast, too furious? An interrogation of progress in the land reform process in Zimbabwe*, p. 23

⁶ Ruswa, G., *Too fast, too furious? An interrogation of progress in the land reform process in Zimbabwe*, p. 27

⁷ Zimbabwe Human Rights NGO Forum, *Land reform and property rights in Zimbabwe*, p. 3

considered. A conflict also arises when a landowner who holds the deed on the property is deprived of the land for redistribution purposes without the statutory compensation.⁸ It might also be the case that the landowner considers the redistribution to be illegal on other grounds which are also reasons of conflict. Given those considerations, we can ask whether the Government of Zimbabwe has violated international law since the right property could be considered not to have been guaranteed. The land redistribution process in Zimbabwe has introduced a new dimension and discussion in the interpretation of international law, treaty law and general legal norms under domestic law⁹ which is why the subject of this thesis is of relevance and interest.

The idea for this thesis arose after having seen the documentary film 'Mugabe and the white African' in October 2010. The documentary follows Mike Campbell, who bought his farm in Zimbabwe in 1975, receiving the title deeds for the land in the process. In 2000, Mike Campbell and his family began to be subjected to harassment. They have endured threats, beatings and other forms of abuse from various authorities, and as a result turned to a court in the country whereupon and they were granted leave to appeal to a tribunal which examines human rights issues in the Southern African Development Community (SADC).¹⁰ There, the Tribunal supported their case, stating that Zimbabwe violated several articles of the SADC Treaty.¹¹ However, Zimbabwe continued to violate the Tribunal's judgment, leading to a new decision from the Tribunal in July 2010.¹² This decision demonstrated the country's unwillingness to comply with the original judgment from 2007, since the Tribunal in this decision once again requested Zimbabwe to follow the previous ruling.

1.2 Purpose

This thesis highlights the problems that arise when historic injustice permeates a country and legal instruments are used to try to remedy this injustice, but instead violate a second party's rights. We examine the emergence of land reform, its implications, the legal instruments involved and whether the national legislation in Zimbabwe complies with international law. This requires first and foremost an account of relevant national laws as they constitute the legal basis for land reform. Additionally, provisions in the ACHPR and UDHR must also be examined, as these are

⁸ The statutory compensation can be found in Section 16B in the Constitution of Zimbabwe

⁹ Manokore, L M., *Contextualising the SADC Tribunal and the land issue in Zimbabwe – A sociolegal perspective*, p. 1

¹⁰ Mike Campbell (Pvt) Limited and others vs. The Republic of Zimbabwe SADC (T) (Case No. 02/2007)

¹¹ Ibid.

¹² Fick and Others vs. Republic of Zimbabwe Case No. SADC (T) 1/2010S

the rules on human rights in the country. One of the objectives of this thesis is also to determine whether or not the Fast Track Land Reform Programme in its context is violating international human rights law and which parties' are prioritized in conflicts over land.

1.3 Research Questions

- Are the land redistribution rules in Zimbabwe's national laws in conformity with the international human right to property, as described in the African Charter of Human and Peoples' Rights?

- Can the land reform in Zimbabwe be regarded as one of the exceptions in Article 14 of the African Charter of Human and Peoples' Rights?

- Which parties' rights are prioritized in conflicts over land rights?

1.4 Delimitation

We do not examine the issue of women's rights to property, since this is a specific problem area of its' own and too complex for the scope of this study. In the thesis, we based our study on Amendment No. 17 of the Constitution of Zimbabwe since this amendment has been widely criticized by the International Community.

In Southern Africa, the land question is a major issue and many countries deal with this problem. Almost all of the countries in Southern Africa have more or less resolved the issue, each employing different legal instruments. Zimbabwe is the most disputed country in this part of the world and has experienced the biggest problems with redistribution of land. Therefore, this is considered the most relevant country to explore for the purposed of this thesis.

1.5 Methodological framework

We use a rather unconventional method for our research which is based on different research techniques.

As the authors of this thesis have received a Minor Field Study Scholarship, the investigation is conducted in Namibia. The SADC Tribunal, which is located in Windhoek, Namibia, has been one of the main sources for this thesis. Our minor field study in Windhoek has been the most important source for our findings. Here, we have had the opportunity to find literature, articles,

reports, journals, court judgements and legislation acts that have been invaluable for our study. These, we could access at the Human Rights and Documentation Centre at the Faculty of Law, University of Namibia. We have also been able to retrieve information from the library at the SADC Tribunal. Due to the findings in Namibia, the authors have received a new perspective and better understanding of the African legal context. This has been an important experience since this is a legal view that we have not experienced before.

We have also conducted interviews with Professor Sam K. Amoo, Faculty of Law at University of Namibia.

We interpret legal text, legislative history, practices and doctrine in this area. Since this legislation is not known to us, we investigate this deeper and determine the applicable law. We also investigate national law since we compare it to of the African Charter of Human and Peoples' Rights.

At the international legal level, we examine the rights and their importance as they are described in ACHPR, with special emphasis on property rights. Furthermore, ownership has to be established. What is ownership and for whom? This is examined with particular regard to national law in Zimbabwe and its convergence with ACHPR. Since international law is based on treaty and customary law, we explore these sources by examining the relevant treaties and practices in the area. Our primary source of law has to be the doctrine, because many relevant articles and reports have been written in the area.

PART II

2 HISTORICAL VIEW ON LAND SEGREGATION IN ZIMBABWE

2.1 Introduction

Before the white settlers from Europe arrived and colonized Zimbabwe, all land belonged to the black population in the country.¹³ The passage of several years since colonization up-to-date has made reparations for the wrongs of the past a difficult task. This was mainly due to *inter alia* the constitutional restraints that over-protected the right to property for the white population in the Zimbabwean Constitution deriving from the Lancaster House Negotiations.¹⁴

2.2 Colonial legacy: 1889 – 1980

Zimbabwe's black population suffered gross racial discrimination during the colonial years of the country's history.¹⁵ The invasion by Europeans has had, like in the rest of the African continent and other parts of the world, profound results.¹⁶ The unjust distribution of land dates back to this period of time, when the country was called Rhodesia, and can be found to be the seeds to the major discontent of today.¹⁷ The British government granted the British South Africa Company a charter in 1889 to develop commerce in what today is called Zimbabwe, a quest was led by Cecil Rhodes, who hoped to find mineral wealth. The 'gold-hunger' had driven him and his group to Zimbabwe in hope of big findings, however, after quite disappointingly minor findings of gold, focus was shifted towards agriculture by the British South Africa Company. During this period the white settlers were offered major pieces of land, regardless of whether they belonged to the black population or not. Settlers treated the black indigenous population with a racist view of their life and ways, and often took the most fertile areas of land from them.¹⁸

In Zimbabwe, the right to property and ownership in land were in the pre-independence period based on the system of common heritage, in other words the indigenous non-capitalist regime. Before the colonial time, the indigenous communities Mashonaland and Matebeleland had the

¹³ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 2

¹⁴ Ibid.

¹⁵ International Crisis Group, *Blood and soil*, p. 21

¹⁶ Austin, R., *Racism and Apartheid in southern Africa*, p. 21

¹⁷ International Crisis Group, *Blood and soil*, p. 21

¹⁸ Ibid.

right over ownership of land and this can be said to be strong and stated in law as the individual rights of the Europeans. When the colonists arrived in Zimbabwe, they were convinced that there was no existing African system of ownership of land, or at least, the system was deformed.¹⁹

During colonization, the white settlers took the most fertile land and had an exclusive legal title for this. Meanwhile, the black peoples' land was communally owned and not as good as the whites' land, and with no rights of exclusive ownership. The type of ownership that was available for the black population was to hire land.²⁰ The black people were paid nothing by way of compensation when the Europeans took the land.²¹

2.3 Laws allowing land segregation

Formal laws and regulations from colonial times, cemented the injustice that still permeates Zimbabwe.²² In 1930, measures were taken to exclude the African population from arable land through the Land Apportionment Act. The purchase areas were created as a result of the recommendations of the 1925 Morris Carter Land Commission, these recommendations later being incorporated in the Land Apportionment Act. Before, Africans could legally purchase land anywhere in Zimbabwe but the Act eliminated this possibility and instead, the only lands for purchase were the appointed areas for purchase land according to the new Act. In other words, the Act divided the land into racial lines.²³

¹⁹ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, pp. 3-4

²⁰ Interview with Professor Sam K. Amoo, 2011-09-15

²¹ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, pp. 5-6

²² Bond, P., & Manyanya, M., *Zimbabwe's plunge*, p. 50

²³ International Crisis Group, *Blood and soil*, p. 21

Land Apportionment in Southern Rhodesia in 1930:²⁴

CATEGORY	ACRES	% OF COUNTRY
European Areas	49 149 174	51
Native Reserves	21 127 040	22
Unassigned Areas	17 793 300	18,5
Native Purchase Areas	7 464 566	7,8
Forest Areas	590 500	0,6
Undetermined Areas	88 540	0,1
Total	96 213 120	100

The Act consolidated the division and imposed a fundamentally lower status upon the black citizens in the country.²⁵ 'Private' land, which was not defined, was still an unknown concept to most Africans when the Land Apportionment Act was incorporated. European cultures and ideas increased the desire to own land. Several important legal restrictions were placed on land in the purchase areas. For example, farm owners were forced to obey stringent limitations on cropping and the number of persons allowed living on the farm. The government also set the limits of inheritance, reserving to the appointed Native Land Board the right to refuse heirs. Through these special purchase areas, the white settlers could still gain an advantage from the land.²⁶

A very clear example of this treatment through history can be found in Southern Rhodesia's Constitution from 1961. Here, a voting-system, based on income, automatically gave the white population a continuing white minority rule. The indigenous population was also controlled with native reservations, passport laws, racial segregation in public places and various discriminatory practices in the labour market.²⁷

²⁴ Embassy of Zimbabwe, *Background to Land Reform in Zimbabwe*

²⁵ Austin, R., *Racism and apartheid in southern Africa*, p. 34

²⁶ Shutt, A K., *Everyone has a right to the farm*, pp. 3-4

²⁷ Austin, R., *Racism and apartheid in southern Africa*, p. 34

3 LAND REFORM IN ZIMBABWE

3.1 Introduction

”We want the whites to learn that the land belongs to Zimbabweans”
– Robert Mugabe²⁸

The general definition of land reform is: “The redistribution of property or rights in land for the benefit of the landless, tenants and farm labourers”.²⁹ Land redistribution in Zimbabwe has introduced a new dimension to the interpretation of international law, treaty law and general legal norms under national law. The debate surrounds the way in which different international institutions have wanted to bring justice to the issue of land ownership in Zimbabwe. Past colonial legacies and injustices had dispossessed about 12 million black Zimbabweans of their land and relocated them to arid sandy small areas referred to as ‘Tribal Trust Lands’.³⁰

Land reform, in some contexts also called land redistribution, has in many cases been hindered by large landowners who have large economic and political interests in the matter.³¹ The debate often involves different parties, but they mainly agree that land inequality must be handled through land redistribution.³² Thus, the so-called Fast Track Land Reform Programme has been criticized by both Zimbabweans and others.³³

3.2 Zimbabwe – a society review

”The Land is the Economy; the Economy is the Land”
– Election slogan for ZANU-PF in 2002

Zimbabwe has long been one of the more economically prominent countries in Africa, which mainly exported agriculture and had a high educated population. Harare, the capital of

²⁸ International Crisis Group, *Blood and soil*, p. 76

²⁹ Adams, M., *Land reform: New seeds on old land?*, p. 1

³⁰ Manokore, L. M., *Contextualising the SADC Tribunal and the land issue in Zimbabwe – A sociolegal perspective*, p. 1

³¹ Toulmin, C., & Quan, J., *Evolving land rights, policy and tenure in Africa*, p. 39

³² Sida Studies, *Of Global Concern*, p. 155

³³ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 2

Zimbabwe, was the model for the modern city in Africa.³⁴ The majority of the economy consists of agriculture and therefore the question of land redistribution becomes of vast importance.³⁵

In the year 1980, Robert Mugabe came to presidential power and presented himself as a person with goals that would keep Zimbabwe as a 'multi-race state'. However, his attitude in recent years has come to be reversed. President Mugabe has, together with his party, the Zimbabwe African National Union-Patriotic Front (ZANU-PF), by selective application of the law and through political violence, retained control in the country.³⁶

For the first 20 years of independence, Zimbabwe carried out the most timid land reform programme in the world. This was done by concentrating on paying market prices for the land in the expectation that there would be donor support for the creation of a class of African commercial farmers.³⁷

In the late 1990s the Zimbabwean government began to lose popularity due to the deteriorating economy. At the same time, the ruling party, ZANU-PF, lost political legitimacy and violent elements organized by the War Veterans Association (WVA) to seize white farms was unleashed. Seizures by landless people had occurred throughout the previous ten years, but after the referendum for a new constitution had been rejected in 2000, ZANU-PF supported the occupation of land.³⁸ This proved to be an effective tactic for Mugabe and his party in order to survive, but came at a high cost. As attacks on the white farmers grew, agriculture was destroyed, leading to the loss of livelihoods for many black workers from the farms.³⁹

Zimbabwe's economy has deteriorated dramatically in recent years with inflation at the end of 2003 reaching 600 %, reducing to 500 % in April 2004.⁴⁰ The International Monetary Fund (IMF) has noted that Zimbabwe has the fastest declining economy in the world with a GDP that has declined by 40 % since 1999.⁴¹ In an attempt to turn the focus from the failing economy,

³⁴ International Crisis Group, *Blood and soil* p. 9

³⁵ International Crisis Group, *Blood and soil* p. 6

³⁶ International Crisis Group, *Blood and soil*, pp. 9-10

³⁷ Campbell, H., *Reclaiming Zimbabwe, The Exhaustion of the Patriarchal Model of liberation*, p. 78

³⁸ Ibid.

³⁹ International Crisis Group, *Blood and soil*, p. 11

⁴⁰ International Crisis Group, *Blood and soil*, p. 10

⁴¹ IRIN, UN Office for the Coordination of Humanitarian Affairs, *Pensioners hurt by record inflation*

President Mugabe introduced the issue of land distribution to his political agenda in the late 1990s.⁴²

Zimbabwe has repeatedly demonstrated that a land dispute can quickly become violent, especially when the actions in question are undertaken with political agendas at the expense of longer-lasting profits.⁴³ In the beginning of year 2000, Zimbabwe was at the center of the international community's attention because of the violence that had accompanied the farm occupations. The violence during the occupations became internationalized since media wanted to establish international sympathy for the white commercial farmers and their 'private' property. Interesting to notice is that while ten whites were killed in the invasions, there were more than 100 blacks killed due to the increasing violence.⁴⁴

The African peoples' dispossession of land has had different consequences. One of them is that their economic and political submission is closely linked to this.⁴⁵ The opposition, the Movement for Democratic Change (MDC), sees land reform as a tactic, initiated by the ruling party ZANU-PF, for Mugabe and his party to maintain their political power rather than being an honest concern regarding land equality.⁴⁶

There is no single story of the land reforms in Zimbabwe. In Masvingo province for example, 1,2 million hectares have been redistributed to around 20 000 households. The land is divided in so-called A1 and A2 schemes. The A1 is smallholder farming where the settlers have done reasonably well and A2 scheme includes small-scale commercial agriculture. One opinion from one of these farmers is that nowadays there is more land and due to this, the production has increased. There are always both winners and losers with the new reform, but it cannot be characterized as utter failure.⁴⁷ The best land in Zimbabwe still belongs to the white farmers and Robert Mugabe's approach to land reform has been inconsistent and instable, since his methods often have been violent and unlawful.⁴⁸

⁴² International Crisis Group, *Blood and soil*, p. 11

⁴³ International Crisis Group, *Blood and soil*, p. 5

⁴⁴ Campbell, H., *Reclaiming Zimbabwe, The Exhaustion of the Patriarchal Model of liberation*, p. 78

⁴⁵ Austin, R., *Racism an Apartheid in southern Africa*, p. 31

⁴⁶ Sida studies, *Of Global Concern*, p. 155

⁴⁷ Scoones, I., *A new start?*, pp. 1-2

⁴⁸ Bond, P., & Maryanya, M., *Zimbabwe's plunge*, p. 185

3.3 Objectives of land reform

The reasons for land reform have already been implied, but to clarify further, they are based on the political and social binding inheritance from the colonial era in Zimbabwe.⁴⁹ The aim was to give palliation to the landless, contributing to minimize poverty and create conditions for social and political stability.⁵⁰ But one of the aims was also to redistribute rights and assets between the residents in Zimbabwe.⁵¹

3.4 The Lancaster House Constitution

3.4.1 Background of the Constitution

The Rhodesian independence in 1965 was established during the Lancaster House negotiations which led to the Lancaster House Agreement. Land was one of the paramount issues mentioned during the discussions. During the negotiations, the British government repeatedly insisted on strict provisions in the Constitution protecting the rights and privileges of the few white Zimbabweans, who collectively owned 70 % of the arable land. The negotiations actually almost collapsed due to this demanded provision. The agreement was announced as follows (partial record of the Lancaster House negotiations):

*“We have now obtained assurances that ... Britain, the United States of America and other countries will participate in a multinational donor effort to assist in land, agricultural and economic development programs. These assurances go a long way in allaying the great concern we have over the whole land question arising from the great need our people have for land and our commitment to satisfy that need when in government”.*⁵²

3.4.2 Purpose and framework of the Lancaster House Constitution

One of the main objectives of the struggle for freedom was the land distribution, but due to the Lancaster House Agreement the distribution was delayed. Laws, rules and expensive cost for the resettlements were some of the main circumstances which limited the procedures. The Lancaster

⁴⁹ Ruswa, G., *Too fast, too furious? An interrogation of progress in the land reform process in Zimbabwe*, p. 3

⁵⁰ Ibid.

⁵¹ Toulmin, C., & Quan, J., *Evolving land rights, policy and tenure in Africa*, p. 9

⁵² Manokore, L. M., *Contextualising the SADC Tribunal and the land issue in Zimbabwe – A sociolegal perspective*, p. 1 and Embassy of Zimbabwe, *Background to Land Reform in Zimbabwe*

House Agreement imposed the government to pay the farmers fair compensation with the local currency in a reasonable time instead of adequate compensation.⁵³

The Lancaster House Constitution imposed certain restrictions regarding the redistribution of land⁵⁴ and one of the provisions protected acquisition of land on a willing buyer-willing seller basis to protect white Zimbabweans, so-called “sunset clauses”. Since there has been no meaningful redistribution after independence, one can say that it is a question of legal constitutional limitations.⁵⁵ This provision remained in the Constitution for a period of ten years, but the agreement did not perform to the expectations since the willing buyer-willing seller provision was not supported in many ways. First of all, the white commercial farmers did not offer the quantities of land that were required to enable the new Zimbabwe government to adequately assist the great amount of Zimbabweans that needed to be resettled. Secondly, the land offered was often located in areas with little rainfall and was unsuitable for the black indigenous farmers. Thirdly, the market price was so high, due to the *fair market* clause in the agreement, that the government could not afford it.⁵⁶ The problem with this approach was that it ignored the past and present realities and injustices.⁵⁷ In 1987, the Government in Zimbabwe had managed to settle 40 000 families compared to the original target of 162 000.⁵⁸

Since this time, more than 10 acts of Parliament have been changed to amend the Constitution.⁵⁹ In the Amendments No. 11 and No. 13, the courts were excluded from considering the question of fair compensation of the acquisition of rural land. These amendments lead to an increased opposition, especially amongst the white commercial farmers, to the whole issue of land distribution. The white commercial farmers mint that resettlement lead to unemployment for the workers on the large-scale commercial farms. They also believed that the distribution would lead to decreasing productivity since the new owners would not have the proper knowledge to take care of the farms.⁶⁰

⁵³ D’Engelbronner-Kolff, M., *The provision of non-formal education for human rights in Zimbabwe*, p. 34

⁵⁴ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 6

⁵⁵ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 9

⁵⁶ Manokore, L M., *Contextualising the SADC Tribunal and the land issue in Zimbabwe – A sociolegal perspective*, p. 2

⁵⁷ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 9

⁵⁸ Manokore, L M., *Contextualising the SADC Tribunal and the land issue in Zimbabwe – A sociolegal perspective*, p. 2

⁵⁹ See the Constitution of Zimbabwe

⁶⁰ D’Engelbronner-Kolff, M., *The provision of non-formal education for human rights in Zimbabwe*, pp. 34-35

3.5 The Land Reform and Resettlement Program

The definition of land reform can be divided into three different categories; land redistribution, land restitution and a change of ownership in land tenure. Land redistribution is used in order to justify existing imbalances in land tenure, where the government redistributes land. Land restitution is a process where land rights were wrongly taken by settlers and original owners are entitled to regain their original status. Restitution is based on the violation of another right, the right to property.⁶¹

By the year 1995, Zimbabwe's government had managed to resettle only a small part of the intended number of families and the pressure on the government to act was imminent. The communal farmers even began to resettle themselves on farms owned by white commercial farmers. This persuaded the government to take action and resulted in the Land Acquisition Act in 1992. The act allowed the Zimbabwe government to compulsorily acquire land for resettlement and give fair compensation for the land that was acquired. The owner who was affected by the acquisition was given two options. The first one was to agree with the price set by the acquiring authority; the second to contest the price. Thus, it is important to note that at this time the targeted land was derelict land, under-utilized land, land owned by absent landlords, land neighboring communal areas and land from farmers with more than one farm or oversized farms.⁶²

One can observe that at one of the numerous donor conferences, 48 countries and other donors agreed that the need for land reform in Zimbabwe was urgent, since the issue of colonial injustice had to be addressed. Many countries also pledged financial and material support in order to help the Zimbabwe government with the resettlement. However, white commercial farmers that had been targets for acquisitions began to challenge these decisions in national courts. This drove the Zimbabwe government to amend the Constitution of 2005 retrospectively, stating in Section 16B that:

- (a) all agricultural land,
- is acquired by and vested in the State with full title therein

And;

- (b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

⁶¹ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 13

⁶² Manokore, L M., *Contextualising the SADC Tribunal and the land issue in Zimbabwe – A socio-legal perspective*, p. 2

Amendment (No. 17) 2005 Section 16B of the Zimbabwe Constitution made it unlawful for a party to challenge the acquisition of the actual land acquired by any acquiring authority. It only allowed for the party to challenge the value of the improvements on the land.⁶³

In the beginning of the 21st century, the Government of Zimbabwe introduced the Fast Track Land Reform Programme as a new period of the land reform. The aim of the program was to take land from rich white commercial farmers for redistribution to the poor and middle-income landless black population. In the years 2000 and 2001, over 2000 farms and 6 million hectares were listed in the official government's journal for compulsory acquisition.⁶⁴

There are different views on the developments in Zimbabwe since the Fast Track Land Reform Programme was introduced. One argument is that the reform has been devastating and that Zimbabwe was, at one time, one of the most outstanding African economies. Another argument is that the reform did not impact solely in a negative sense⁶⁵ and some researchers claim that no catastrophe has occurred during the period that land reform has been ongoing.⁶⁶

⁶³ Manokore, L. M., *Contextualising the SADC Tribunal and the land issue in Zimbabwe – A socio-legal perspective*, p. 3

⁶⁴ Human Rights Watch, *Zimbabwe – Fast Track Land Reform in Zimbabwe*, pp. 11-12

⁶⁵ Winter, J., *Zimbabwe land reform not a failure*

⁶⁶ Scoones, I., et al, *Zimbabwe's Land Reform -Myths & Realities*

4 INTERNATIONAL LAW

4.1 Introduction

Rules of international law are created by states for states, with purposes that relate to themselves and the relations between sovereign states and other institutional subjects of international law, for example the African Union. Only sovereign states can be a part of international law by entering treaties and the primary purpose is to deal with relations between states and not individual rights. However, human rights which are a part of international law, have come to be the issue for relationships between states and individuals since they primarily protect the individual's rights.⁶⁷

Moreover, a state can never rely on its national legislation to avoid its legal obligations under treaty law.⁶⁸ It is therefore no defense to an international breach that the state claims to have been following the rules of its domestic law. Any other rules or situation would permit international law to be avoided by the simple framing of national laws.⁶⁹

4.2 The issue of personality

States have traditionally been said to have personality at international level, but the situation of personality is complex since individuals also have certain personality. Yet it is concluded that states have the primacy as subjects of the law. The issue of personality is relevant since several international bodies, including the African Commission on Human and Peoples' Rights (AC), has illustrated that international law is not mainly the domain of the state, but that the role of other entities such as individuals is just as important. In international law there is an assumption of a divide between subject and object, but with the evolution of international human rights law there is now support for that other entities than states have some international status.

4.3 Customary law

4.3.1 Custom as international law

Customary law has evolved from practices and behaviors by states and is one of the sources in international law.⁷⁰ One of the most important factors for defining customary law is that the state

⁶⁷ Dixon, M., *International law*, p. 3

⁶⁸ The Vienna Convention on the Law of Treaties, Article 27

⁶⁹ Malcom, S., *International law*, pp. 104-105

⁷⁰ Dixon, M., *International law*, p. 30

practice has to be uniform and consistent. State practice includes how a state acts, for example national legislation and practice of international organizations. The practice must also somehow be general and known to a significant number of states. *Opinio juris* is a part of customary law that is so strong that it can be compared to treaty law and is also recognized as law.⁷¹

4.3.2 African view on customary law

Customary law is said to be ‘very African’ and that it protects the values and norms of African societies. A member of a tribe must always follow the authority and has no reason to fight against him; what he or she does must benefit the interests of the collective. This tradition has thus been weakened by the colonial influence from Europe.⁷²

Africans use the family definition in a broad sense and do not have the concept of the nuclear family. The guiding principles in the African society are survival of the entire community, cooperation, interdependence and collective responsibility. The individuals’ rights must always be balanced against the requirements of the group. It is important to remain flexible in terms of individual rights and always consider the requirements of the group as a whole.⁷³

An important difference between Africa and Western states is the ownership of land while private ownership is considered to be absolute right within the Western society, the land is communally held in Africa. In a human rights perspective, the communal system of land ownership guarantees individuals social security and at least minimum economic rights.⁷⁴

4.4 Treaty law

Treaty law consists of international written agreements which are binding, such as conventions, treaties and protocols and are results of negotiations.⁷⁵ The main treaty which codifies this is the Vienna Convention. The legal effect of treaties is that only parties to that specific treaty are bound by it. Some treaties can reflect customary law and non-parties can have the exact same obligations as in the treaty, but only because they exist in customary law. Since treaties are

⁷¹ Dixon, M., *International law*, pp. 31-33

⁷² Cassese, A., *Human rights in a changing world*, p. 54

⁷³ Cobbah, J., *African values and the human rights debate: an African perspective*, pp. 35-37

⁷⁴ Cobbah, J., *African values and the human rights debate: an African perspective*, p. 38

⁷⁵ Dixon, M., *International law*, p. 29

voluntary, the members must therefore ratify and sign it in order to be bound by the rules of the treaty. Once ratified, the parties of that treaty are mutually bound.⁷⁶

4.5 Human right as a part of international law and constitutional obligations

4.5.1 Introduction

Human rights are based on an expansive desire to unify the world by drawing up a list of guidelines for all governments. These guidelines are an effort to bring to light the respect of human dignity and all states should take these as parameters for assessing their actions. Human rights can also be defined as an “attempt by the contemporary world to introduce a measure of reason into its history”.⁷⁷

Today, most states acknowledge the existence of human rights as a part of international law. These rights limit the states’ freedom of action towards foreigners and nationals. The right to property can also receive protection as a human right due to regional international laws, which apply between several states with common values in this area. Regional international laws can arise through customary law; existing rules are *de facto* a result of negotiated regional human rights conventions. Hence, there is a paradox since human rights by definition are universal.⁷⁸

4.5.2 Human rights in the Universal Declaration of Human Rights

Since the Universal Declaration of Human Rights is a Declaration by the General Assembly, it is not legally binding, but on the other hand it possesses strong moral power. It can also be argued that the rights and articles of the UDHR are so widely accepted that they form a part of general principles of law. Thus, they can probably not be said to form part of international customary law. During the last years, the Declaration has reached the status of being considered a common standard for all peoples and all nations. It is also frequently referred to in different international and national human rights instruments.⁷⁹ Through this Declaration, it is said that individuals received protection for their fundamental rights.⁸⁰

⁷⁶ Dixon, M., *International law*, pp. 27-29

⁷⁷ Ibid.

⁷⁸ Cassese, A., *Human rights in a changing world*, p. 158

⁷⁹ Smith, R., *International Human Rights*, p. 36

⁸⁰ Smith, R., *International Human Rights*, pp. 39-40

The UDHR proclaims in its preamble to be a “common standard of achievement for all peoples and all nations ... to secure their universal and effective recognition and observance”. This states the universality of the charter and this is often said to be based on the very fact of being human. Thus, things such as natural law, morality and philosophy are also considered as a part of universality. This statement assumes that all cultures worldwide have standard rules or practices for human rights.⁸¹ For the first time the international community recognizes that certain values must overcome national interests.⁸² These arguments are challenged by a universal application, but different cultures have different values concerning the human condition and consequently, there cannot be a commonly applicable theory of human rights. Also the simple fact that civilizations vary in geographical location and time can be a considerable challenge to universality.⁸³

4.5.3 African view on human rights

The African tradition is focused on the family instead of the individuals and this tradition does not take the individual in account as autonomous and possessed of rights above and prior to society. The colonialists in Africa did not do much to change traditional conceptualizations of the social order and society. Regardless of specific colonial policies and structure, all colonized people were subject to ultimate authority in the form of the colonial ruler. The irrelevance of the Western conception of human rights founded on natural rights doctrines is not rooted solely in traditional cultural patterns, but is also a consequence of the articulated modernization goals of African countries.⁸⁴

The conflicting ideas of cultural relativism and universality also exist in the African legal system. The question is whether human rights have relevance in Africa, or if this is merely an attempt by the West to influence and control African countries. It is argued that human rights instruments origins from the Western liberal tradition and that they do not take account of the poverty and political instability that has faced many African countries. Therefore the concepts, which can be considered as narrow, on which international law is based on can make it difficult to apply the present system for the protection of rights in Africa.⁸⁵

⁸¹ Evans, M., & Murray, R., *The African Charter on Human and Peoples' Rights*, pp. 219-220

⁸² Cassese, A., *Human rights in a changing world*, p. 168

⁸³ Evans, M., & Murray, R., *The African Charter on Human and Peoples' Rights*, p. 221

⁸⁴ Pollis, A., & Schwab, P., *Human rights: A Western construct with limited applicability*, p. 89

⁸⁵ Murray, R., *The African Commission on Human and Peoples' Rights and International Law*, p. 33

4.5.3.1 Human rights – a Western/European construction?

Human rights, as defined by the West, can said to be rejected or meaningless and the conception of human rights are not applicable to Southern African countries. The state has, in this context, become the embodiment of the people where the individual has no rights or freedoms that are natural and outside the purview of the state.⁸⁶

In many cultures, the notion of the group rather than the individual is evident in the concepts of property ownership. Hence, land is owned communally and there is no right to individual ownership of holdings.⁸⁷

Among human rights advocates at an international level, there is an ongoing discussion which of the political or economical right should have priority. The Western notion of absolute rights includes the right to private property, a right that is central to an understanding of the development of Western pluralist and capitalist societies.⁸⁸

4.6 The human right to property

4.6.1 Definitions of the right in UDHR and ACHPR

The right to property can be defined as “the exclusive right of possessing something”, “rules governing the use of resources” or “a defensible claim to a particular place or thing”.⁸⁹ The right to property has always been a controversial and debatable right. Thus, in some international instruments it is an obvious right and is today a more considerable human right in international law than previously.⁹⁰

Article 17 of UDHR, which also describes the right to property, states that “everyone has the right to own property alone as well as in association with others,” and that “no one shall be arbitrarily deprived of his property”.

In ACHPR the right to property is stated in Article 14, which maintains that: “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in

⁸⁶ Pollis, A., & Schwab, P., *Human rights: A Western construct with limited applicability*, pp. 92-93

⁸⁷ Pollis, A., & Schwab, P., *Human rights: A Western construct with limited applicability*, p. 89

⁸⁸ Pollis, A., & Schwab, P., *Human rights: A Western construct with limited applicability*, p. 94

⁸⁹ Zimbabwe Human Rights NGO Forum, *Land Reform and Property Rights in Zimbabwe*, p. 7

⁹⁰ Obisienunwo Orlu Nmeielle, V., *The African human rights system: its laws, practice, and institutions*, p. 119

the general interest of the community and in accordance with the provisions of appropriate laws.” Furthermore, the ACHPR also states, in article 21 (2), that: “In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.”⁹¹

4.6.2 Framework of the right

Historically, the protection of the property right against interference by the state and others was important in liberal theory. Sometimes this right is described as a negative right, a non-interference right. This right is one of the prominent rights related to notions of individual liberty and autonomy and one can say that this statues a division between the state and the individual. The liberal state is closely associated with the ideal of the rule of law, hence with some minimum of separation of government powers such as an independent judiciary that can protect individual rights against executive abuse.⁹² In the concept of property rights, ownership is a question about balance between the interest of the state and the interest of the individual.⁹³

The right for governments to acquire land for public interests is a commonly recognized right, including measures which do not provide full market compensation for the land. These redistributive measures are an instrument for protecting economic and social rights. Full protection for existing property rights can only be guaranteed and justified in a situation where every person owns enough to be able to maintain a minimum standard of living. These basic criteria must be carried out in a way that is stipulated and required by the African Charter in relation to property rights.⁹⁴

4.6.3 The principle of compensation for expropriation of property

Expropriation has been defined as “the deprivation by state organs of a right in a property either as such, or by permanent transfer of the power of management and control. The deprivation may be followed by transfer to the territorial state or to third parties, as in cases of land distribution as a means of agrarian reform”.⁹⁵

⁹¹ Human Rights Watch, *Fast track land reform in Zimbabwe*, p. 37

⁹² Steiner, H J., & Alston, P., *International human rights in context – Law, politics, morals*, pp. 363-364

⁹³ Interview with Professor Sam K. Amoo, 2011-09-15

⁹⁴ Human Rights Watch, *Fast track land reform in Zimbabwe*, p. 37

⁹⁵ Brownlie, I., *Principles of International Law*, pp. 508-509

There are three conditions that have to be fulfilled to make expropriation of private property lawful. These conditions are that it has to be prompt, adequate and an effective compensation has to be paid by the expropriating state. In the case that the compensation is not paid, the taking of property is considered unlawful and as confiscation. Thus, it is not clear if the principle of compensation has become a part of customary international law since there are disagreements between developed and developing states. The later argues that states can expropriate without paying compensation whilst the developed countries state that even if expropriation is for public purposes, compensation must be paid.⁹⁶

4.6.4 The individual's right to challenge expropriation decisions

The right for the individual to challenge expropriation decisions is stated in international treaties as the ACHPR. In Article 3 of ACPHR, the complainant must have the chance to challenge the decision of compulsory acquisition and bring the matter in front of an impartial and competent court. Property rights must be protected but not without limitations since the event may come that a state must expropriate land for public purposes and the great good of society. If public interest is not defined in a constitution and is a subject to the determination of the state, then there must be legal rights given to the individual to be able to challenge the expropriation decision.⁹⁷

4.7 Why do countries commit to human right treaties?

4.7.1 States' intentions and behaviors

International law has both positive and negative effects. International treaties are not binding for states unless they choose to be bound; the effects of treaties depend on who agrees to be bound. One can say that states bound by a treaty are more respectful to it than if they are not a party to the treaty. When the state is a party, the behavior of the state typically improves over its own former behavior. It can be expected that a state which already promotes human rights will aim to improve the visibility and set a good example for other states regarding human rights. Hence, there is a relationship of causality since states which are good in promoting human rights are disposed to entering human rights conventions or/and treaties.⁹⁸

⁹⁶ Malanczuk, P., *Akehurst's Modern Introduction to International Law*, p. 235

⁹⁷ Interview with Professor Sam K. Amoo, 2011-09-15

⁹⁸ The United Nations International Covenant on Civil and Political Rights, *Does It Make a Difference in Human Rights Behavior?*, p. 100

There are several arguments confirming that a party of an agreement does not change its behavior. The mechanisms used for implementing human rights are considered as being weak and therefore non-effective when used against unwilling parties. A state may also join the agreement to avoid foreign criticism. There can also be internal factors that may be in conflict with the state's intention to respect human rights. Human rights treaties are expected to be more effective where there is domestic legal enforcement of treaty commitments. Governments that anticipate that their behavior can be changed by domestic actors may force them to abide by a treaty and are also likely to be more forced by their treaty commitments.⁹⁹

4.7.2 Zimbabwe's commitments to human right treaties

Zimbabwe is a party to many international treaties and conventions, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, UDHR, SADC and the ACHPR. This means that Zimbabwe, as a government, has the duty to guarantee equal protection of the law to all persons without discrimination. This also applies to private citizens and the government must prevent serious violations of these rights. Zimbabwe's Constitution gives a similar guarantee in Section 18 (1) which stipulates that "every person is entitled to the protection of the law".¹⁰⁰ Zimbabwe has many times been criticized for violations of international law and human rights. For example, in August 2009, The UN Refugee Agency released a publication showing these violations.¹⁰¹

4.8 The African Charter on Human and Peoples' Rights

4.8.1 Introduction to the Charter

The concept of the state is central in any discussion of rights, since that international human rights law derives from public international law where the state is the central actor. International human rights law primarily concerns the relationship between the state and the individual. In this respect it is interesting to investigate which organs or individuals can be viewed as being state entities, and therefore owing duties under international law. However, this depends "on the ideological conception of the African State concerned which role the concept of duties in the African Charter may play in practice".¹⁰²

⁹⁹ The United Nations International Covenant on Civil and Political Rights, *Does It Make a Difference in Human Rights Behavior?*, p. 100

¹⁰⁰ Human Rights Watch, *Fast track land reform in Zimbabwe*, p. 36

¹⁰¹ Human Rights Watch, *False Dawn: the Zimbabwe Power-Sharing Government's Failure to Deliver Human Rights Improvements*, p. 1

¹⁰² Murray, R., *The African Commission on Human and Peoples' Rights and International Law*, p. 33

When creating the ACHPR the Charter of the United Nations was used as guidance and a framework. Through the UN Charter, which is ratified by and binding for almost each and every single sovereign state in the world, the member states pledge to promote human rights. In Article 1 (3) the objective of international co-operation is described as “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. In the articles 55 and 56, it is described that the member states strive to “achieve universal respect for, and observance of, human rights and fundamental freedoms”.¹⁰³

4.8.2 History and background

Discussions about creating a regional human rights document in Africa began in Lagos 1961, organized by African jurists who recognized the need of a convention on human rights.¹⁰⁴ At this time, many of the African countries had just gained independence. In 1963, the leaders of the new countries in Africa had a meeting and agreed to create a union, the Organisation of African Unity (OAU). The purpose of OAU was to bring the governments closer together to give the African people better living standards.¹⁰⁵

The first Charter was harshly criticized for not forcefully condemning abuses against dissidents. The criticism leveled against OAU’s principle that no interferences in an individual country’s internal affairs should occur. Furthermore, the Charter did not acknowledge the individual’s human rights¹⁰⁶ and did not contain any provision for the protection of the rights of the African masses. The emphasis from 1963 was on the state rather than the people or the individual where the focus was to prevent colonialism and apartheid. Threats to human rights appeared to be reflected in the OAU Charter as coming from outside the continent and were something which African unity could help to prevent.¹⁰⁷

Due to the criticism of the old charter, the OAU amended the Charter in favor of human rights and as a regional human rights document. In Nairobi, June 1981, the African Charter on Human and Peoples’ right was adopted. The Charter was enforced in October 1986 after approval from

¹⁰³ Bogdan, M., *Äganderätten som folkrättsligt skyddad mänsklig rättighet*, pp. 13-14

¹⁰⁴ United Nations – Centre for Human Rights Geneva, *The African Charter on Human and Peoples’ Rights*, p. 1

¹⁰⁵ African Commission on Human and Peoples’ Rights, *History*

¹⁰⁶ Ankumah, E., *The African Commission on Human and Peoples’ Rights*, p. 4

¹⁰⁷ Murray, R., *Human rights in Africa – from the OAU to the African Union*, p. 8

the majority of the members in the African Union.¹⁰⁸ Worth mentioning is that the ACHPR actually draws inspiration from the UDHR.¹⁰⁹

4.8.3 Binding nature of the Charter

Due to *pacta sunt servanda* and the Vienna Convention Article 26, every party to a treaty is bound by the whole content, and parties to the African Charter shall respect the requirements of the charter to the full. The only way to not undertake an article in the treaty is if the article is limited. The only limitations which they can invoke are those expressly laid down by the instrument in question and which consist solely of the limitation clauses to which certain rights are subject and in a general clause of the same kind. Therefore, it is of importance to consider to what extent these limitation clauses can actually serve to compensate the absence of a genuine derogation clause. The African Charter has no human right that provides an absolute guarantee, while most of the rights are circumscribed *ab initio* in limitation clauses, especially the right to property as set out in Article 14 of the Charter.¹¹⁰

The Charter must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its purpose and objects. The African Charter's objective is to confer the rights of the individuals. The rights and the freedoms of the individuals must be interpreted extensively which implies that the power of states to limit the guaranteed rights should be circumscribed to the maximum possible extent. The ultimate object of a limitation clause is not to make a government's power stronger but to ensure the effective implementation of the rights and freedoms of its subjects.¹¹¹

The definition demonstrates that all rights are not absolute rights. Most rights are *prima facie* rights that can be limited, thus for the balance between the government's need to operate and the need for individual freedom.¹¹²

¹⁰⁸ African Commission on Human and Peoples' Rights, *History*

¹⁰⁹ See the Preamble of ACHPR

¹¹⁰ Ouguergouz, F., *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa*, p. 429

¹¹¹ Ouguergouz, F., *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa*, p. 432

¹¹² Ouguergouz, F., *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa*, p. 431

In a democratic society the exception to these kinds of clauses must be necessary. Liberty must remain the rule and its limitation the exception. The effect of the exceptions must never be to destroy the rights in question; hence the limitations must be strictly interpreted.¹¹³

Even if the right to property is given restrictions, the individual's rights must be protected. The right for a state to expropriate must be used sparingly; it must be used only where it is necessary.¹¹⁴

States must go further than merely changing their legislation according to the wording in Article 1 and Article 62 of ACHPR. This approach is similar to other international bodies.¹¹⁵ In this context it is interesting to notice the status of international human rights in Zimbabwe domestic law. In Section 111B of the Constitution it is stated that "...International human rights law is only applicable and would be used as a tool of interpretation by the courts if it is similarly incorporated. International law is thus enforced as long as it does not conflict with municipal law".¹¹⁶

4.8.4 The special characteristics of the African Charter

4.8.4.1 African values as a fundamental part of the Charter

The Charter contains different prerogatives and obligations that are protected, and also contains a list of the institutions for the protections of these values.¹¹⁷ The aim of the Charter is to combine traditional African values and international norms. It also states, in part I, rights and duties which may be new as an international instrument but are in accordance with the African concept "rights are inseparable from duties".¹¹⁸ This is unique to African Charter, where the Charter will reflect the special distinction of the African culture. It can be suggested that the authors of the African Charter drew inspiration from virtues of the historical traditions and the values of African civilization in order to ensure that they produce a Charter which was not something that was already existing or imported. It can be described that the Charter is mutual between the individual and the society.¹¹⁹ For example, Article 18 of ACHPR shows the

¹¹³ Ouguergouz, F., *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa*, p. 433

¹¹⁴ Interview with Professor Sam K. Amoo, 2011-09-15

¹¹⁵ Murray, R., *The African Commission on Human and Peoples' Rights & International Law*, pp. 53-54

¹¹⁶ Heyns, C., *Human Rights Law in Africa*, p. 1715

¹¹⁷ United Nations – Centre for Human Rights Geneva, *The African Charter on Human and Peoples' Rights*, p. 1

¹¹⁸ United Nations – Centre for Human Rights Geneva, *The African Charter on Human and Peoples' Rights*, p. 1

¹¹⁹ Baricako, G., *The African Human Rights System: Ten Years of Development*

indication for the society to assist the family; the family is the custodian of moral and traditional values recognized by the community.

4.8.4.2 The notion of the state

What role the concept of duties in ACHPR plays in each state, depends on the ideological view of the African state concerned. This raises the issue if human rights provide protection in the private sphere.¹²⁰ The relationship between the state and the individual is different in Africa from the Western Europe, particularly because of the combination of colonial and traditional structures. As a result, this could lead to a different concept of rights since “human rights were...primarily the historical response to the rise of the modern nation State”. In a continent where the idea of the sovereign state was unknown and where the principles of international law have been forced, created by Western states, the applicability to non-Western countries can be evaluated.¹²¹

Traditionally, international human rights law constitutes rights owed by the state to the individual. It provides protection from abuses of the state, but in the African context the concept of the state detached from the individual is not the same as in Western Europe. It emphasizes the community and family rather than the individual and as a result the separation between the public and private is less apparent.¹²²

4.8.4.3 The definition people

One of the characteristics of the Charter is the definition *peoples' rights*. The definition *people* has been hard to define since Africa is a pluralistic community with different ethnic groups and conflicts between individuals. In the title of the Charter, the definition is worded but not defined. One of the reasons why the definition *people* was never defined in the Charter was to avoid complicated discussions. This reveals the authors' intention on *a priori* to favor or exclude any interpretation of the word *people*.¹²³ Article 23 (2) shows one potential interpretation of the term *people*:

¹²⁰ Murray, R., *The African Commission on Human and Peoples' Rights & International Law*, p. 34

¹²¹ Murray, R., *The African Commission on Human and Peoples' Rights & International Law*, pp. 36-37

¹²² Murray, R., *The African Commission on Human and Peoples' Rights & International Law*, p. 38

¹²³ Ougergouz, F., *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa*, p. 205

“... (a) any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;...”

The AC, which has the responsibility of ensuring the protection of human rights in Africa,¹²⁴ is known to having not examined the significance of peoples’ in a serious way. One of the reasons is said to be that the Commission is not ready to interpret the Charter in a way that can be interpreted to sympathize with the secessionist view in some parts of Africa.¹²⁵ ‘Peoples’ rights’ normally refer to the rights of a community (be it ethnic or national) to decide how they should be governed, how their economies and cultures should develop. These rights also include other rights such as the right to national and international peace and security, and the right to a clean and satisfactory environment. Solidarity rights are another name given to this category of rights.¹²⁶

The terminology itself makes it hard to determine whether collective rights are human rights or not. A human right can only be enjoyed by a human being and collective rights are ultimately destined for individuals why they therefore *ipso facto* are human rights. Since we are all human beings and belong to different kind of groups, it is not surprising that international law not only recognizes inalienable rights of individuals, but also recognizes certain communities, including peoples and nations. By separating peoples’ from human rights does not obfuscate but progressively develops international human rights in the Charter. One can say that international collective and individual rights are no different, but there is a conceptual difference between these two (peoples’ and human) rights.¹²⁷

The definition has primarily been approached in the context of the right to self-determination, where it has been used to indicate an ethnic group or a community that identifies itself as such because of common interests. A consisting part of the word’s meaning is that there has to exist an ethnic group linked by a common history where it is important to not only having a common history, but also a present state of mind. One can go deeper and say that the concept of distinct character depends on a number of criteria which may appear in combination. There is also argued that it is not possible to produce a definition covering all possible situations. From these different perspectives on what *people* might mean, it is clear that the main attributes are commonality of

¹²⁴ African Commission on Human and Peoples’ Rights, *History*

¹²⁵ Evans, M., and Murray, R., *The African Charter on Human and Peoples’ Rights*, p. 233

¹²⁶ African Commission of Human and Peoples’ Rights, *Guidelines for submission of communications - The Rights and Freedoms protected in the Charter*

¹²⁷ Kiwanuka, R N., *The meaning of “people” in the African Charter on Human and Peoples’ Rights*, pp. 60-61

interests, group identity, distinctiveness and a territorial link. Hence, *people* refer to a group of persons within a specific geographical entity as well as to all the persons within that entity.¹²⁸

Three premises can be set up for the title of the Charter. First, the individual remains the primary subject of international human rights law, second, international human rights law recognizes the existence of groups, and third, the enjoyment of individual human rights requires certain human rights to devolve directly upon groups. The third premise can be said to show peoples' sovereignty and be termed solidarity rights. These rights seek to infuse the human dimension into areas where it has all too often been missing and left to the state. The rights can only be realized through efforts by all social actors together, in other words; the individual, the state, public and private bodies and the international community.¹²⁹

4.8.5 Impact of the African charter on national law

Relevant in this aspect are the obligations of the various actors under international law. The states obligations derive from Article 1 of the ACHPR, although it has been questioned whether the Article provides the forceful obligations that can be found in other international instruments and if states in fact are bound by its' provisions. Yet, it is generally accepted that states have bound themselves by ratifying the ACHPR, "...a principle which is self-evident according to which a state which had contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure fulfillment of obligations undertaken". The UN Human Rights Committee has held that the Charter leaves it to the states to decide, in other words it is the discretion of the states how they incorporate the treaty.¹³⁰

4.8.5.1 Problems between the Charter and domestic law in practice

Since the Charter includes duties of the individual, some scholars have argued that this duty emphasizes the individual responsibility rather than the states'. Another view is that these duties are vaguely defined and could be used by states to suppress individual rights.¹³¹ On the other hand a state cannot rely on its domestic laws to avoid legal obligation under international treaties.¹³²

¹²⁸ Kiwanuka, R N., *The meaning of "people" in the African Charter on Human and Peoples' Rights*, pp. 62-63

¹²⁹ Kiwanuka, R N., *The meaning of "people" in the African Charter on Human and Peoples' Rights*, p. 60

¹³⁰ Murray, R., *The African Commission on Human and Peoples' Rights & International Law*, p. 52

¹³¹ Evans, M., and Murray, R., *The African Charter on Human and Peoples' Rights*, p. 229

¹³² Malcom, S., *International Law*, pp. 104-105

The individual is required to perform certain duties which go to the heart of African society. As mentioned above, the family has an important role in society; Article 27 of the Charter states the duty to every individual towards his family and society. The individual is, for example, obliged by Article 29 of the Charter to preserve the harmonious development of the family, and strengthen positive African cultural values. The lacking definition for some of these concepts constitute a great problem.¹³³ The duties of the individual are generally expressed as moral rules rather than legal norms in ACHPR.¹³⁴

4.8.6 Article 14 – The right to property

4.8.6.1 Public need or public interest?

The Article 14 reads as follows:

“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”

Most of the rights in the African Charter are stated in general terms. In contrast to other human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms in this Charter cannot be justified by emergencies or special circumstances. In article 14, there is a distinction between *public need* and *the general interest of the community*. The aim of the public power, to expropriate land, is to ensure that the general interest takes precedence over an individual interest when they are in conflict. A quite restricted explanation of the right of communal property could be defended by states in the name of ‘values of African civilization’. The definition does not exclude nor confirm such an understanding.¹³⁵

Article 14 in ACHPR gives the possibility of limitation to the right to property, given that they are justified by the provisions of *public need*, *general interest of the community* and are *in accordance with the provisions of the appropriate laws*.¹³⁶ These tolerate infringements of the right to property. This is solely governed by the domestic law of the state. Therefore the reference to the law in Article 14 is satisfactory from the legal standpoint, since there is nothing preventing a state from passing a

¹³³ Smith, R., *International Human Rights*, p. 127

¹³⁴ Evans, M., & Murray, R., *The African Charter on Human and Peoples’ Rights*, p. 231

¹³⁵ Ougergouz, F., *The African Charter on Human and Peoples’ Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa*, p. 153

¹³⁶ Ankumah, E., *The African Commission on Human and Peoples’ Rights – Practice and procedures*, p. 142

law that enables it to expropriate an individual for “public need” or “the general interest”, since it has sovereign power to determine what such need may comprise.¹³⁷

In Namibia and in Ghana for example, the Constitution itself will give provisions, because land reform will mean a limitation to the right of ownership. Hence, the Constitution itself will be the primary source to give the Government or Parliament the power to act within that legislation for land reform. In the Namibian Constitution, for example, it is stated that the state can expropriate property in situations where the state needs land, but cannot get it other than through expropriation. This can be done accordingly to that it has to be for public interest, but the Namibian Constitution does not determine what public interest is.¹³⁸

Otherwise, traditionally, public interest has been defined like, in the case of Ghana, for infrastructure, development, health, safety etc. That is the traditional concept of public interest emanating from the concept of eminent domain, where the state can expropriate for certain purposes. With these certain purposes, the individual receive a stronger right to property and with defining it in the Constitution is a better protection for the individual.¹³⁹

4.8.6.2 Expropriation and compensation

Expropriation is one of the tools for the public power to ensure that the general interest is prioritized over individual interest when they conflict, and is governed by the domestic law of the state. In other words, Article 14 does not stipulate anything that prevents a state from enabling laws allowing expropriation of land from an individual for the mentioned reasons, since it is in the state’s sovereign power to determine the domestic laws.¹⁴⁰ This is clarified by the fact that the ACHPR, unlike other human right treaties, does not clearly state under which circumstances the right to property may be limited.¹⁴¹

It is of importance to mention that the Charter does not express any provisions for the compensations in situations of expropriation.¹⁴² Even if Article 14 regulates such an important

¹³⁷ Ouguergouz, F., *The African Charter on Human and Peoples' Rights*. *A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, p. 152

¹³⁸ Interview with professor Sam K. Amoo, 2011-09-15

¹³⁹ Ibid.

¹⁴⁰ Ouguergouz, F., *The African Charter on Human and Peoples' Rights*. *A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, p. 153

¹⁴¹ Ankumah, E., *The African Commission on Human and Peoples' Rights – Practice and procedures*, p. 142

¹⁴² Obisienunwo Orlu Nmehielle, V., *The African human rights system: its laws, practice, and institutions*, p. 119

right as the right to property, there is very little practice by the AC to determine the breadth and applicability of the article.¹⁴³

There is one known case regarding the right to property in which the victim had been deprived of his property and suffered economic losses because of the expropriation. The Commission did not, however, settle the question of whether the right to property in Article 14 had been violated or not.¹⁴⁴

In the Kessel case, one of the issues was if the farm workers on expropriated farms were negatively affected when they had to move in favor for the formally disadvantaged black population and if this could constitute public interest. The government, in the context of the land or because of the land reform, should be able to determine what amounts to public interest.¹⁴⁵

The principle of expropriation is not disputed in international law, but the ways of expropriation are widely discussed and more particular the obligation to compensate. Here, as the principle of expropriation, only the principle of compensation is accepted and no consensus having been reached on how the compensation should be executed. In Article 21 (2 and 3) of ACHPR the position of the African states are clearly shown:¹⁴⁶

“1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.”

The common view is that Article 14 includes both individual and collective rights to property and also leaves some freedom of choice for the state parties to the ACHPR to determine their domestic legislations.¹⁴⁷

¹⁴³ Obisienunwo Orlu Nmehielle, V., *The African human rights system: its laws, practice, and institutions*, p. 120

¹⁴⁴ Case John K. Modise v. Botswana, Communication No. 97/93, note 405

¹⁴⁵ Interview with professor Sam K. Amoo, 2011-09-15

¹⁴⁶ Ouguergouz, F., *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa*, p. 153

¹⁴⁷ Ouguergouz, F., *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa*, p. 154

4.8.6.3 Limitations

The only legitimate reasons for the limitation of the rights and freedoms of the Charter are stated in the general clause, Article 27 (2), “the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.” The effect of this limitation shall never undo the rights in question and must always be strictly interpreted. Freedom and liberty are the rules and the limitation is the exception.¹⁴⁸

4.9 Traditional African view on land and property rights

4.9.1 The nature of indigenous tenure land rights

To analyze Africa in this context is to generalize, but there are a select number of views that are said to be common throughout the continent when it comes to the perspectives on land. Therefore, these will be presented to give a perspective on the underlying traditions which have influenced Article 14 of the ACHPR.

Compared to the Western philosophy on ownership, the African view is very different from European values. Since Africa has a wide range of cultural traditions, natural conditions and political systems, it can be problematic to make general assumptions and statements about indigenous land rights. However, some common features can be presented in this context. These tenure land right systems give the community the right to the land. The land is also seen as a part of the social system, therefore the question of who has the right to use the land is determined by birth, common residence, social status or some combination of these factors. Transactions of the land are therefore considered limited to the members of the lineage.¹⁴⁹

Throughout history, agriculture in Africa has been characterized by a relative abundance of land and a need to relocate depending on the season. Despite these facts, individuals and families are able to claim unending interest in the land if they have invested labor or capital, and the same interests are inherited in the family and can be given to them by free will.¹⁵⁰

However, the land cannot be owned in the same way as the Western worlds' view on ownership, and it is only the *interest* that is inherited. The investment of labor or capital is used as a way to

¹⁴⁸ Ouguergouz, F., *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa*, pp. 433-435

¹⁴⁹ The World Bank Economic Review, vol. J. NO, p. 158

¹⁵⁰ The World Bank Economic Review, vol. J. NO, p. 158

exclude others from farming the land. Uncultivable land, forests and fishery are considered as common property which cannot be handed down in the same way as the interest in pasture land.¹⁵¹

Common property, also called *common pool resources*, can be defined as “public goods which are used simultaneously or sequentially by different users because of difficulties in claiming or enforcing exclusive rights”. The ‘communal’ character of the rights means, more or less, that there is a degree of community control over who can be part of the group as well as who qualifies for access and use of the land.¹⁵² However, the definition of common property can change over time. For example, a family-held field can be defined as private property over the cropping season and can pass to common property during the dry season.¹⁵³

4.10 Southern Africa Development Community and the Tribunal

4.10.1 Introduction to the SADC

“Who is SADC? I am SADC!”

- Peter Chamada, relative to one of Mugabe’s ministers

The Southern African Development Community (SADC) started in 1980 as the Southern African Development Coordination Conference (SADCC) with the objective of political liberation of Southern Africa. At a summit in 1992, the Heads of State and Government signed the SADC Treaty and Declaration which transformed SADCC into the SADC.¹⁵⁴

The vision of SADC is a shared future that will ensure economic prosperity, development of standards of living and quality of life, liberty and social justice, peace and security for the people of Southern Africa. This mutual vision is rooted in common values, principles and the historical and cultural relationship that has existed between the people of Southern Africa since ancient times. SADC objective is governed by Article 5 of the Treaty, which specifically required promoting and defending the security and peace.¹⁵⁵

¹⁵¹ Ibid.

¹⁵² Toulmin, C., & Quan, J., *Evolving land rights, policy and tenure in Africa*, p. 152

¹⁵³ Toulmin, C., & Quan, J., *Evolving land rights, policy and tenure in Africa*, p. 154

¹⁵⁴ *Introducing SADC*

¹⁵⁵ *SADC Vision and Objectives*

The Tribunal was established under Article 9 of the SADC Treaty as one of the institutions of SADC in 1992.¹⁵⁶ One of the most important components for the Tribunal's sustainability has been its legitimacy and effectiveness in regional integration. Article 16 of the Treaty describes the Tribunal's mandate and jurisdiction:

*“... to ensure adherence to a proper interpretation of the provisions of the Treaty, subsidiary instruments and to adjudicate upon disputes referred to it,¹⁵⁷ [and] [to] give advisory opinions on such matters as the Summit or Council may refer to it”.*¹⁵⁸

The decisions of the Tribunal are meant to be to be final and binding.¹⁵⁹ Interesting to mention is that the SADC Tribunal was inspired by the European Union model as a dispute resolution between states, thus the member states view on the Tribunal was that it should serve as a dispute resolution institution that would not necessarily affect their sovereignty.¹⁶⁰ Article 32 of the SADC Protocol states:

“1. The law and rules of civil procedure for the registration and enforcement of foreign Judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement.

2. States and institutions of the Community shall take forthwith all measures necessary to ensure execution of the decisions of the Tribunal.

3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.

4. Any failure by a State to comply with a decision of the Tribunal by any party concerned.

5. If the Tribunal establishes the existence of such a failure, it shall report its finding to the Summit for the latter to take appropriate action.”

¹⁵⁶ The SADC Tribunal is the African counterpart to the European Court of Human Right in Strasbourg

¹⁵⁷ Article 16 (1) SADC Treaty

¹⁵⁸ Article 16 (4) SADC Treaty

¹⁵⁹ Article 16 (5) SADC Treaty

¹⁶⁰ Manokore, L M., *Contextualising the SADC Tribunal and the land issue in Zimbabwe – A sociolegal perspective*, p. 4

The Tribunal, with its applicable laws in the said jurisdiction, decision enforcement, its independence, impartiality and the protection of human rights, is still closely supervised by third parties since it is not a self-financing institution and is therefore dependent on external financing. Due to these facts, there is a danger of third party influence in the decision-making.¹⁶¹

The SADC Tribunal has recently ruled over land disputes in Zimbabwe, such as the so-called Campbell Case, which was initiated in 2007.¹⁶² In this case, Article 4 was actualized, which stipulates that SADC and its member states shall act in accordance with the principles of human rights, democracy and the rule of law. Since the Tribunal's establishment, 19 cases have been brought up to be ruled over, and 11 of which were against the Government of Zimbabwe. The majority of these cases concerned the country's ongoing land reform program.¹⁶³

As an international organization, SADC is bound to act in accordance and within the scope of the constituent documents governing its institutions. It will be shown that although a decision to review the Tribunal is not itself problematic, the suspension of the Tribunal and failure to fill Tribunal vacancies is not authorized by nor compatible with the SADC Treaty, Tribunal Protocol and the Tribunal's Rules of Procedure and is therefore *ultra vires*.¹⁶⁴ While the Tribunal has the mandate to develop its own jurisprudence, it must also give regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law applicable in member states.¹⁶⁵

Worth mentioning, however, is that the SADC Tribunal was recently suspended, since too few member states signed the SADC Protocol. Currently, the legal status of the Tribunal is therefore uncertain.¹⁶⁶

4.10.2 Human rights in SADC law

In the Mike Campbell Case, the SADC Tribunal clarified that Article 4 (c) of the SADC Treaty requires member states to comply with human rights.¹⁶⁷ In the Barry Gondo Case the Tribunal also determined that Article 6 (1) stipulates the same obligation for member states.¹⁶⁸

¹⁶¹ Manokore, L M., *Contextualising the SADC Tribunal and the land issue in Zimbabwe – A sociolegal perspective*, p. 4

¹⁶² Ibid.

¹⁶³ Ndlovu, P N., *Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal*, p. 64

¹⁶⁴ The Commercial Farmers' Union of Zimbabwe, *Legal opinion on decision on SADC Tribunal*

¹⁶⁵ See Article 21 (b) of the Protocol

¹⁶⁶ Interview with Professor Sam K. Amoo, 2011-09-15

¹⁶⁷ Mike Campbell (Pvt) Limited and others vs. The Republic of Zimbabwe, Case No. 2 of 2007

¹⁶⁸ Gondo and others vs. The Republic of Zimbabwe, Case No. 5 of 2008

Article 4 (c) states “SADC and its Member States shall act in accordance with the following principles: ... human rights, democracy and rule of law.” The phrase ‘shall act’ defines a binding obligation and therefore member states must, in this context, oblige to human rights.¹⁶⁹ Even if the wording of the Article is clear, there remain some objections as to whether or not it is a binding obligation. The main objection is that since the word *principles* is used and therefore of non-binding nature, but it is doubtful if such a line can be drawn between the words principle and *rules*, even as a matter of legal theory. This protestation does not consider the longstanding usage in international law of the word *principles* as a reference to binding obligations.¹⁷⁰

Article 6 (1) states that “Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.” As stated, the language of binding obligations is used in this provision: Member States *inter alia* shall refrain from taking specified measures. Thus, there are some problematic aspects to this provision and the major one seems to be the unspecific objectives. This makes it hard to determine which measures are ‘likely to jeopardize’ any of the SADCs objectives, but at the same time Article 6 (1) refers to the principles in Article 4. This gives the somewhat indistinct provision that an objective determination of the standard can be applied.¹⁷¹

¹⁶⁹ Bartells, L., *Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal*, p. 9

¹⁷⁰ Ibid.

¹⁷¹ Bartells, L., *Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal*, p. 11

5 NATIONAL LAW OF ZIMBABWE

5.1 Introduction

The courts of Zimbabwe are organized as a pyramid, with numerous local courts at the base, courts of appeal in the middle and the High Court at the top, presided over by a chief justice where the president appoints the High Court's justices.¹⁷²

The precedent refers to past decisions of the superior courts and establishes the legal positions of cases ruled over in the courts and establish the reasoning for decisions made by the judges in each particular case. Equally, precedents therefore guide the courts in making future decisions in similar cases brought before them.¹⁷³

The maxim *Stare Decisi at non queta movere* best sums up the use of case law in Zimbabwe. The maxim means to stand by old decisions and not disturb settled points. Supreme Court decisions in Zimbabwe are binding on all interior courts. High court rulings also bind the lower courts such as the Magistrates courts.¹⁷⁴

5.2 The Constitution

5.2.1 The current Constitution

*“I, Robert Mugabe, cannot be dragged to court by a settler. If white settlers just took the land from us without paying for it, we can in similar way, just take it from them, without paying for it, or entertaining any ideas of legality and constitutionality”.*¹⁷⁵

Section 3 of the Constitution of Zimbabwe declares that the Constitution is the supreme law of the country and any other law which is inconsistent with it is deemed as void to the extent of that inconsistency.¹⁷⁶

¹⁷² Arnold, J R., & Wiener, R., *Robert Mugabe's Zimbabwe*, p. 94

¹⁷³ Saki, O., & Chiware, T., *The Law in Zimbabwe*

¹⁷⁴ Ibid.

¹⁷⁵ The quote origins from a ZANU Central Committee meeting in September 1992 see D'Engelbronner-Kolff, M., *The provision of non-formal education for human rights in Zimbabwe*, pp. 34-35

¹⁷⁶ Section 3 of the Constitution of Zimbabwe states: “This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”

The current Constitution of Zimbabwe is the result of a settlement agreement reached at Lancaster House in England in the year 1979. It sets out the State Structure, the Bill of Rights, the Judiciary, the Legislature and other administrative institutions such as the Public Service Commission. The Constitution has been amended 27 times in period of over 20 years. Today, the ongoing question is whether all changes are of interest to Zimbabweans but rather for the benefit of the current ruling party. A Constitutional Committee (COPAC) has been established to assist the constitutional making process and after 31 years from independence, Zimbabwe will see itself as having a national developed Constitution.¹⁷⁷

The Lancaster House Agreement of 1979¹⁷⁸, which the current Constitution is based on, was meant to be transitory piece of legislation which would change after independence, peace and stability. However, it had provisions which did not allow any modifications before the lapse of ten years. In particular Section 16, which dealt with issues pertaining to land as private property.¹⁷⁹

5.2.2 Section 16 of the Constitution – The Property Clause

The Property Clause can be found in Section 16 of the Constitution. From an international perspective, a property clause is not a self-evident part of a constitution. Many states with a constitutional order have protected the right to property, but far from all.¹⁸⁰ Even if the property clause provides protection for private property, at the same time, it provides for land reform through Section 16B. Even here, the conflict between the right to redistribution and the right to protection of property is quite clear and will be discussed further in PART III, but nevertheless it is an issue of the most intense political contestation in Zimbabwe's post-colonial history.¹⁸¹

The Government of Zimbabwe claims that Section 16 of the Constitution protects the right to property and, accordingly, this section has been amended to provide for further occurrences when property can be compulsory acquired in cases of public interest, which are required to complete the ongoing land reform program. Amendment No. 17, which is the amendment to Section 16, removed the courts jurisdictions to rule over cases regarding land acquisitions by the

¹⁷⁷ Saki, O., & Chiware, T., *The Law in Zimbabwe*

¹⁷⁸ See chapter 3.4 The Lancaster House Constitution in the thesis

¹⁷⁹ Saki, O., & Chiware, T., *The Law in Zimbabwe*

¹⁸⁰ For example in Sweden, the right to private property is protected through kap. 2 § 18 regeringsformen

¹⁸¹ Chitsike, F., *A Critical Analysis of the Land Reform Programme in Zimbabwe*, p. 10

state.¹⁸² It also relieves the Government of Zimbabwe from the responsibility of compensating the deprived party for the property acquired through the same section.

16A - Agricultural land acquired for resettlement

(1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance -

(c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land;

and accordingly—

(i) **the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement**, through an adequate fund established for the purpose; and

(ii) if the former colonial power fails to pay compensation through such a fund, **the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.**

These provisions can be said to derive from the Lancaster House Agreement, where Britain promised to financially assist Zimbabwe in their land reform when becoming an independent state in 1980.¹⁸³ During the first two decades after independence, Britain provided financial assistance through a “land resettlement grant” and economic support to the Government of Zimbabwe.¹⁸⁴ Britain is here referred to as “the former colonial power” and it is quite clear that the Government of Zimbabwe, even today, lean strongly against this promise.

5.3 Customary law

The customary law of Zimbabwe is normally unwritten and expresses the customs and practices of the tribes of Zimbabwe, which have existed since time immemorial. The nature of customs has to be certain, reasonable and have obtained the recognition of formal law.¹⁸⁵ The Zimbabwean Constitution establishes the recognition of African Customary Law through Section

¹⁸² Shadow Report to The African Commission on Human and Peoples’ Rights, *Zimbabwe: Human rights in crisis*, p. 10

¹⁸³ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 7

¹⁸⁴ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 11

¹⁸⁵ Compare chapter 4.2 Customary law in the thesis

89 of the Constitution with the wording “Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law...”.

The customary law of Zimbabwe is limited in scope in its application. Section 3 of the Customary Law and Local Courts Act details the circumstances under which Customary law is to apply and reads as follows;

Application of customary law

(1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires-land

(a) customary law shall apply in any civil case where-

(i) the parties have expressly agreed that it should apply; or

(ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or

(iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;

(b) the general law of Zimbabwe shall apply in all other cases.

(2) For the purposes of paragraph (a) of subsection (1)-

"surrounding circumstances", in relation to a case, shall, without limiting the expression, include-

(a) the mode of life of the parties;

(b) the subject matter of the case;

(c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which apply to the case;

(d) the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe, as the case may be.

5.3.1 A comparison with Namibia

Customary law in Namibia has never been defined in legal documents, but there is a formal legal definition in Traditional Authorities Act 2000 (Act No. 25 of 2000). There, the definition of customary law is for example norms and usages in traditional community in so far as they are in accordance with the Constitution of Namibia and do not conflict with any other written law in the country. Further, traditional communities consist of a homogenous group of persons which

share for example the same customs and traditions. This view on traditional community, the importance of homogeneity, has been a popular debate issue and legal discourse on commercial land enclosures.¹⁸⁶

Due to several cases during the years, the meaning of customary law has been brought up in courts.¹⁸⁷ In this context, customary law can be said to always be subordinate to statutory law.¹⁸⁸

It is argued that customary land tenure is related to an entity that is the same now as it was in the mid-1950s and at the independence. This misleading notion can be compared to changes in customary law in the 1990s. For example, today even unmarried women and individuals can buy piece of land for themselves or for their young children, which states that customary law has changed.¹⁸⁹

Any member of a traditional community will give the same information about customary law because communities are homogeneous and customary law is uncontested. Customary law is a living law where flexible principles and rules are consisting in this law where the community has authority to amend. It is argued that codification of customary law will destroy the most important qualities, namely openness for solving problems with reconciliation instead of instruments in written law to settle the case. If a codification of customary law is enforced, this will lead into an act of parliament and moreover imply that customary law is no longer belonged to the communities in which it developed. Customary law constantly evolves and the flexibility allows new interests and changed political environments to be accommodated.¹⁹⁰

5.4 Laws allowing the Fast Track Land Reform Programme

5.4.1 Constitutional protection

Most constitutions of the world, which also is the case in Zimbabwe, contain stated or implied recognition of the right to property. The Constitution of Zimbabwe guarantees the right to property in Chapter III Section 16, although the latest amendments have expanded the grounds

¹⁸⁶ Werner, W., *What has happened has happened – The complexity of Fencing in Namibia's Communal Areas*, pp. 4-5

¹⁸⁷ See especially Kaputuza and Another vs. Executive committee of the Administration for the Hereros and Others, 1984 (4) SA 295 (SWA), p. 138 and Abuid Uazengisa and Others vs. The Executive Committee of the Administration for the Hereros and 11 Others, 1987, p. 21

¹⁸⁸ Werner, W., *What has happened has happened – The complexity of Fencing in Namibia's Communal Areas*, pp. 4-5

¹⁸⁹ Werner, W., *What has happened has happened – The complexity of Fencing in Namibia's Communal Areas*, p. 6

¹⁹⁰ Werner, W., *What has happened has happened – The complexity of Fencing in Namibia's Communal Areas*, pp. 8-9

on which property can be compulsorily acquired.¹⁹¹ The exception to the right to property, which also is the main legal basis for the Fast Track Land Reform Programme, is stated in Section 16B.

16B – Agricultural land acquired for resettlement purposes

- (2) Notwithstanding anything contained in this Chapter -
- (a) all agricultural land...
 - (b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.**
- (3) The provisions of any law referred to in section 16 (1) regulating the compulsory acquisition of land... a person having any right or interest in the land-
- (a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;**

The underlying principle of Section 16B is that a state has an inherent right to compulsorily acquire private property within its territory for public purposes and to pay no compensation for the property acquired, except for improvements on the land.¹⁹²

The state of Zimbabwe, the acquiring authority, does not need to give a notice of intention to acquire the land to the present owner before acquisition and neither is it obliged to state that the acquisition is reasonably necessary for resettlement purposes.¹⁹³

5.4.2 Land Acquisition Act – compulsory acquisition of land by the President

In 1992, a number of white commercial farmers challenged the then existing Land Acquisition Act in terms of constitutionality. According to this ruling, there was no doubt that a program like the Fast Track Resettlement Programme was in the public interest since the people of Zimbabwe had been deprived of their property through a fraudulent and wrongful process during the colonial-era.¹⁹⁴ Later in 1996, the Supreme Court sitting as the Constitutional Court determined

¹⁹¹ CHORE Africa Programme Mission Report, *Land, housing and property rights in Zimbabwe*, p. 44

¹⁹² The law in Zimbabwe – The legislatur

¹⁹³ Mike Campbell (Pvt) Ltd. and Another vs. Minister of National Security Responsible for Land, Land Reform and Resettlement, Judgment No. SC 49/07

¹⁹⁴ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 7

that the Land Acquisition Act was constitutional since the acquisition of land was based on public interest.¹⁹⁵

After the elections in 2000, the re-elected ZANU-PF government amended the Land Acquisition Act as one of the measures to accelerate the land reform program. The main effect of this amendment is to relieve the Government of Zimbabwe of the requirement to pay any compensation for compulsory acquired land for redistribution. The provisions apply only to the acquisition of agricultural land for resettlement and there is no obligation for the government to show that the land is appropriate for resettlement. The Act also contains several amendments that remove different obstacles for the government to put the land reform on a “fast track”. Even if the amendment to the law is controversial, clearly it simplifies the acquisition of land for resettlement purposes and gives the Zimbabwean government ‘free-hands’ to do so.¹⁹⁶ Under Section 8 of this act, more than 2 900 of total 4 500 white commercial farmers were given 45 days to stop production, and another 45 days to leave their properties. The Act sought to give legal cover to the executive lawlessness.¹⁹⁷ Section 8 of the Act has been legally challenged in the Supreme Court of Zimbabwe where one judge gave a minority opinion saying the Section was unconstitutional.¹⁹⁸

In 2001, Robert Mugabe used his presidential powers and amended the Land Acquisition Act with retroactive effect from 2000. This meant that land was immediately transferred without any legal challenges, to the acquiring authority.¹⁹⁹

A High Court ruling in November 1994 stated that Zimbabwe was a sovereign state and entitled to the compulsory acquisition of property in the public interest, which contained resettlement. Further, the ruling argued that the Constitution provided compensation on such acquisition that designation was not acquisition without compensation. Due to the ruling, the Land Acquisition Act was a reasonable way to resolve the different perceptions and desires of Zimbabweans within a constitutional framework. The land question was placed in a broader historical and social context in the High Court ruling. Anyway, the Land Acquisition Act could and indeed has been used arbitrarily as a political weapon.²⁰⁰

¹⁹⁵ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 17

¹⁹⁶ Coldham, S., *Land Acquisition Act, 2000 (Zimbabwe)*, pp. 227-229

¹⁹⁷ Campbell, H., *Reclaiming Zimbabwe, The Exhaustion of the Patriarchal Model of liberation*, p. 57

¹⁹⁸ Freeth, B., *Mugabe and the white African*, p. 128

¹⁹⁹ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 21

²⁰⁰ D’Engelbronner-Kolff, M., *The provision of non-formal education for human rights in Zimbabwe*, pp. 34-35

5.4.3 The Rural Land Occupiers (Protection from Eviction) Act

The Rural Land Occupiers (Protection from Eviction) Act was enacted with the purpose of protecting occupiers on land that was not yet acquired by the government in 2001. This Act refers to the Land Acquisition Act in 2 (2) and stipulates that “a person occupying rural land who... would be subjected to any legal proceedings..., shall be a protected occupier of rural land”. The occupier will be protected from eviction if (1) he was occupying the land on the fixed date and is still occupying the land at the date of commencement of the Act, (2) he occupied such land in anticipation of being resettled by an acquiring authority on that or any other land for agricultural purposes in terms of the Land Acquisition Act and (3) he qualifies for settlement on that or any other land in accordance with the relevant administrative criteria fixed by an acquiring authority for the resettlement of persons for agricultural purposes. Also anything contrary in any other law, but subject to the Rural Land Occupiers Act, no court can issue any kind of order in purpose to recover land from a protected occupier.²⁰¹

5.4.4 The rule of law and the Fast Track Land Reform Programme

As discussed above, the land reform process was mainly based on the Land Acquisition Act and one of the laws that guided the land reform was Rural Land Occupiers Act. The latter act legalized the illegal occupations of land that had belonged to white farmers, stating in Section 3 (1) that the occupiers would be protected for a period of time.²⁰² This act also invalidated previous orders in this matter from the High Court and Supreme Court in Section 3 (3).

The question that naturally arises is whether the legality of the land reform process can be determined to be legal or not since the Supreme Court and the High Court have carried out different rulings. The disregard of the rule of law during the implementation of the fast track land reform programme, has mostly affected the poor, black Zimbabweans who do not have the means for escaping the ongoing violence or securing their belongings and livelihoods.²⁰³ The land reform is aiming at repairing historical injustices, but the fear is that it may also create new ones that will be more difficult to solve in the future.²⁰⁴

²⁰¹ The Rural Land Occupiers (Protection from Eviction) Act Section 3 (1) and 3 (2)

²⁰² Ruswa, G., *Too fast, too furious? An interrogation of progress in the land reform process in Zimbabwe*, p. 23

²⁰³ Sida studies, *Of Global Concern*, p. 156

²⁰⁴ Ibid.

The program has also been criticized for being a parody of rule of law since it violates fundamental human rights, Zimbabwe's obligations under international law and not following the municipal courts' orders.²⁰⁵

Exceptions to the right to property must exist for a declared public interest objective, but the process and conditions for such derogation must be clearly stipulated by law. The law must also, in this aspect, guarantee the right of the affected person to challenge any such limitations before courts and tribunals. The government has a duty to protect existing land rights but it also has an obligation to increase the access of marginalized groups to land and land resources. By doing this, the country fulfills its' constitutional and international human rights obligations to respect, protect, promote and secure the rights of everyone to internationally guaranteed human rights.²⁰⁶

²⁰⁵ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 2

²⁰⁶ CHORE Africa Programme Mission Report, *Land, housing and property rights in Zimbabwe*, p. 45

PART III

6 CASE STUDIES

6.1 Introduction to the cases

As declared before, a state can never rely on its national legislation to avoid its legal obligations under treaty law. It is therefore no defense to an international breach that the state claims to have been following the rules of its domestic law. Also, it has been illustrated that international law is not mainly the domain of the state, but that the role of other entities such as individuals is just as important.

The right for governments to acquire land for public interests is a commonly recognized right and the aim is to ensure that the general interest takes precedence over an individual interest when they are in conflict, but this can only be done by fulfilling three conditions; it has to be prompt, adequate and an effective compensation has to be paid by the expropriating state. In the case that the compensation is not paid, the taking of property is considered unlawful and as confiscation. Thus, the ACHPR does not express any provisions for the compensations in situations of expropriation. The principle of expropriation is not disputed in international law, but the ways of expropriation are widely discussed and more particular the obligation to compensate. The right for the individual to challenge expropriation decisions is stated in international treaties, the complainant must have the chance to challenge the decision of compulsory acquisition and bring the matter in front of an impartial and competent court.

Due to *pacta sunt servanda* and the Vienna Convention Article 26, every party to a treaty is bound by the whole content, and parties to the African Charter shall respect the requirements of the charter to the full. The only way to not undertake an article in the treaty is if the article is limited. Article 14 in ACHPR gives the possibility of limitation to the right to property, given that they are justified by the provisions of *public need, general interest of the community* and are *in accordance with the provisions of the appropriate laws*. These tolerate infringements of the right to property. This is solely governed by the domestic law of the state and there is nothing preventing a state from passing a law that enables it to expropriate an individual for “public need” or “the general

interest". In this context, the SADC Treaty provides for binding obligations for member states to comply with human rights through Article 4 (c) and Article 6 (1).

With these principles in mind, a study of cases in this part is conducted in an effort to determine which party is given the property rights in different disputes over land and what role the stated principles of international law play in this context. The parties have very different backgrounds, which is why they cannot be regarded as one homogenous group. Therefore the aim is to focus on the legal basis and principles which give property rights to one party or another.

The Charter of Fundamental Social Rights in SADC embodies the recognition of human rights as described in the African Charter of Human and Peoples' Rights.²⁰⁷ Therefore we analyze cases both from the SADC Tribunal and the AC. We have also studied other cases of significance which have had influence in the relevant legal area of property rights.

6.1.1 Mike Campbell (Pvt) Limited and others vs. The Republic of Zimbabwe²⁰⁸

In October 2007, Mike Campbell (PVT) Limited brought a case before the SADC Tribunal challenging the acquisition of agricultural land in Zimbabwe by the government. The case was at the time pending in the Supreme Court which had not yet settled the case. Campbell argued that the process of land acquisition in Zimbabwe was illegal in accordance with Article 6 of the SADC Treaty and that of the African Union Charter. He also stated that an interim measure had to be taken to interdict the Zimbabwean government from acquiring Campbell's land until the finalization of the case.²⁰⁹ One of the central problems of this case is the relationship between the legal regime of SADC on the one side and Zimbabwe's national law on the other.²¹⁰

As been said before, the case also actualizes Article 4 of the SADC Treaty where the commitment to act in accordance to the principles of human rights is of particular interest. Since the right to property is considered as a human right, according to a number of international legal instruments.

²⁰⁷ The Charter of Fundamental Social Rights in SADC, Article 3

²⁰⁸ Mike Campbell (Pvt) Limited and others vs. The Republic of Zimbabwe SADC (T) (Case No. 02/2007)

²⁰⁹ Manokore, L M., *Contextualising the SADC Tribunal and the land issue in Zimbabwe – A socio –legal perspective*, pp. 4-5

²¹⁰ Ruppel, O., & Bangamwabo F X., *The SADC Tribunal: A legal analysis of its mandate and role in regional integration*, p. 6

The Zimbabwean government on their part argued that the land acquisition process was based on natural justice principles whereby the black indigenous people of Zimbabwe must be given back their land, since the land was taken away from them through illegal measures and processes of the colonialism. Campbell had also failed to exhaust all options provided under domestic law.

The Constitution, Amendment Act No. 17 of 2005, gave the government the right to expropriate farmland without compensation and hindered courts from ruling over legal challenges considering such matters. Section 2 (2) of the amendment provides that “all agricultural land... is acquired by and vested in the State with full title therein...; and...no compensation shall be payable for land referred to in Paragraph (a) except for any improvements effected on such land before it was acquired”.

The practical implications of the Constitutional Amendment Act No. 17 resulted in farm expropriations, where the majority of the white farmers were evicted with force from their farms with no compensation, since the Zimbabwean government considered the land stolen in the first place. The government has only compensated a few farmers for their developing work on the land and other improvements. The Zimbabwean Supreme Court (sitting as a Constitutional Court) later ruled in the Campbell Case at a domestic level, that “by a fundamental law, the legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded”.

In its final decision, the SADC Tribunal ruled in the favor of Mike Campbell and the 77 other farmers that had co-applied to the case, and concluded that the Republic of Zimbabwe was in breach of the obligations stated in Articles 4 (c) and 6 (2) of the SADC Treaty. The Tribunal also ruled that a fair compensation for the compulsorily acquired land should be paid by Zimbabwe. The Campbell Case is the only case the Tribunal has heard that dealt with substantive human rights issues. The Tribunal has the potential to implement and apply international human rights instruments, which it did not do in this case, but the Tribunal considered different arguments relating to international law and made several comparative analyses based on international human rights law.²¹¹

²¹¹ Mike Campbell (Pvt) Limited and others vs. The Republic of Zimbabwe SADC (I) (Case No. 02/2007)

6.1.2 Cases from the African Commission on Human and Peoples' Rights

The AC has little case law on the right to property, but some of these will here be presented and discussed.

6.1.2.1 *Leite vs. the Government of Seychelles and Another*²¹²

This petition was based on a notice of intended acquisition dated 20 September 2001. The purpose of the proposed acquisition was stated herein as 'for housing development'. No "notice to treat" had been served on the petitioner. In August 2000, the counsel for the petitioner was informed that the government did not wish to continue with the published acquisition, but was still interested in negotiating to purchase part of the petitioner's land. The petitioner stated that he does not wish to part with his property and he also mentioned that he has no other land. He stated that the proposed acquisition was not in the public interest and that there are political reasons for the acquisition.

The court refers to another similar case, *Perera vs. R Premadasa & Ors* (1979) that "the discrimination on the grounds of political opinion must be deliberate on the part of the person or persons who had the power under the Land Acquisition Act to acquire lands for a public purpose and that on the basis of the facts of that case, the petitioner had failed to prove that the decision to take possession of the lands was taken for the sole purpose of taking political revenge", as alleged.

There are several limitations for the right to property and the limitation relevant to the present matter is acquisition "in the public interest". The Court argued in this case that the term "public interest" is wider than the term "public purpose" in its scope and application. In terms of the definition of "public interest", the acquisition to be of public interest should *inter alia* be "to promote the public welfare". Public welfare is later on described as "the prosperity, well-being or convenience of the public at large, or of a whole community, as distinguished from the advantage of an individual or limited class".²¹³

²¹² *Leite vs. the Government of Seychelles and Another* (2003) AHRLR 222 (SyCC 2002)

²¹³ Para 12-15 in the case

The court came to the judgment that the intended acquisition of a part of the petitioner's land, did not contravene the fundamental right to property guaranteed in article 26 (1) of the Seychelles Constitution.²¹⁴

6.1.2.2 John K. Modise vs. Botswana²¹⁵

John K. Modise was born in South Africa and had been a Botswana citizen since 1995. His father, a Botswana citizen, immigrated to South Africa to work there. During the father's stay, he got married and the Complainant was born of that marriage. The mother died shortly after his birth, and he was thus brought to Botswana, where he grew up. The Complainant is claiming Botswana as his nationality since the government confiscated his property based that he at the time was a South African citizen.

In the judgment, the state argues that the complaint misunderstood and misinterpreted Section 20 (2) of the Constitution of Botswana. Section 20 (2) concerns those individuals born outside the protectorate of Bechuanaland and who were at the time of their birth either subjects of Her Majesty or crown protected persons and whose fathers had acquired Botswana citizenship in compliance with the provisions of Section 20 (1).

Mr. Modise was not a subject of Her Britannic Majesty and of her colonies, nor a protected person of the English crown. South Africa was at that time not a British colony. The Complainants arguments were weak since he did not belong in the protectorate of Bechuanaland. He could not claim Botswana nationality by parentage because he was explicitly excluded there from by Section 20 (2) of the Constitution.

The complainant argues that he has suffered financial losses since the government confiscated his property. The Government of Botswana has not disproved this claim. "It is trite law that where facts go uncontested by a party, in this case, the Respondent State, such would be taken as given. The Commission therefore finds the above action of the Government of Botswana an encroachment of the Complainant's right to property guaranteed under Article 14 of the Charter."

²¹⁴ Para 22

²¹⁵ John K. Modise vs. Botswana, African Commission on Human and Peoples' Rights, Comm. No. 97/93 (2000)

6.1.2.3 Media Rights Agenda and Constitutional Rights Project vs. Nigeria²¹⁶

In this case, the AC ruled that the state of Nigeria had violated Article 14 of the ACHPR based on the government's sealing up of the premises of a number of publications. In doing so, the Commission verified the legality of the government measures and at the same time exploring the article to the limit. As said before, the article permits infringements on the right to property on two conditions; that they are laid down in "the provisions of appropriate laws" and that they are taken "in the interest of public need or in general interest of the community".

The decision is considered as extremely important since the Commission has made a restrictive interpretation of the limitations clauses on the rights guaranteed by the Charter, and hence an interpretation favorable to the individual.²¹⁷ The right was defined as follows:

"The right to property necessarily includes a right to have access to property of one's own and the right that one's property not be removed. The decrees which enabled these premises to be sealed up and for publications to be seized cannot be said to be "appropriate" or in the interest of the public or the community in general. The Commission holds violation of Article 14. In addition, the seizure of the magazines for reasons that have not been shown to be in the public need or interest also violates the right to property".²¹⁸

6.2 Other cases of significance

6.2.1 Gramara (Pvt) Limited and Another vs. Republic of Zimbabwe

The two applicants herein were parties together with 77 others in a judgment that was delivered SADC Tribunal in the case of Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe. The Tribunal gave its judgment in favor of the applicants on the 28th of November 2008. They now wanted an order for the registration of the decision of the Tribunal for the purposes of its enforcement in Zimbabwe.

²¹⁶ Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project vs. Nigeria, Twelfth Annual Report of the Commission – 1998/1999.

²¹⁷ Ouguergouz, F., *The African Charter on Human and Peoples' Rights – A comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, pp. 152-155

²¹⁸ Evans, M. & Murray R., *The African Charter on Human and Peoples' Rights – The System in Practice*, pp. 174-175

This case was settled in the High Court of Zimbabwe and mainly discussed how to solve a possible conflict between international and domestic law. Here it is determined that a state cannot defend failures to comply with international obligations by referring to their domestic constitution. However, it is also concluded that neither legal system enjoys supremacy over the other, since they both hold supremacy in their domestic spheres.²¹⁹

6.2.2 Mabo and Others vs. State of Queensland²²⁰

The majority of the Australian High Court held in this case, that the indigenous inhabitants of the Murray Islands were entitled to the land on these islands. To reach these conclusions the court held that under Australian common law, a form of native title existed as a burden upon the Crown's ultimate title to all Australian land.

In the decision it was stated “whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of indigenous inhabitants of settled, colonies, an unjust and discriminatory doctrine of that kind (the doctrine of *terra nullis*) can no longer be accepted”.²²¹

6.2.3 Alexkor Limited vs. The Richtersveld Community and Others²²²

In the Richtersveld case, the South African Constitutional Court argued that the natives' rights in land exist even after conquest or incorporation after failed to prove that the dispossession was the result of discriminatory laws or practices in the Land Claims Court.

The first appellant, Alexkor, a public company, was wholly owned by the second appellant, the Government of the Republic of South Africa and conducted business in the diamond mining sector in Richtersveld. Richtersveld is a large area of land in South Africa and has been inhabited by what is now known as the Richtersveld Community. The claim does not contain the whole Richtersveld area, only a narrow strip of land that is registered as Alexkor.

In the Constitutional Court, the relevant provisions in the case can be found in Section 2 (1) of the Restitution of Land Rights Act 22 of 1994.

²¹⁹ Gramara (Pvt) Limited and Another vs. Republic of Zimbabwe

²²⁰ Mabo and Others vs. State of Queensland 107 A.L.R. 1 (1992)

²²¹ Ibid.

²²² Alexkor Limited and the Government of the republic of South Africa vs. The Richtersveld Community and Others CCT 19/03

*“A person shall be entitled to restitution of a right in land if –
(d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
(e) the claim for such restitution is lodged not later than 31 December 1998.”*

The Richtersveld Community claimed that it was dispossessed of ownership (under common law) or the right to exclusive beneficial occupation and use of the subject land including the exploitation of its natural resources.

However, given that indigenous law ownership is the way in which black communities have held land in South Africa since time immemorial, the inevitable impact of the Precious Stones Act’s failure to recognise indigenous law ownership was racially discriminatory against black people who were indigenous law owners. The laws and practices by which the Richtersveld Community was dispossessed of the subject land accordingly discriminated against the Community and its members on the ground of race.

The Constitutional court stated that the Community does not have to rely on the common law since it has rights under the Act and is asserting those rights. The Court argues that, the Richtersveld Community was entitled in terms of Section 2 (1) of the Restitution of Land Rights Act 22 of 1994 to restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof.

Further, the Court means that when the state treated the Alexkor land as its own and was implementing laws that excluded the Community from all benefits in it and ultimately to vest ownership of the subject land in Alexkor, had no relevance. Whether or not that was unlawful under the laws then prevailing was also irrelevant according to the Court. Nor did the Court regard the question whether the Community after so many years could claim back the land under the common law.

7 ANALYSIS

7.1 Introduction

To be able to answer our research questions, an analysis of theory and cases will now be conducted. This emphasizes, in our view, the link between theory and practice. It also clarifies the differences and similarities between these two approaches. In this part, we will analyze conformity between national and international laws, what stipulates public need or public interest, if the land reform can be regarded as one of these exceptions and try to conclude which party's rights that are prioritized in conflicts over land.

7.2 Conformity between Zimbabwe's national laws and international laws

The expropriation of land in Zimbabwe is carried out for public purposes and is considered to be one of the exceptions in Article 14 of the ACHPR. The problematic part in this aspect is the *modus operandi* under which the land reform is handled.

There is no question that there is a need for land reform in Zimbabwe and that the state is empowered to regulate land tenure in its jurisdiction. In doing this, however, established laws regulating land redistribution must be in conformity with international laws and standards. This is highlighted in a publication, released in 2009 by the United Nations High Commissioner for Refugees (UNHCR). In their view, Zimbabwe clearly failed to comply with international law and violated human rights by carrying out their land reform program.²²³

A crucial element in the land question is the failure of the Zimbabwean government to guarantee that adequate compensation is paid to the farmers whose land has been compulsory acquired or occupied. The Fast Track Land Reform Programme represents the government's stubbornness to proceed with the land reform at all costs. Amendment No. 17 of the Constitution tries to put the duty to compensate on the 'former colonial power' (Britain) through Section 16A, but since this is not done by a binding mutual agreement it is not a binding obligation. Even if there may be a moral obligation for the 'former colonial power' to compensate for acquired land, no legal obligation to do this can derive from the Constitution since the agreement is not mutual. The process of land reform in Zimbabwe and the failure or refusal of the Zimbabwean government

²²³ Human Rights Watch, False Dawn: *the Zimbabwe Power-Sharing Government's Failure to Deliver Human Rights Improvements*, p. 2

to pay compensation to those dispossessed of their land through compulsory acquisition, can be said to be an obvious breach of international law principles related to expropriation.

7.2.1 What stipulates public need or public interest?

Article 14 in the ACHPR does not define what constitutes public need or interest and at the same time the Article leaves it to the states to determine what constitutes these two provisions. Thus, the common view is that Article 14 includes both individual and collective rights to property and also leaves some freedom of choice for the state parties to the ACHPR to determine their domestic legislations.

It is a commonly recognized right for governments to acquire land for public interests. This belief is also in accordance with the case law of Zimbabwe which has stated that Zimbabwe is a sovereign state and entitled to the compulsory acquisition of property in the public interest. Section 16 of the Zimbabwean Constitution defines the country's power to determine what public interest or public need is.²²⁴

The acquiring state's own considerations should normally be accepted since, due to the principle of sovereignty, it should be able to make own democratic decisions without any other state or international organ interfering.²²⁵ Since this amount of power is given to the state to decide what stipulates public need or public interest, there is a possibility that human rights do not provide for satisfactory protection in the private sphere. Considering this, Zimbabwe can with domestic tools decide what stipulates public need or public interest. With the Constitution in mind, it is undoubtedly that land reform stipulates public need or public interest through Section 16.

7.2.1.1 Can the land reform in Zimbabwe be regarded as public need or public interest?

According to Article 14 in ACHPR, a limitation to the right to property can be considered as lawful if it is done in the public need or public interest. The question that arises is; can the land reform in Zimbabwe constitute "public need" or "public interest"? One can argue that there is a necessity for a land reform to give the population that is in need of land a chance to receive it. This also seems to be in accordance with the population's willingness to have a land reform since both the white and the black population argue for such a need.

²²⁴ By contrast, according to the interview with Professor Sam K. Amoo 2011-09-15, the Constitution of Ghana clearly states that public interest is public health, environment, infrastructure etc.

²²⁵ Bogdan, M., *Åganderätten som folkerättsligt skyddad mänsklig rättighet*, p. 28

That land reform is done in the public interest can also be motivated by several rulings from the Zimbabwean Supreme Court, where there was no doubt that a program like the Fast Track Resettlement Programme was in the public interest since the people of Zimbabwe had been deprived of their property through a fraudulent and wrongful process in the past.²²⁶

In this context, the laws of Zimbabwe have to be considered. The public need for a land reform is reflected in many domestic laws which have given the land reform legal status since they have become a part of statutory law in Zimbabwe. The main legislation in this aspect is the Zimbabwean Constitution which stipulates land reform in several sections and articles. Article 16A (1A) in the Constitution allows the Government of Zimbabwe to carry out a land reform to correct historical injustices, which is the main justification argument that the government is using. In other words, land reform can be carried out on these legal grounds and fulfill the requirements for the exception in Article 14 in ACHPR. Although, the provisions of Amendment No. 17, as we have seen, do not fulfill the internationally recognized principle of compensation nor gives the dispossessed party the possibility to challenge the compulsory acquisition.

7.2.2 Expropriation and compensation

The aim of the public power, to expropriate land, is to ensure that the general interest takes precedence over an individual interest when they are in conflict. As has been shown, Article 14 in ACHPR does not express any provisions for compensation in situations of expropriation. However, Article 21 (2) of the ACHPR contains a provision for the state to compensate the dispossessed people adequately in the case of spoliation. It is a compulsory statement which obliges the state to guarantee the right to the lawful recovery of the dispossessed peoples' property. This statement is not in accordance with Article 16B (2) of the Zimbabwean Constitution since the national legislation does not allow compensation at all. In other words, Amendment No. 17 of the Constitution is not in conformity with the internationally recognized principle of compensation for expropriated property.

Even if the common view is that Article 14 of the ACHPR leaves some freedom of choice for the state parties to determine their domestic legislations, the states cannot remove the compensation clause. The requirement still remains, but it is left to the states to decide the type and amount of compensation. In this regard, Amendment No. 17 of the Zimbabwean Constitution can therefore, again, be considered to be unlawful.

²²⁶ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 7

Another view is that, even in this regard, history has had a big impact on the legislation. During the Lancaster House Agreement, Britain promised to economically assist Zimbabwe with land reform. Since then, the Zimbabwean government does not consider themselves to have an obligation to compensate for compulsory acquired land. In other words, Zimbabwe provides and recognizes the right to compensation throughout another state, but financial compensation never occurs due to disputes regarding this historical agreement.

7.2.3 Challenging the decision

For an effective protection of the individual, an independent judiciary that can protect individual rights against executive abuse is desirable. Amendment No. 17 Section 16B (3) of the Zimbabwean Constitution makes it unlawful for a person having any right or interest in the land to challenge the acquisition of the actual land acquired by any acquiring authority. It only allows for the party to challenge the value of the improvements on the land. With this in consideration, the Amendment seems to fail to protect the individual.

There is a procedural requirement for the right of the individual to be involved in the whole process when talking about expropriation of a person's land. The individual, the person whose land is about to be expropriated for land reform or whatever public purposes, must be involved in the process and there must be transparency.

Since Amendment No. 17 forbids the complainant to challenge the ruling, this can be compared to what is stipulated in the ACHPR. According to Article 3 of the ACHPR, the complainant must have the chance to challenge the decision of compulsory acquisition and bring the matter in front of an impartial and competent court. The compulsory purchases of land must be enacted with given rights for those who are affected by the land reform.

It may not be surprising that countries as Zimbabwe do not want to pay compensation due to the historical injustices where white settlers took land without paying for it. It has to be mentioned that one cannot blame historical injustice when considering human rights²²⁷ and the right to property is a recognized human right in Zimbabwe through the ACHPR and UDHR.

²²⁷ Bogdan, M., *Äganderätten som folkerättsligt skyddad mänsklig rättighet*, p. 18

A state can never rely on its national legislation to avoid its legal obligations under treaty law which is the case of Zimbabwe. Hence, Zimbabwe's national laws fail to protect the individual in the light of international law and shows Zimbabwe's legal failure. The Land Reform Programme in Zimbabwe has been characterized by laws that are not capable of delivering a credible program for those in need of land and also not capable of protecting the legal owners of land. Legal instruments do though exist that could be used as a basis for an effective program that is in accordance with basic international human rights, but the problem seems to be that Zimbabwe refuses to implement its international obligations.

7.2.4 Concluding conformity with international laws

The Constitution, the Land Acquisition Act and the Rural Land Occupiers Act can be considered to be a travesty of the human right to property and even the rule of law. This is so, since these laws legalize illegal actions, Amendment No. 17 takes away the constitutional right to the protection of law and forbids local courts from dealing with any legal challenges relating to acquired land.

Through Sections 16A-16B, the Zimbabwean government fails to provide for effective remedies for human rights violations, going against various international human rights instruments that Zimbabwe has ratified. The conclusion that can be drawn in this context is that the Government of Zimbabwe appears to deny its obligations to provide for remedies to affected farm owners, which again also can be seen in the Mike Campbell Case.

Some scholars argue that three failures can be found in Zimbabwe's legal system, namely, the abuse of retroactive legislation, the enactment of retroactive laws and the frequent changes in laws. The last one can be related to the Zimbabwean Constitution which has been amended many times since the independence.²²⁸ In other words, it is not certain that Zimbabwe's legislations can be considered to be a legal system at all.

7.3 Which parties' rights are prioritized in conflicts over land rights?

Through this thesis, we have shown that there on the one hand can be a claimant who demands redistribution of land and on the other hand a current owner of the same piece of land, who most likely wants to keep it. The current owner's right in land is protected by the Constitution, whereas a legitimate claimant has a right to redistribution of the land also provided by the

²²⁸ Bangamwabo, F X., *The right to restitution of land: A legal diagnosis of the land reform in Zimbabwe*, p. 26

Constitution. Consequently, there are two competing land rights and the question arises concerning which right to prioritize.

As we have seen, national laws do not always comply with international law. If these different legislations contradict, one cannot be prioritized over the other, instead a balance must be reached between the two. The Zimbabwean constitutional property clause provides for the implementation of land reform measures, such as redistribution, that will interfere with other rights in land, such as ownership.

The whole context of land reform can be said to protect the individual since private subjects are involved in the process and the purpose is to redistribute among persons, especially economically underprivileged. International treaties, such as the UDHR and the ACHPR, protect individuals based on the very fact of being humans. Through human rights, as a part of international law, individuals have received greater protection.

Since the African family values are strongly rooted and that the ACHPR notes “peoples”, it can be said that the Charter emphasizes the community and family rather than the individual. Further, the African customary law states that the individual’s rights must always be balanced against the requirements of the group. It is important to consider the requirements of the group as a whole and therefore one can argue that ACHPR is referring to the collective rights rather than the individual.

It can be remarked that the AC has the responsibility of ensuring the protection of human rights in Africa and this can be said to strengthen the protection of the individual. Since the ACHPR includes duties of the individual, some scholars have argued that this duty emphasizes the individual responsibility rather than the states’. Another view is that these duties are vaguely defined and could be used by states to suppress individual rights.

The former Constitution in Zimbabwe shows that the individual’s right has been decreased over time as more than 10 acts of Parliament have been changed to amend the Constitution. This can be considered not to be in conformity with the rule of law since trust cannot be put in such a legal system. One can ask if the Zimbabwean Constitution really complies with the objectives of ACHPR since there are no stated specific circumstances for expropriation, for example health or environmental causes. These circumstances can simplify for the state to alter the meaning of

‘public purpose’ and ‘public interest’, which cannot be considered to be in conformity with protecting individual’s rights. More specifically, individuals cannot trust the definition if it constantly changes. In a worst case scenario, the state can by behavior change the meaning of ‘public purpose’ and ‘public interest’ from time to time and the individual would no longer be protected.

In the concept of property rights, ownership is a question about balance between the interest of the state and the interest of the individual. The state has the right to property through the limitations set out in different legal instruments and where individuals can be considered having larger possibilities of owning land since it could be said to constitute the main principle. At the same time, the exemptions can be used broadly by the state, to the extent that they in practice have an advantage, regardless of the fact that the individual in theory has greater protection for ownership of land. Even if this right is given restrictions, the right of the individual must be protected. One solution to these theoretical issues may be to define the circumstances in the Constitution, under which land can be acquired.

7.3.1 Analysis of the cases - private rights versus community rights

The problems of international law are quite clear in our case. As stated before, only sovereign states can be a part of international law by entering treaties and the primary purpose is to deal with relations between states and not individual rights. However, this is something that currently is changing since individuals are given an increasing number of rights that are part of international law. The title of ACHPR raises a controversial question of the difference and relationship between individually human rights and collectively peoples’ rights. There is no doubt that the applicants have different backgrounds and that the circumstances in the cases differ in many aspects, but they all somewhat deal with the issue of private rights contra community rights.

Zimbabwe has committed to several human right treaties and other international instruments. This shows the state’s intentions and willingness to participate and be recognized as a state that follows international law. However, the country has repeatedly shown that it easily can ignore the same treaties and instruments. How can a state consider itself to have the right to ignore international agreements? A part of the answer could be that international obligations, such as human rights treaties, are based on the beliefs of the Western world that puts the individual in the center which can be said to be the opposite from the African view.

The Southern African tradition has always been to own communal land and one can ask, especially in the case of Zimbabwe, if this can be recognized as *opinio juris* which is Zimbabwe's practice and behavior, a part of customary law. *Opinio juris* is strong enough to be compared to treaty law and also be recognized as law. After analyzing the cases one can ask if the judges have had this in mind when giving their rulings based on for example the nature of the case and the surrounding circumstances or if it appeared as the parties have agreed to it. There is a possibility to interpret that common law has been used since it seems like the parties wanted to use this.

In our main case, the Mike Campbell Case, the complainant was supposed to receive compensation for the land that the Government of Zimbabwe had compulsorily acquired. Until this day, Mike Campbell's family still has not received any compensation and the farm has been burned to the ground. The only thing his family has is a decision from the SADC Tribunal, that they won their case against the Republic of Zimbabwe and that the state must comply with international legislations.

The Mike Campbell Case can in this context not be emphasized enough, since it in many ways constitutes a revolutionary decision by an international human rights court. First of all, the decision confirms the theory of human rights stressing the individual's rights. The interesting aspect is that the SADC Tribunal is situated in the capital of an African country, which logically would be influenced by the African tradition of prioritizing the community's interests. Since this was not the case, there seems to be an ongoing change in customary law. Second of all, one of the central problems of the case seems to be the relationship between the legal regime of SADC on the one side and Zimbabwe's national law on the other. The question that arises is how far can the universal recognition of human rights change the subjects and actually limit state sovereignty to abandon human right obligations? In the case of Zimbabwe, the country has already made their statement in this question by refusing to comply with the ruling and refer to the principle of sovereignty.

Before the Mike Campbell Case, it seems like the courts have defended community owned land. This means that the community's rights have been prioritized over the individual's rights and therefore is considered as public interest. The maxim *Stare Decisi at non queta movere* means to stand by old decisions and not disturb settled points which can be said argues in favor for the Court's negligence of Mike's case at national level. Thus, it can at the same time be said that common law

has changed and now prioritizes the individual's property rights according to the ruling delivered by the SADC Tribunal.

One can compare the Mike Campbell Case to Namibia, where customary law is the traditions and usages of the traditional community. Throughout history, community owned land has been the common type of ownership in Namibia just like in Zimbabwe. Thus, there are several circumstances which prove that customary law is flexible and constantly changing. One example is the major events in the country during the 1990s. Even today there is an ongoing change of customary law in Namibia, where for example women's property rights have become a part of customary law. This can be compared to Zimbabwe, where one can argue that land and property rights have been given a new meaning since customary law changes over the years. This would mean that the individual's property rights has become more evolved since the right to property today is considered as a human right for individuals, which seems to be given priority over the old customary law.

The question still remains if this change in customary law actually is the case, considering the ongoing land reform which seems to prioritize the public interest over the private interests. This is not typical only for Zimbabwe; it seems to be the case of all the Southern African countries. In this context, it seems like the Mike Campbell Case has set the base for a new era of thinking in African international law since older judgements prioritize the native's right to the land.

It seems on the one hand to be a general opinion that indigenous land rights need to be prioritized, but on the other hand there are also rulings that emphasizes the right of the individual. In this aspect the indigenous rights can be said to be customary law, which stands for tradition, and the individual's rights are stressed by international human rights. There is not necessary a conflict between the two, but can as we have seen lead to divergences. Even here, one can see the impact of the Western idea of human rights on the traditional African view on land rights.

Further, it is quite clear that the ongoing land reform in Zimbabwe is in the public interest and public need and therefore stipulates an exception to Article 14 of the ACHPR. There are several cases which state that the indigenous people, who were wrongfully deprived of their property, have the right to restitution or resettlement, which also is an argument for the land reform being in the public need and public interest. It is obvious that, when applying these facts to the land

situation in Zimbabwe, the indigenous peoples' rights to property were violated and consequently, they have the right to redistribution of the land. Thus, since the process is done without compensating the person who is subject of the dispossession, the Zimbabwean Constitution cannot therefore be considered to comply with Article 21 (2) of the ACHPR.

The conclusions that can be drawn are that Zimbabwe is entitled to carry out a land reform, but not under the circumstances that it is done today. The process has to be done with compensation, the chance to challenge the decision and in a non-discriminatory way to be in accordance with international human rights.

8 CONCLUSIONS

We are well aware that with our Western, and more particular Swedish, view on this complex problem, we cannot provide a full solution. Nonetheless, we will try to make our own contribution to possible solutions to the problem and complement our conclusions with suggested solutions from others. By doing this, we hope to provide some directions for the future.

When travelling in Namibia, we have had the opportunity to discuss the land reform with persons from different Southern African countries, including Zimbabwe. Since there are ongoing land reforms in several African countries, as well as in Namibia, we also got to experience the sensibility of the subject which mostly, apart from at the University of Namibia, only is discussed in smaller private groups. Namibia became independent in 1990 and we could still see things that gave us short glimpses of the time of apartheid, not to mention the still existing tensions between the black and white populations.

All over the world, land is an invaluable natural resource, which also is the case in Zimbabwe and the control of land has been the source to many national and international conflicts. As we have seen throughout this thesis, land has a much deeper meaning in many African societies and embodies traditions and ancestral heritages. Land can be the symbol of wealth but also the root to disputes, which is the reality that has progressed beyond the colonial past and the present era of globalization. The right to ownership is much more than just the mere possession; it is a direct access to other human rights such as food, water, employment, education and health. Ultimately, survival can be said to depend on these rights.

Land reform and land redistribution are not only necessary, but also desirable so that the imbalances of the ownership of land can be redressed. The Lancaster House Agreement itself had the land question as a key feature and has been a central government policy ever since. Thus, the current land crisis seems to have more to do with how the process has been managed by the Government of Zimbabwe. We have seen that at the center stage of the conflict are the violent invasions by war veterans in which properties have been destroyed. The government has disregarded these farm invasions and failed to protect and uphold the rights of the affected farmers and bring the invaders to justice, just as we have seen in the Mike Campbell Case. These

actions constitute violations of the Constitution of Zimbabwe and of internationally recognized human rights, including the right to property.

8.1 Political sensibility and complexity

It can be considered that the aim of land reform is to repair historical injustices. In the future, the risk is that new injustices will be created that will be more difficult to solve. This is so, since the way that the reform is carried out today is both unlawful and creates new disputes between the white and black population. As has been clearly stated throughout this thesis, the matter of land reform is an utterly sensible question, especially in Zimbabwe.

The historical injustices that permeates the country still causes legal problems that are, with the legal instruments of today, almost impossible to solve. Even if the land was wrongfully taken during the colonial era in Zimbabwe, decades have passed since this time. The white individuals who owns the land today is usually not the ones responsible for the deprivation of property that the indigenous people has been exposed to. For these persons it probably feels very unfair, that their land can be taken from them because of an event that happened before they were born. On the other side, restoring the land rights and giving them back to the indigenous people has a great symbolic value and is not more than fair.

Many countries in Southern Africa are struggling with the fundamental question of justice. The question is how land can be distributed to include the black minority whose property rights were marginalized during the period of colonization. In addition, a further question is how this will be done in a way that does not undermine the rule of law.²²⁹

The entire conflict in Southern Africa is based on historical injustice, especially in countries like Zimbabwe, South Africa and Namibia.²³⁰ Several fundamental problems feature at the core of the debate and questions that can be asked include: What should the goal of land reform be? Is it simply to change the existing division between farmers or the reduction of poverty for the black majority who do not own any land? Or is it both?²³¹

²²⁹ International Crisis Group, *Blood and soil* p. 3

²³⁰ Ibid.

²³¹ International Crisis Group, *Blood and soil* p. 4

8.2 Possible solutions

The solution to the conflict between land rights, when two rights collide, seems to be that the public need for land redistribution is given priority over private property rights. As stated earlier, it also seems like neither land reform nor property rights can be given absolute preference since a balance has to be established between them. In other words, even if the constitutional rights and the international human rights are in conflict, it does not mean that one of them can be given priority at the cost of the other right. The solution is therefore to constitute a balance between these two rights.

8.2.1 What should the international community do?

The international community must start putting more pressure on ZANU-PF and Robert Mugabe. The AU has promised that they will provide for an African solution through an intervention lead by South Africa and SADC, but this has not yet happened. It is now time for the UN to prioritize Zimbabwe and protect the Zimbabwean people, so that they are given a chance to vote for whom they want under an internationally supervised election.²³² Also, publicity can be used as a key weapon in developing the African system through publicity of rights and condemnation of violations.²³³

This type of solution provides for an engagement of the international community and a chance for the population to express their real opinions. Also, if the rule of law is upheld, a new impartial court can be created since it is now 'contaminated' with political influence.

8.2.2 The African Union Tribunal as the new dispute settlement institute

In our view, the AU should establish their Tribunal, which has been planned for years. The need for the AU Tribunal cannot be emphasized enough since the legal status of the SADC Tribunal today is unknown.²³⁴ If there is no tribunal that can rule in cases regarding human rights, then the point of committing to human right treaties is undermined. Today, the only option for dealing with human rights is recommendations from the AC.

²³² Freeth, B., *Mugabe and the White African*, p. 12

²³³ Smith, R., *International Human Rights*, p. 135

²³⁴ When visiting the SADC Tribunal, we learned that it is currently suspended since it was established under circumstances that were not in conformity with the SADC Protocol.

The AC should clearly define under which circumstances a government may impose restrictions to the right to property, since states can incorporate the right to property in their constitutions without more specifically defining the limitations. Further, there are some other factors that have to be considered in this context. Firstly, how to design land reform programs that are aiming to cure the still existing effects of past discriminations. Secondly, considerations must be made regarding whether the limitations of the right to property are for the benefit of private persons as opposite to the general public. Thirdly, the proportionality of the interference between the individual's right and public interest must be analyzed before designing these land reform programs.²³⁵

Since the recommendations from the AC cannot be regarded as an adequate tool for solving conflicts like the one in Zimbabwe, one must look at other solutions. What is left is for the UN to intervene in the conflict or for the International Court of Justice (ICJ) to handle the case. The problem is though that UN has no legal grounds for intervention and ICJ only handles disputes between states and not states and individuals. Therefore, in our opinion, the establishment of the AU Tribunal is of urgency and vast importance.

8.3 Last remarks

The Government of Zimbabwe accuses Britain to be directly responsible for the land crisis through the colonial past and that they have an obligation to compensate for expropriated land. This dispute between these countries regarding the Lancaster House Agreement and the duty to compensate should, in our opinion, be solved by the Vienna Convention on the Law of Treaties. Worth mentioning is that, as stated before, ACHPR bases its framework on other international human rights instruments such as the UDHR. This can be said to strengthen the concept of maintaining human rights, since UDHR is a widely used and accepted instrument worldwide.

Another problem seems to be that the population of Zimbabwe “haven't reached a stage where they're ready to fight their own wars. Relying on external forces to liberate them is not sustainable”. In other words, the Zimbabweans need to be convinced that their independence lies in their own hands and that Mugabe is not their liberator but more their captivator.²³⁶ Considering the ongoing land crisis and the high number of black Zimbabweans who are still

²³⁵ Ankumah, E., *The African Commission on Human and Peoples' Rights – Practice and procedures*, p. 142

²³⁶ *Operation Murambatsvina: An Overview and Summary*, p. 14

either landless or crowded in the communal lands, one could argue that since independence there has been no meaningful land reforms that took place.

The African system is still young, but has made remarkable progress, with a steep learning curve, under very difficult conditions. Thus, it has withstood the African characteristics.²³⁷ International human rights are constantly evolving, but at the same time, the right to land remains one of the least developed aspects of international human rights law.²³⁸ With this in mind, it is not hard to draw the conclusion that the land question in many domestic legal systems, especially in Zimbabwe, is of a complexity that we might never come to understand. Legal instruments can only do so much as providing the tools for a solution, but not give the answer to how to solve the problem.

²³⁷ Murray, R., *The African Commission on Human and Peoples' Rights and International Law*, p. 201

²³⁸ CHORE Africa Programme Mission Report, *Land, housing and property rights in Zimbabwe*, p. 44

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APPENDICES

1. AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS

(Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)

Preamble

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and people' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:

Part I: Rights and Duties

Chapter I: Human and Peoples' Rights

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.

2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that: (a) any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter; (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

Chapter II: Duties

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.

2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defense in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Chapter IV -- Applicable Principles

Article 62

Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

2. CONSTITUTION OF ZIMBABWE, AMENDMENT NO. 17, 2005

CHAPTER III THE DECLARATION OF RIGHTS

16 Protection from deprivation of property

(1) Subject to section *sixteen* A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that—

[Subsection amended by section 2 of Act 5 of 2000 - Amendment No. 16]

(a) requires—

(i) in the case of land or any interest or right therein, that the acquisition is reasonably necessary for the utilization of that or any other land—

A. for settlement for agricultural or other purposes; or

B. for purposes of land reorganization, forestry, environmental conservation or the utilization of

wild life or other natural resources; or

C. for the relocation of persons dispossessed in consequence of the utilization of land for a

purpose referred to in subparagraph A or B;

or

(ii) in the case of any property, including land, or any interest or right therein, that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that or any other property for a purpose beneficial to the public generally or to any section of the public;

and

[Paragraph as substituted by section 6 of Act 30 of 1990 - Amendment No. 11]

(b) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition; and

[Paragraph as substituted by section 6 of Act 30 of 1990 - Amendment No. 11]

(c) subject to the provisions of subsection (2), requires the acquiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property, interest or right; and

[Paragraph as substituted by section 6 of Act 30 of 1990 - Amendment No. 11]

(d) requires the acquiring authority, if the acquisition is contested, to apply to the High Court or some other court before, or not later than thirty days after, the acquisition for an order confirming the acquisition; and

[Paragraph as amended by section 9 of Act 15 of 1990 - Amendment No. 10]

(e) enables any person whose property has been acquired to apply to the High Court or some other court for the prompt return of the property if the court does not confirm the acquisition, and to appeal to the Supreme Court; and

[Paragraph as substituted by section 3 of Act 9 of 1993 - Amendment No. 13]

(f) enables any claimant for compensation to apply to the High Court or some other court for the determination of any question relating to compensation and to appeal to the Supreme Court:

Provided that the law need not make such provision where—

- (i) the property concerned is land or any interest or right therein; and
- (ii) the land is substantially unused or is used wholly or mainly for agricultural purposes or for environmental conservation or the utilization of wild life or other natural resources; and
- (iii) the land or interest or right therein, as the case may be, is acquired for a purpose referred to in paragraph (a)(i).

[Paragraph as inserted by section 3 of Act 9 of 1993 - Amendment No. 13 and amended by section 7 of Act No. 14 of 1996 - Amendment No. 14]

(2) ...

[Subsection substituted by section 6 of Act 30 of 1990 - Amendment No. 11 and amended by section 7 of Act No. 14 of 1996 - Amendment No. 14 and repealed by section 2 of Act 5 of 2000 - Amendment No. 16]

(2a) ...

[Subsection repealed by section 2 of Act 5 of 2000 - Amendment No. 16. Originally inserted by section 7 of Act No. 14 of 1996 - Amendment No. 14]

(3) Where any person, by virtue of a law, contract or scheme relating to the payment of pensions benefits, has a right, whether vested or contingent, to the payment of pensions benefits or any commutation thereof or a refund of contributions, with or without interest, payable in terms of such law, contract or scheme, any law which thereafter provides for the extinction of or a diminution in such a right shall be regarded for the purposes of subsection (1) as a law providing for the acquisition of a right in property.

(4) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question authorizes the taking of possession of property compulsorily during a period of public emergency or in the event of any other emergency or disaster that threatens the life or well-being of the community or where there is a situation that may lead to such emergency or disaster and makes provision that—

(a) requires the acquiring authority promptly to give reasonable notice of the taking of possession to any person owning or possessing the property;

(b) enables any such person to notify the acquiring authority in writing that he objects to the taking of possession;

(c) requires the acquiring authority to apply within thirty days of such notification to the High Court or some other court for a determination of its entitlement to take possession;

[Paragraph as amended by section 13 of Act 25 of 1981 - Amendment No. 2]

(d) requires the High Court or other court to order the acquiring authority to return the property unless it is satisfied that the taking of possession is reasonably justifiable, in the circumstances of any situation arising or existing during that period or as a result of that other emergency or disaster or that may lead to such emergency or disaster, for the purpose of dealing with that situation;

[Paragraph as amended by section 13 of Act 25 of 1981 - Amendment No. 2]

(e) requires—

(i) when possession is no longer reasonably justifiable as referred to in paragraph (d), wherever possible, the prompt return of the property in the condition in which it was at the time of the taking of possession; and

(ii) the payment within a reasonable time of fair compensation for the taking of possession and, where appropriate, for the failure to return the property in accordance with subparagraph (i) or for any damage to the property;

[Subparagraph as amended by section 6 of Act 30 of 1990 - Amendment No. 11]

and

(f) enables any claimant for compensation to apply to the High Court or some other court for the prompt return of the property and for the determination of any question relating to compensation, and to appeal to the Supreme Court.

[Paragraph as amended by section 13 of Act 25 of 1981 - Amendment No. 2]

(5) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question imposes or authorizes the imposition of restrictions or limitations, to the extent permitted by paragraph 2 of Schedule 6, on the remittability of any commutation of a pension.

[Subsection as inserted by section 3 of Act 9 of 1993 - Amendment No. 13]

(6) [Subsection repealed by section 6 of Act 30 of 1990 - Amendment No. 11]

(7) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein in any of the following cases—

(a) in satisfaction of any tax or rate;

(b) by way of penalty for breach of any law, including any law of a foreign country which, by or in terms of an Act of Parliament, is recognised or applied for any purpose in Zimbabwe, whether under civil process or after conviction of an offence, or forfeiture in consequence of a breach of the law or in pursuance of any order referred to in section 13(2)(b);

[Paragraph as amended by section 6 of Act 30 of 1990 - Amendment No. 11]

(c) upon the removal or attempted removal of the property in question out of or into Zimbabwe in contravention of any law;

(d) as an incident of a contract, including a lease or mortgage, which has been agreed between the parties to the contract, or of a title deed to land fixed at the time of the grant or transfer thereof or at any other time with the consent of the owner of the land;

(e) in execution of the judgment or order of a court in proceedings for the determination of civil rights or obligations;

(f) by reason of the property in question being in a dangerous state or prejudicial to the health or safety of human, animal or vegetable life or having been constructed or grown on any land in contravention of any law relating to the occupation or use of that land;

(g) in consequence of any law with respect to the limitation of actions, acquisitive prescription or derelict land;

- (*b*) as a condition in connection with the granting of permission for the utilization of that or other property in any particular manner;
- (*i*) by way of the taking of a sample for the purposes of a law;
- (*j*) where the property consists of an animal, upon its being found trespassing or straying;
- (*k*) for so long only as may be necessary for the purpose of any examination, investigation, trial or inquiry;
- (*l*) in the case of land, for so long only as may be necessary for the purpose of the carrying out thereon of—
 - (i) work for the purpose of the conservation of natural resources of any description; or
 - (ii) agricultural development or improvement which the owner or occupier of the land has been required, and has without reasonable or lawful excuse refused or failed, to carry out;
- (*m*) in consequence of any law requiring copies of any book or other publication published in Zimbabwe to be lodged with the National Archives or a public library;
- (*n*) for the purposes of, or in connection with, the prospecting for or exploitation of minerals, mineral oils, natural gases, precious metals or precious stones which are vested in the President on terms which provide for the respective interests of the persons affected;
- (*o*) for the purposes of, or in connection with, the exploitation of underground water or public water which is vested in the President on terms which provide for the respective interests of the persons affected; except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(8) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein in any of the following cases—

- (*a*) for the purpose of the administration, care or custody of any property of a deceased person or a person who is unable, by reason of any incapacity, to administer it himself, on behalf and for the benefit of the person entitled to the beneficial interest therein;
- (*b*) by way of the vesting or administration of any property belonging to or used by or on behalf of an enemy or any organization which is, in the interests of defence, public safety or public order, proscribed or declared by a written law to be an unlawful organisation;
- (*c*) by way of the administration of moneys payable or owing to a person outside Zimbabwe or to the government of some other country where restrictions have been placed by law on the transfer of such moneys outside Zimbabwe;

(d) as an incident of—

(i) a composition in insolvency accepted or agreed to by a majority in number of creditors who have proved claims and by a number of creditors whose proved claims represent in value more than fifty *per centum* of the total value of proved claims; or

(ii) a deed of assignment entered into by a debtor with his creditors;

(e) by way of the acquisition of the shares, or a class of shares, in a body corporate on terms agreed to by the holders of not less than nine-tenths in value of those shares or that class thereof.

(9) Nothing in this section shall affect the making or operation of any law in so far as it provides for—

(a) the orderly marketing of any agricultural produce or mineral or any article or thing prepared for market or manufactured therefor in the common interests of the various persons otherwise entitled to dispose of that property or for the reasonable restriction of the use of any property in the interests of safeguarding the interests of others or the protection of lessees or other persons having rights in or over such property; or

(b) the taking of possession or acquisition in the public interest of any property or any interest or right therein where that property, interest or right is held by a body corporate established directly by law for a public purpose in which no moneys have been invested other than moneys provided from public funds.

(9a) Nothing in this section shall affect the making or operation of any Act of Parliament in so far as it provides for the extinction of any debt or other obligation gratuitously assumed by the State or any other person.

[Subsection as inserted by section 6 of Act 30 of 1990 - Amendment No. 11]

(9b) Nothing in this section shall affect or derogate from—

(a) any obligation assumed by the State; or

(b) any right or interest conferred upon any person; in relation to the protection of property and the payment and determination of compensation in respect of the acquisition of property, in terms of any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations.

[Subsection inserted by section 7 of Act No. 14 of 1996 - Amendment No. 14]

(10) In this section—

“acquiring authority” means the person or authority compulsorily taking possession of or acquiring the property or the interest of right therein;

“agricultural purposes” includes forestry, fruit-growing and animal husbandry, including the keeping of poultry, bees or fish;

“land” includes anything permanently attached to or growing on land;

[Definition as inserted by section 6 of Act 30 of 1990 - Amendment No. 11]

“pensions benefits” means any pension, annuity, gratuity or other like allowance—

(a) which is payable from the Consolidated Revenue Fund to any person;

(b) for any person in respect of his service with an employer or for any spouse, child or dependant of such person in respect of such service;

(c) for any person in respect of his ill-health or injury arising out of and in the course of his employment or for any spouse, child or dependant of such person upon the death of such person from such ill-health or injury; or

(d) for any person upon his retirement on account of age or ill-health or other termination of service;

“piece of land” means a piece of land registered as a separate entity in the Deeds Registry.

16A Agricultural land acquired for resettlement

(1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance -

(a) under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;

(b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;

(c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land; and accordingly—

(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and

(ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.

(2) In view of the overriding considerations set out in subsection (1), where agricultural land is acquired compulsorily for the resettlement of people in accordance with a programme of land reform, the following factors shall be taken into account in the assessment of any compensation that may be payable -

- (a) the history of the ownership, use and occupation of the land;
 - (b) the price paid for the land when it was last acquired;
 - (c) the cost or value of improvements on the land;
 - (d) the current use to which the land and any improvements on it are being put;
 - (e) any investment which the State or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it;
 - (f) the resources available to the acquiring authority in implementing the programme of land reform;
 - (g) any financial constraints that necessitate the payment of compensation in instalments over a period of time;
- and
- (h) any other relevant factor that may be specified in an Act of Parliament.

[Section inserted by section 3 of Act 5 of 2000 - Amendment No. 16]

16B Agricultural land acquired for resettlement and other purposes

(1) In this section -

“acquiring authority” means the Minister responsible for lands or any other Minister whom the President may appoint as an acquiring authority for the purposes of this section;

“appointed day” means the date of commencement of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005.

(2) Notwithstanding anything contained in this Chapter -

(a) all agricultural land -

(i) that was identified on or before the 8th July, 2005, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], and which is itemised in Schedule 7, being agricultural land required for resettlement purposes; or

(ii) that is identified after the 8th July, 2005, but before the appointed day, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], being agricultural land required for resettlement purposes; or

(iii) that is identified in terms of this section by the acquiring authority after the appointed day in the *Gazette* or *Gazette Extraordinary* for whatever purpose, including, but not limited to -

A. settlement for agricultural or other purposes; or

B. the purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or

C. the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in subparagraph A or B; is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii), with effect from the date it is identified in the manner specified in that paragraph; and

(b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

(3) The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18(1) and (9), shall not apply in relation to land referred to in subsection (2)(a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2)(b), that is to say, a person having any right or interest in the land -

(a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;

(b) may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired.

(4) As soon as practicable after the appointed day, or after the date when the land is identified in the manner specified in subsection (2)(a)(iii), as the case may be, the person responsible under any law providing for the registration of title over land shall, without further notice, effect the necessary endorsements upon any title deed and entries in any register kept in terms of that law for the purpose of formally cancelling the title deed and registering in the State title over the land.

(5) Any inconsistency between anything contained in□

(a) a notice itemised in Schedule 7; or

(b) a notice relating to land referred to in subsection (2)(a)(ii) or (iii);

and the title deed to which it refers or is intended to refer, and any error whatsoever contained in such notice, shall not affect the operation of subsection (2)(a) or invalidate the vesting of title in the State in terms of that provision.

(6) An Act of Parliament may make it a criminal offence for any person, without lawful authority, to possess or occupy land referred to in this section or other State land.

(7) This section applies without prejudice to the obligation of the former colonial power to pay compensation for land referred to in this section that was acquired for resettlement purposes.

[Section inserted by section 2 of Act 5 of 2005 - Amendment No. 17]

3. THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TREATY

PREAMBLE

WE, the Heads of State or Government of:

The Republic of Angola

The Republic of Botswana

The Democratic Republic of Congo

The Kingdom of Lesotho

The Republic of Malawi

The Republic of Mauritius

The Republic of Mozambique

The Republic of Namibia

The Republic of Seychelles

The Republic of South Africa

The Kingdom of Swaziland

The United Republic of Tanzania

The Republic of Zambia

The Republic of Zimbabwe

HAVING REGARD to the objectives set forth in "Southern Africa: Toward Economic Liberation - A Declaration by the Governments of Independent States of Southern Africa, made at Lusaka, on the 1st April, 1980";

IN PURSUANCE of the principles of "Towards a Southern African Development Community - A Declaration made by the Heads of State or Government of Southern Africa at Windhoek, in August, 1992," which affirms our commitment to establish a Development Community in the Region;

DETERMINED to ensure, through common action, the progress and well-being of the people of Southern Africa;

CONSCIOUS of our duty to promote the interdependence and integration of our national economies for the harmonious, balanced and equitable development of the Region;

CONVINCED of the need to mobilise our own and international resources to promote the implementation of national, interstate and regional policies, programmes and projects within the framework for economic integration;

DEDICATED to secure, by concerted action, international understanding, support and co-operation;

MINDFUL of the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law;

RECOGNISING that, in an increasingly interdependent world, mutual understanding, good neighbourliness, and meaningful co-operation among the countries of the Region are indispensable to the realisation of these ideals;

DETERMINED to alleviate poverty, with the ultimate objective of its eradication, through deeper regional integration and sustainable economic growth and development;

FURTHER DETERMINED to meet the challenges of globalization;

TAKING INTO ACCOUNT the Lagos Plan of Action and the Final Act of Lagos of April 1980, the Treaty establishing the African Economic Community and the Constitutive Act of the African Union;

BEARING IN MIND the principles of international law governing relations between States;
Have decided to establish an international organisation to be known as the Southern African Development Community (SADC), and hereby agree as follows:

CHAPTER THREE

PRINCIPLES, OBJECTIVES, SADC COMMON AGENDA AND GENERAL UNDERTAKINGS

ARTICLE 4

PRINCIPLES

SADC and its Member States shall act in accordance with the following principles:

- a. sovereign equality of all Member States;
- b. solidarity, peace and security;
- c. human rights, democracy and the rule of law;
- d. equity, balance and mutual benefit; and
- e. peaceful settlement of disputes.

ARTICLE 6

GENERAL UNDERTAKINGS

1. Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.
2. SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit.
3. SADC shall not discriminate against any Member State.
4. Member States shall take all steps necessary to ensure the uniform application of this Treaty.
5. Member States shall take all necessary steps to accord this Treaty the force of national law.
6. Member States shall co-operate with and assist institutions of SADC in the performance of their duties.

CHAPTER FIVE INSTITUTIONS

ARTICLE 9

ESTABLISHMENT OF INSTITUTIONS

1. The following institutions are hereby established:
 - a. the Summit of Heads of State or Government;
 - b. the Organ on Politics, Defence and Security Co-operation;
 - c. the Council of Ministers;
 - d. the Integrated Committee of Ministers;
 - e. the Standing Committee of Officials;
 - f. the Secretariat;
 - g. the Tribunal; and
 - h. SADC National Committees.
2. Other institutions may be established as necessary

4. UNIVERSAL DECLARATION OF HUMAN RIGHTS

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their

universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.