1 Introduction

1.1 Transitional Justice and the Land Question

The purpose of this paper is to contribute to the debate on the issue of transitional justice in Zimbabwe. This paper focuses specifically on the land question. The decision to focus on ‘land’ is few issues are as emotive and divisive as the land question in Zimbabwe. Writing in 1977 on the same issue, Palmer observed: “On both sides the issue has become emotionally charged, defying all attempts at rational analysis”. This remains the case today, with deep divisions and in many cases, high levels of acrimony, preventing or obfuscating rational debate around the land question.

In 1994, one of Zimbabwe’s renowned scholars specialising in agrarian issues, Sam Moyo, wrote in relation to the land question, “Fourteen years after independence in 1980, the land question remains the most hotly and popularly contested policy reform area [in Zimbabwe]”. Sixteen years later (and thirty years into independence) nothing has changed in this respect. The Government of Zimbabwe’s Fast Track Land Reform Programme launched in 2000, involving forced evictions of white commercial farmers, has placed the land issue under the international spotlight for the last decade, highlighting conflicts that pre-date independence.

This paper demonstrates continuities in the application of force and law for purposes of land expropriation in both colonial and post-colonial periods. It examines how these tactics have created multiple victims before and after independence. An effective framework of transitional justice should take cognisance of the multiplicity and diversity of victims and to manage their competing rights, interests and expectations.

Transitional justice proceeds on the belief of resolving past wrongs in order to achieve some kind of justice for the victims of those wrongs. This means that the nature of the conflict from which the country is ‘transitioning’ must be properly defined and understood. Similarly, it is
necessary to have a clear definition of the ‘past’ during which this ‘conflict’ and ‘wrongs’ over which justice must be done occurred³.

1.2 An Enduring Conflict

This paper argues that in order to create a meaningful and conclusive transitional justice mechanism over the land issue, the nature of the conflict must necessarily be understood in historical terms. That history is a critical part of the present day conflict. Here the words of Sir Shridath Ramphal are most relevant:

It was about land in the beginning; it was about land during the struggle; it has remained about land today. The land issue in Zimbabwe (Rhodesia) is not ancient history.⁴

Anything less would be selective and exclusionary in that it would leave out the aggrieved victims of past, albeit older wrongs who also demand a share of justice. Unless those multiple and clashing claims are addressed holistically, any purported solution will, at best, be temporary. A legalistic analysis of the rights and wrongs of this latest episode of conflict is unlikely to help resolve this enduring question, let alone satisfy concerned parties.

2 Evolution of the Land Question in Zimbabwe

The point advanced in this section is that history matters a great deal in addressing the question of justice in respect of land. It demonstrates the multiplicity of victims for whom justice has been, and in some cases continues to be, elusive. This section shows how the law was used during the colonial era to legitimise the expropriation of land and how this created a set of victims whose interests were never satisfied at independence, thus creating an exploitable reservoir of grievances.

2.1 Law, Expropriation and Victims of the Colonial System

The history of conflict over land in modern Zimbabwe commences with the colonisation in 1890 of the land between the Zambezi and Limpopo rivers by Great Britain via the agency of the British South Africa Company

³ This raises critical questions, too – what, for example, is meant by ‘the past’? How does one define ‘the past’? In other words, at what point does one say ‘the past’ starts from one point up to another in order to identify the wrongs that must be addressed as part of the transitional justice debate? These are difficult questions but they matter a great deal if transitional justice is to achieve a more agreeable outcome, particularly in relation to the land question in which case the weight of history is too heavy to overlook. In respect of land, the past and present are inseparable.

⁴ Ramphal was the Secretary-General of the Commonwealth from 1975-90. He made this comment in an interview with Gugulethu Moyo and Mark Ashhurst (eds), "Sleight of hand at Lancaster House" in Day After Mugabe (Africa Research Institute, 2007), p. 160
(BSAC) led by Cecil John Rhodes. The BSAC was granted a Royal Charter in 1889 by the British Crown with part of the mandate being to, “discharge and bear all the responsibility of government”. Between 1894 and 1895, ‘Native Reserves’ for Africans were created, showing the beginnings of segregation and forced removals of Africans from their ancestral lands.

Upon realisation of the consequences of white settlement in their land, the local African population instigated and participated in military uprisings in 1893 (Matebele Uprising) and 1896-7 (First Chimurenga) against the new order. They were defeated by the military might of the new settlers. From then on, the history of expropriation of land from Africans intensified. The law played an important role in this process.

During the course of colonialism, various legal instruments were enacted, giving legal control of the land to the new settlers. According to the International Commission of Jurists (ICJ) Report (1976):

> The initial expropriation of African land was consolidated by the subsequent Rhodesian land settlement legislation ... its objective was to strengthen white dominion over the most fertile and economically important land and maintain the African population as a labouring class”

An important event is the seminal land case in which the courts held legal justification to expropriation of land from the Africans.

### 2.2 In Re Southern Rhodesia

In 1918 a significant judgment was passed by the Privy Council of the House Lords in the case of *In Re Southern Rhodesia*, stating in effect that all unalienated land belonged to the British Crown and not to the BSAC. More significantly, it justified the expropriation of land from Africans on the basis that the lands were *Terra Nullius* (not owned by any person) because the local tribes were not sufficiently civilised to have developed any recognisable property rights over the land. The Privy Council stated in justification of its position:

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5 The decisive agreement was the Rudd Concession signed between Lobengula, king of the Ndebele Kingdom and Rhodes’ emissaries led by Mr Rudd. By that agreement, Lobengula was construed to have given away control of the land over which his powerful Ndebele kingdom ruled.


8 (1919) A.C. 210

9 The core dispute was in fact between the new settler community and the BSAC over who owned the land. The settlers’ disputed the BSAC’s assertion that it owned the land whilst the settlers believed that it could only own land that was in its administrative capacity and any new Government should be declared the rightful owner of unalienated land.
Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society... Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.¹⁰

According to Palmer, the case presented for the Africans in this case was summarily dismissed on the grounds that the Ndebele sovereignty, and with it all African rights to land, had been broken up and replaced by a new, ‘and, as their Lordships do not doubt, a better’ system, as defined by the 1894 Order in Council.¹¹

The Privy Council came to the conclusion that, “whoever now owns the unalienated lands, the natives do not”.¹² This decision, which set a precedent for justifying land expropriations from indigenous communities in various parts of the British Empire, shows the critical role played by the judiciary in the interpretation and enforcement of land expropriation rights. The legislature weighed in with new laws to legalise expropriation of more land.

2.3 Land Apportionment Act (1930) and the Land Tenure Act (1969)

The events of the next sixty years saw the encroachment into and further dispossession of, local lands. All this was forcibly done under the authority of the law, including for example the Land Apportionment Act of 1930. Writing about the Land Apportionment Act, Palmer states:

For whites in Rhodesia, the Act has become something of a Magna Carta, guaranteeing the preservation of their way of life against encroachment from the black hordes, whereas for Africans the Act is seen as blatantly discriminatory and palpably unjust.¹³

This colonial system gave rise to grievances, which manifested in local associations and later political parties pushing a nationalist and freedom agenda. Between 1965 and 1979, a protracted war of independence, known as the Second Chimurenga, after the original in the 1890s was spearheaded by the two main political parties, namely ZANU and ZAPU – which today

¹⁰ In Re Southern Rhodesia, opt cit p. 233
¹¹ Palmer R. opt cit at p. 134
¹² Supra
¹³ Palmer, p 178. On page 153, Palmer also quotes a Colonial Office official as having observed: ‘I fear that a good deal of natives’ grievances is the inevitable result of the white population … The Ndebele in central Matabeleland were bitterly opposed to the forced relocation to “distant and inhospitable reserves by aggressive white farmers …’
form ZANU-PF\textsuperscript{14}. As Linnigton states, “the liberation struggle that followed the UDI in 1965 had its roots in the issue of land distribution”.\textsuperscript{15}

The case of the Tangwena people in Eastern Zimbabwe provides a more vivid illustration of the application of force and law in land expropriation which created victims and intensified resentment that fuelled the war of independence.

**Law, Force & Violence: The Case of the Tangwena People**

The people of the Tangwena sub-group of the Shona people in Manicaland resisted attempts to move them from their ancestral lands in the area known as Gairezi. According to the ICJ Report (1976), the land had been sold in 1905 by the BSAC to the Anglo-French Matabeleland Company which had later ceded it to a farmer known as Mr Hanmer.

When the Rhodesia Front government took over power in 1962 they sought to strictly enforce the segregation laws and it became imperative for Mr Hanmer to remove the Tangwena people who were now regarded as ‘squatters’. They resisted and attempts at criminal prosecution of Chief Tangwena eventually failed but the government went on to make a proclamation in terms of section 86 of the Land Apportionment Act ordering the Tangwena people to leave the land. They Tangwena people resisted and according to the ICJ Report:

\[\text{just before dawn on September 18 1969 the police arrived to evict the people and when they resisted, nine police land rovers and a bulldozer moved to flatten their huts, crops and fruit trees.}\textsuperscript{16}\]

The Tangwena people rebuilt their huts and planted new crops but in November they were destroyed again. After that they fled to the mountains and lived in hiding\textsuperscript{17}. Chief Tangwena was quoted as having lamented:

\textit{The government has raped me of my land. They have taken away my heritage. They have guns and I don’t. I see no point in talking to this...}
government. First they took my land, then my cattle and lastly my children, yet they say they are a Christian government.\textsuperscript{18}

The situation is aptly captured by the ICJ which stated that the treatment of the Tangwena people illustrated the “brutal methods” employed by the Rhodesian government to implement its policies of racial separation\textsuperscript{19}. An observer looking at the treatment of the white commercial farmers in the post 2000 period would say much the same in terms of the kind of treatment used in their evictions – showing again continuities differences emerging only in the identity of the victims all of whom however can rightfully demand justice for those wrongs.

The net result of these colonial policies was that what was designated as the European population got the bigger share of the land – both in quantity and quality, in addition to the segregation that the law permitted\textsuperscript{20}. As Zimmerelli noted at the time, the:

\begin{quote}
unequal distribution of land [has] lead to over-crowding, over-cropping and over-grazing of the African farm lands while a great amount of (fertile) European land [has gone] completely unused.\textsuperscript{21}
\end{quote}

The significance of this historical overview is that it presents the bigger picture of historical land expropriation and the roots of the current problem in Zimbabwe. It demonstrates that a combination of the law and forceful means were employed to dispossess and evict the Africans from the land. The law sought to legitimise land expropriation and segregation of Africans from white settlers. The law left Africans at the periphery of economic activity, in geographically inferior lands far from the rail service and urban areas. This colonial system created victims whose only available recourse was to pursue armed struggle to address these injustices.

The war failed to resolve the land problem for victims. The law was again used to maintain and perpetuate a colonial system which left colonialism’s victims unsatisfied.

3 Lancaster House and the Land Question: A Missed Opportunity

\textsuperscript{18} ICJ Report 1976 Opt cit p. 105. He is also quoted as having said, “I used to feed my pigs and eat them. Now I feed on wild things as if I were a pig” Quoted in Holman, M. Last Hideout for the Tangwena Observer Magazine 6 July 1975 (London).

\textsuperscript{19} Another incident was the removal in 1967 of 5,000 Africans to the Gokwe area which was infested by Tsetse fly, a bug that affects both humans and livestock.

\textsuperscript{20} According to Palmer at p. 186, “When the Land Apportionment Act was finally passed in 1930, the country’s 48,000 Europeans (of whom only 11,000 were settled on the land), were given on average 1,000 acres per head of population. Their share was greater than that of the one million still predominantly rural Africans who had only 29 acres per head of population …in the districts”

\textsuperscript{21} Zimmerli C.H. Human Rights and the Rule of Law in Southern Rhodesia, 20 ICLQ 239
The war ended in 1979-80, following the signing of the Lancaster House Constitutional Agreement between the warring parties. The new constitution was clearly a product of compromise as evidenced by its weaknesses relating to the land question. Linnington observes that the final agreement reflected to a large extent the fact that the various participants had had to make concessions on a number of issues. For example, the Patriotic Front (representing the nationalists) was obviously disappointed that its views on the land issue were not reflected in the text of the new constitution.22

The Patriotic Front23 preferred provisions facilitating speedy land reform providing their black supporters a greater share of the country’s arable land.

Instead of facilitating an honest, open and conclusive resolution of the land question, the Lancaster House talks simply postponed the problem. The Africa All Party Parliamentary Group of the UK Parliament echoes this view:

The prime objective of Lancaster House was to achieve a political settlement and in order to do this it was necessary to defuse the land issue rather than solve it. There was no final agreement on land reform at Lancaster House. Given this, it is unsurprising that the land remains a thorn in both Britain and Zimbabwe’s side 30 years later.24

The Lancaster House Constitution contained a clause (section 16), that created a strong and robust framework for protecting property rights. It ensured, in effect, that for the first ten years of independence, land redistribution would be based on the “willing buyer, willing seller” principle. Section 16 was one of the entrenched provisions of the new constitution which meant that it could not be amended for a period of ten years. One scholar quotes the view of the Patriotic Front as saying in 1979 that:

The Lancaster House conference produced a constitution which secured for the whites unhindered citizenship rights, a bill of rights which precluded the expropriation of private property …25

The legal architecture and a lack of financial resources limited the pace of land reforms in the 1980s. This view is echoed by Linnington who wrote:

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22 Linnington, p. 37.
23 The Patriotic Front, consisting primarily of ZANU and ZAPU, was led by Robert Mugabe and Joshua Nkomo at the constitutional talks at Lancaster. Mugabe and Nkomo were later to become President and Vice President of Zimbabwe, respectively.
25 Moyo, op. cit.
For the first ten years of independence the government was precluded from embarking on a meaningful process of land redistribution because section 16 of the Constitution was effectively insulated from amendment during that time.\(^{26}\)

The government was restricted to buying land for resettlement but only on a “willing buyer, willing seller” basis in respect of utilised land. It could compulsorily purchase under-utilised land but again this was subject to stringent conditions and in any event the criteria for determining whether land constituted “under-utilised land” eligible for compulsory purchase was fraught with complexities impeding its determination. A free-market "willing buyer, willing seller" basis was never going to adequately resolve the problem given that it depended on the will of the seller and the financial capability of the buyer to take up any offer. According to Moyo, land reform progress during the first decade and a half of independence was unsatisfactory as the “land supply side of the redistribution effort [was, at the time] the least transparent and most contentious issue around which future conflicts will revolve”.\(^{27}\)

Given the primacy and political sensitivity of the land question, it is hardly a surprise that section 16 of the Constitution became one of the most bitterly contested clauses in the Bill of Rights – not only in the courts but in parliament, the media and later in the field, when farms were forcibly occupied post-2000.

What the Lancaster House Constitution did was to acknowledge, legalise and attempt to legitimise white hegemony whose moral legitimacy remained intensely contested. No clear attempt was made to pursue transitional justice, to ensure the wrongs of the past were dealt with to the satisfaction of involved parties, alleged transgressors and victims alike. The Lancaster House Constitution paid little, if any, attention to the plight of the victims of the colonial system, leaving the wounds to fester and very unpleasantly burst twenty years later. It protected those who owned property but did not address the concerns and interests of those who were dispossessed by the unjust colonial system. Land grievances and claims were therefore unresolved, left instead to the operation of market forces through the “willing buyer, willing seller” principle.\(^{28}\)

The tragedy is that the postponement of this problem at Lancaster perpetuated land inequality, which afforded the ZANU-PF government a

\(^{26}\) Linnington, p. 427.

\(^{27}\) Moyo, p. 3. He was writing in 1994 and events of post 2000 in respect of the eventual conflict post 2000 goes some way to prove the accuracy of his prediction, which at the time went unheeded.

\(^{28}\) This view is also acknowledged by the Africa All Party Parliamentary Group of the UK parliament in its Report on Land in Zimbabwe: past mistakes, future prospects (2009). It states, “The feeling that justice on land was denied at Lancaster House is felt strongly today, both in Zimbabwe and throughout southern Africa.” p. 18
platform to rally support based on Pan-Africanism and social justice rhetoric when facing its greatest electoral challenge from the Movement for Democratic Change (MDC) in 2000. By so doing, ZANU-PF presented itself as the party continuing the revolution that had started with the Chimurenga wars. It is little wonder that post-2000 land reforms are couched in ZANU-PF parlance as the *Third Chimurenga*, in reference to continuation of an African struggle for both political and economic independence.

4 Land: Legal Manoeuvres in the 1990s

This section examines the period after the expiration of “willing buyer, willing seller”, and the legislative attempts to redress land imbalances. Initial attempts focused upon the constitution and new legislation. Later legal amendments took a more radical complexion, effectively transferring responsibility from the Zimbabwe state to the United Kingdom. After 2000, the legal manoeuvres were accompanied by force and violence. The use of law and force to dispossess landowners of their properties along racial lines, especially after 2000, echoed the colonial period. The roles had been reversed, and the victims were now white commercial farmers.

4.1 Constitutional Changes

The first move was to amend section 16 of the Constitution. This was achieved by an amendment which came into effect in 1991 and repealed elements of the provision relating to government compensation for acquired land.29

Before the amendment, where the state, as an acquiring authority had acquired land, it was required to *pay promptly adequate compensation* to the landowner. The 1990 amendment required only *“fair compensation”* be paid *“before or within a reasonable time”* after the acquisition of the property, interest or right in it. This was an important change which demonstrated government intent to remove impediments to accelerated land reforms. Essentially by substituting the requirement for “prompt” payment with “payment within a reasonable time” and the compensatory change from “adequate” to “fair” compensation, it watered down the state’s obligations, developing its discretion to acquire land. Later section 16 was amended to bar judicial challenges questioning the fairness of compensation as determined by the Compensation Committee set up under the Land Acquisition Act, 1992.30

It is not intended here to assess the merits or drawbacks of these provisions, but rather to highlight the motivations of interested actors,

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29 Section 6 of Constitution of Zimbabwe Amendment (No. 11) Act 1990 (Act 30/1990)
30 Section 16(2) stated, ‘No such law [authorising acquisition of land] shall be called into question by any court on the ground that the compensation provided is not fair’
particularly the government, which saw itself as legitimately pursuing a course of social justice.

4.2 Land Acquisition Act 1992

The next changes came in the form of a new law providing a framework for land acquisition, namely the Land Acquisition Act 1992. According to Moyo, the Act sought, “an administratively swift process for acquiring selected lands by minimising legal contestations over land designated for acquisition”. The Act was only passed after intense and often hostile debate. According to Tshuma, the Land Acquisition Bill “polarised Zimbabwean society along racial lines with passions running high on both sides of the racial divide”. He stated that the “white agrarian bourgeoisie” campaigned against the Bill on the basis that it would destroy agriculture and the economy. However, according to the same scholar, “for blacks the Bill was seen as an opportunity for redressing historical injustices, an opportunity denied by the Lancaster House Constitution during the first decade of independence”.

The Land Acquisition Act gave powers to the President to acquire land on a compulsory basis. Part IV of the Act allowed the relevant minister in charge of land affairs to designate rural land (essentially commercial farmland) for acquisition. The designation could be challenged and the minister was required to apply to court to confirm the acquisition.

These changes were resisted by the farmers who sought recourse in the courts of law. In one high profile case, the constitutionality of land designation under the Act was challenged: Davies & Others v Minister of Lands, Agriculture and Water Development. However, both the High Court and the Supreme Court dismissed the challenges. Despite the success for the government in this case, it appeared the legal route was not yielding the desired results. While attempting to reverse colonial injustices through legislative change, it viewed the farmers’ legal challenges as resistance to historically just land reform.

5 Compensation and Souring of Relations between Britain and Zimbabwe

A critical and controversial factor in land reform has always been the question of compensation and where responsibility for providing

31 Moyo, p. 3
33 Tshuma, supra at p. 129
34 Moyo states that in 1993-4 40% of farms that had been designated under the 1993 regulations were undesignated after challenges – which seemed to indicate that where valid contestations were made they were accepted.
35 1994(2)ZLR294 (H)
36 1997 (1) SA 228 (ZSC)
compensation to white farmers falls. The government of Zimbabwe has traditionally placed the obligation on the British government. The former colonial power had for years since independence funded land reform under an unwritten arrangement allegedly reached at the Lancaster House talks.

The relationship changed dramatically in 1997, when the New Labour government came to power in Britain with Tony Blair as Prime Minister. New Labour emerged with a different mentality and approach to the land issue in Zimbabwe. This infuriated the Mugabe-led government who felt New Labour was downplaying Britain’s responsibility for the colonial wrongs acknowledged at Lancaster. An often-cited incident is the letter written in November 1997 by the then Secretary for International Development in the new Blair government, Clare Short. In the letter, Clare Short stated that the New Labour government would not accept the obligations of previous British governments. Part of the letter reads:

We do not accept that Britain has a special responsibility to meet the costs of land purchase in Zimbabwe. We are a new Government from diverse backgrounds without links in former colonial interests. My own origins are Irish and as you know we were colonised not colonisers.37

As stated by Dominic Lawson, writing for The Independent newspaper, this was “an astonishingly ill-judged letter”.38 This was the start of a decade long relationship of bitter acrimony between the two governments.

Meanwhile towards the end of the 1990s, President Mugabe and his ruling ZANU-PF party were facing serious pressures domestically. These stemmed from both the deteriorating economic conditions created by Economic Structural Adjustment Programme (ESAP) launched in the early 1990s and more importantly from War Veterans of the Second Chimurenga who were demanding their share of gains from securing independence. In 1997, Mugabe granted them a Z$50,000 lump sum each and further monthly payments of Z$2,000 – from unbudgeted funds. The demands for land reform followed.


38 Lawson goes on to say, aptly, it must be added, “It would have been hard to construct a letter more skillfully designed to enrage Mugabe – or even a man with a much thicker skin than the Zimbabwean leader. Short’s amazing assertion – that because her family was of Irish stock there was no need to honour a commitment to Zimbabwe entered into by a previous British government – was an inimitable mixture of shamelessness and sanctimony. That friend of mine who knows Mugabe says that Short’s letter sent him into a rage against Britain which has scarcely abated for the succeeding decade”. 21 September 2007
There were also pressures from the peasantry. The land occupations of the Svosve people in Svosve communal lands near Marondera displayed the vigorous discontent of many indigenous groups at state collaboration with white farmers. This often understated event demonstrates the real manifestation of grievances over land by local groups that felt the government had not done enough to fulfil their promises of redressing the colonial wrongs of land expropriation. 39

6 Legal Changes in 2000: Amendment No. 16

In February 2000, a peaceful Referendum over a new Constitution was held in Zimbabwe with the government supporting the adoption of the proposed constitution while the opposition campaigned against it. The government lost – the first electoral loss for ZANU-PF since independence in 1980. This forced ZANU-PF into panic mode, realising the real possibility of losing political power and worse, to the MDC, a party supported by white commercial farmers.

After the referendum defeat, war veterans led farm occupations, forcefully and violently evicting white farmers. The land occupations drew international criticism over the demise of the rule of law and violation of property rights. Just before parliamentary elections, the government introduced Constitutional Amendment (No. 16) Act which sought to legitimise extra-legal occupations already taking place and to expedite the land reform process. One clause placed responsibility for compensating evicted farmers on Britain, as the former colonial power, absolving the Zimbabwe government of obligation. The amendment also held that there would be no requirement for fair or adequate compensation – further watering down the government’s obligations already undermined by the 1990 amendment. Here one can see the progressive erosion of the right to compensation, from the robust protections of the 1980 Constitution inherited from Lancaster House to the weak provisions of the 2000 version guaranteeing neither fair nor adequate compensation.

39 The Svosve invasions were not the first as stated by one author: “Between 1983 and 1997, villagers from Mutasa, Chiwiti, Mhondoro and Nyamatsitu, communal lands that the state had leased to white commercial farmers were repeatedly invaded by those seeking to exert historical claims. In each instance, the government evicted these landless villagers by force. In June 1998, the Svosve people of the Marondera and Wedza districts undertook a series of illegal farm occupations. Earlier in October 1996, the land issue came to a head when a group of 200 land hungry peasants invaded an idle state farm adjacent to the Matobo Research Station in Matabeleland in defiance of the government. The unilateral action by otherwise law abiding citizens was an illustration of the growing impatience among thousands of landless Zimbabweans over the implementation of the nation-wide land redistribution programme to correct pre-independence imbalances.” Chikuhwa J. The Haphazard Land Reform at http://chikuhwa.net/zimbabwelandonfusion.htm (last accessed on 14 May 2010).
The parliamentary elections held in June 2000 were marred by violence and allegations of vote rigging. ZANU-PF won a narrow victory. Having amended the Constitution, the new government hastily changed the Land Acquisition Act 1992, stating that in the absence of a fund set up by Britain, the government of Zimbabwe would pay only for improvements on the land but not for the land itself. As under the previous provisions, no challenge would be allowed as to the ‘fairness’ of the compensation as determined by the Compensation Committee. The amendments also removed the process of designation, which according to Coldham, effectively removed what were considered land reform process bottlenecks. Coldham notes, “controversial though they may be, these amendments to the law undoubtedly make it much easier for the government to acquire land for resettlement purposes”.

7 Further Legal Changes in 2005: Amendment No. 17

The government introduced a further amendment to the constitution in 2005, namely Constitutional Amendment (No. 17) Act. It contained further provisions affecting the land question. Essentially, the amendments ousted judicial jurisdiction from determining land acquisition disputes. In Zimbabwe, the Constitution has traditionally provided for the right to the protection of the law under Section 18 of the constitution. This clause effectively took away that right from those aggrieved by the government’s land policy. Hitherto, an aggrieved person could challenge the acquisition, although challenging the fairness of compensation had since been eroded. This provision barred aggrieved persons from approaching the courts when their agricultural land had been taken.

Two other clauses legitimised prior and current land acquisition without compensation. These *ex post facto* provisions were to apply retrospectively, giving the cloak of legality to the acquisition of farms previously occupied illegally. The changes were designed to legitimise the activities during the Fast Track Land Reform Programme, which were then illegal under law.

The constitutional amendments barring access judicial jurisdiction were challenged before the regional court, the Southern African Development Community Tribunal (SADC Tribunal). The SADC Tribunal ruled in the case of *Mike Campbell (Pvt.) Ltd et al. v. Republic of Zimbabwe* [2008] SADCT 2, that white farmers had been racially discriminated against in the execution of the land reform programme and that this conduct by the Government of Zimbabwe violated principles of the SADC Treaty. It also ruled that the farmers were entitled to compensation for the loss of their land. However, the Zimbabwe government refused to pay compensation for the land, arguing that the obligation to pay compensation to the farmers rested on the British government, in its capacity as the former

colonial power. As Britain has refused to accept that it has such a responsibility, the former commercial farmers have been left exposed.

8 GNU and the Unfinished Business over Land

In September 2008, the then ruling ZANU-PF entered into a power-sharing agreement with its two main opponents, the MDC-T and the MDC. This came after a controversial and widely criticised presidential election in June 2008. In the Global Political Agreement (GPA) between ZANU-PF and the two MDC parties which led to the Inclusive Government in 2009, all parties agreed:

5.4 While differing on the methodology of acquisition and redistribution the parties acknowledge that compulsory acquisition and redistribution of land has taken place under a land reform programme undertaken since 2000.

5.5 Accepting the irreversibility of the said land acquisitions and redistribution ...

There is, therefore general agreement around the principle of land reform but more importantly in this regard, common agreement between the key political parties on the fact that the situation is now “irreversible”. However, this is strongly contested by white farmers who lost their farms and continue to demand justice at the very least by way of compensation. There are other disgruntled blacks as well, who have not benefited from the programme since it was skewed in favour of ZANU-PF supporters. Women have also been marginalised in the land reform process which traditionally favoured men. Accusations of multiple farm ownership, especially among the political elites are also commonly made.

On compensation, the idea that farmers should be compensated is acknowledged in the GPA, but the extent and source of this compensation

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41 This is evident in section 16A of the Constitution of Zimbabwe which states that:

“(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”.


43 The text of the GPA can be accessed at http://www.kubatana.net/docs/demgg/mdc_zpf_agreement_080915.pdf (last accessed on 12th May 2010)
remains unclear and disputed. In 2005, the government had amended section 16 of the Constitution, placing the obligation to compensate the farmers on Britain as the former colonial power. 44 Section 16A (1) (ii) further states that should Britain fail or refuse to set up the relevant fund for compensation, “the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement”.

The principle behind this controversial clause is repeated in the GPA which is the basis of the current coalition government. 45 The legitimacy or legality of imposing a constitutional obligation on a foreign country may be called into question. However, these clauses must be read for their political significance in relation to the battle over land, between the governments of Zimbabwe and Britain; between the Zimbabwe government and the white farmers who lost their farms; and between the various players with interests or rights in the land.

The GPA merely represents the agreement of political leaders and their parties vying for political clout. It does not bind the other critical players concerned with the land question, especially those not necessarily falling under or aligned to ZANU-PF or the two MDCs. Like the Lancaster House Agreement in 1979, the GPA is a product of compromise. It suggests that the land issue is finalised. The reality seems otherwise. Article 5.9 of the GPA calls for a land audit, an acknowledgement that the matter is far from settled. That it is part of the GPA, an ostensibly transitional political arrangement, suggests that the land question constitutes an appropriate matter for transitional justice.

9 Conclusion

This essay has done two things:

44 Section 16(1)(i) states that “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”. This former colonial power is Britain.

45 “5.6 Noting that in the current Constitution of Zimbabwe and further in the Draft Constitution agreed to by the parties the primary obligation of compensating former land owners for land acquired rests on the former colonial power.

5.9 The Parties hereby agree to:

(a) …
(b) …
(c) …
(d) call upon the United Kingdom government to accept the primary responsibility to pay compensation for land acquired from former land owners for resettlement”
demonstrated how the combination of force and law has been at the core of *modus operandi* for land expropriations in Zimbabwe, in both the colonial and post-independence periods.

shown that with more effort victims of this application of force and law can be identified both in the colonial and post-colonial periods, demonstrating that transitional justice must take the multiplicity of victims and their multiple concerns into account.

When it comes to the land question, the past and the present are inextricably interwoven. Any attempt to select parts of history will be exclusionary. In the colonial and post-independence periods, law has been manipulated to suit political ends; to enable the expropriator of land to claim legitimacy for its actions. Ultimately, the economic aspects of land reform should be given due weight to ensure the revival of agricultural productivity, which along with mineral production is the mainstay of Zimbabwe’s national economy. Recent reforms have generally failed to do that, meaning the process is not only challenged on the grounds of injustice but also on the paucity of economic consideration. Ultimately, the ideal situation is one in which victims of expropriation receive redress, while land is put to its most productive use. This would paint the perfect picture of social and economic justice.

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