

Chapter 4

Humwe, Human Rights and Globalisation

“The obligation of our profession is to serve as healers of human conflict. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with the minimum of stress on the participants. That is what justice is all about!”¹

4.1. Introduction

The previous chapter concluded that in the contest for the status of “ultimate victim” among stakeholders in the land issue, it was “the inherent dignity” of all concerned that was in the “ultimate victim”. This is not surprising because the human rights culture has emerged in the last half century to dominate every other culture known to man. Often, States assess and rate one another by their human rights records. Quasi-judicial and judicial organs of the United Nations (UN) refer to States’ human rights performances. Donor countries habitually use human rights practice of target States as a basis for continuing or discontinuing economic relations with target States. Citing collapse of the rule of law in Zimbabwe as the basis of its action, Canada imposed in May 2001, a sanctions regime on Zimbabwe. The sanctions included a suspension of new development aid to the Zimbabwean government, severance of export financing and exclusion from participating in Canadian peacekeeping training courses and reaffirmed Canada’s existing policy of banning all military sales to Zimbabwe.² In February 2002, the 15 member States of the European Union imposed a package of sanctions designed to “make known” its disappointment with growing human rights abuse in Zimbabwe. The sanctions include a travel ban to the 15-nation European Union on Zimbabwe’s President Robert Mugabe and his associates, the freezing of their European assets and an arms embargo. Emphasising that the measures

¹ Warren E. Burger – 15th Supreme Court Chief Justice of the United States of America (1969-1986).

² See “Canada imposes Sanctions on Zimbabwe”, at <http://www.mdczimbabwe.com/archivemat/other/intern/mgsa010513cantxt.htm> (visited 02/03/05)

were targeted at the ruling ZANU (PF) leaders and not the people of Zimbabwe themselves whose plight they sympathised with, the The U.S. President George W. Bush issued on 7 March 2003 an “Executive Order Blocking Property of Persons Undermining Property of Democratic Processes or Institutions in Zimbabwe”.³ The sanctions freeze all property and economic assets of the targeted individuals. They also prohibit U.S. citizens or residents from engaging in any transaction or dealing with the targeted individuals. Most organizations nowadays use human rights performance indexes as a means of risk assessment. According to this culture, any threat to the dignity of mankind must be attended immediately by measures targeted at ensuring both the security of victims, and their restoration to their former status to the extent that that is possible.⁴ Baxi⁵ writes that:

Although not radically ameliorative of here-and-now suffering, international human rights standards and norms empower peoples’ movements and conscientious policy makers everywhere to question political practices. That, to my mind, is an inestimable potential of human rights languages, not readily available in the previous centuries. Human rights languages are all that we have to interrogate the barbarism of power.

International Labour Law, International Criminal Law, International Human Rights Law, International Environmental Law and Public International Law, all combine to give us the much needed human rights languages that articulate the threats posed to man’s inherent dignity by errant governments when their actions fall beyond what international law regards as official acts of States for which there can be no immunity from prosecution.⁶ Established in 1919 the International Labour Organization seeks to achieve international peace and security by promoting social justice in the workplace.⁷ The SADC’s land issue should be of concern to

³ See “Office of Foreign Assets Control”, at <http://www.ustreas.gov/offices/enforcement/ofac/sanctions/ascii-versions.html>

⁴ Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994).

⁵ Baxi, U. (2002), *The Future of Human Rights*, Oxford University Press, p.2.

⁶ See *ex parte Pinochet Ugarte*, [1999] H.L. 2 Weekly Law Reports, p.827, at p.846.

⁷ The ILO was established in 1919. See Declaration Concerning the Aims and Purposes of the International Labour Organization, 26th Session (Philadelphia 10 May 1944), Principle II at <http://www.ilo.org/public/english/about/iloconst.htm#annex> (visited 31 March

the ILO particularly because of the threat of homelessness and joblessness that it has generated for those people that work in the agricultural industry. For many of them, the farms on which they worked also became the places they called home.⁸ In the absence of a coherent, cohesive and legitimate land reform policy, many have been left jobless and homeless. Resolution of the land issue would significantly enhance the chance of peace and security in the region to the extent that these workers are rehabilitated.

The Statute of the International Criminal Court⁹ (ICC) targets achievement of international peace and security through prosecution of crimes of the most serious concern to mankind. Arguably, some events that happened during Zimbabwe's land crisis after the Statute of the ICC came into force are subject matter of the ICC's jurisdiction under Article 5(b).¹⁰ Article 13(b) of the Statute of the ICC provides that the Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. Were the Security Council to refer to the Prosecutor of the ICC events that happened in Zimbabwe after 1 July 2002 that appeared to violate Article 5 of the Statute of the Court,¹¹ would the ICC commence proceedings even if Zimbabwe itself has not yet ratified the Statute of the court? The answer to that question might turn on the court's interpretation of what is meant by "in accordance with the provisions of this Statute". The preamble to the Statute of the ICC clearly states that the agenda of the Court is twofold. First, the Court was established to prosecute crimes that threaten the peace, security and well-being of the world. The Statute entrenches the policy of pursuing international peace and security by criminalizing particular conduct. Secondly, the Court was established to ensure that the most serious crimes of concern to the international community as a whole do not go unpunished. The Statute proscribes impunity for the most serious crimes against mankind. Under Chapter VII

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⁸ See "Zimbabwe Soldiers attack farm workers" at <http://www.guardian.co.uk/zimbabwe/article/0,2763,918748,00.html> (visited 01 April 2003)

⁹ 17 July 1998 at <http://untreaty.un.org/English/TreatyEvent2001/index.htm> (visited 31 March 2003)

¹⁰ Discussing crimes against humanity, see Chigara, B. (2002) *Amnesty in International Law: The legality under international law*, Longman, London, pp.6-8.

¹¹ See " 'Hitler' Mugabe launches revenge terror attacks" at <http://www.dailytelegraph.co.uk/news/main.jhtml?xml=/news/2003/03/26/wzim26.xml&sSheet=/news/2003/03/26/ixworld.html> (visited 02/04/03)

of the United Nations Charter, “The Security Council may decide what measures not involving the use of force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. ...”¹² The Security Council has previously referred matters that it regarded as potential threats to international peace and security to judicial organs of the United Nations even in situations where one of the parties was neither a member of the United Nations nor an acceptee of the jurisdiction of the International Court of Justice (ICJ).

The first dispute to come before the newly created ICJ was that between the United Kingdom – a member of the UN that had also accepted the jurisdiction of the ICJ under Article 36 of the Statute of that court, and Albania – a State that was neither a party to the UN, nor an acceptee of the jurisdiction of the ICJ. Moreover, the International Law Commission’s (ILC) draft Statute of the ICC offers good insight into the potential effect of Article 13(b) above. The ILC proposal stated in Article 23(1) that: “Notwithstanding Article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in Article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the UN.” Gargiulo writes that “The intent of the provision was to allow the Security Council, when acting under Chapter VII of the UN Charter, to initiate recourse to the Court by dispensing with both the requirement of the acceptance by a State of the Court’s jurisdiction (draft Article 21), and the lodging of a complaint. In addition, it enabled the Security Council to use the Court as an alternative instrument to the setting up of *ad hoc* tribunals”.¹³ If this is even remotely possible, then the complimentary jurisdiction of the ICC, which many in Rome had regarded as a cop-out, would continue to surprise as it has done already by bringing the Court into existence in just under four years. This is a remarkable pace in international law whose speed is often determined by the average speed of the red tape of all the bureaucracies of the world put together. Those that had advocated an ICC with universal jurisdiction, particularly Germany, had feared that complimentary jurisdiction would dissuade States from readily ratifying the Statute of the court, making unattainable in the foreseeable future the 60 ratifications required to bring the Court into existence - Article 126. They had projected a ten-year gap between adoption of the Statute and the coming into existence of the Court

¹² Article 39.

¹³ Gargiulo, P. (1999) “The Controversial Relationship Between the International Criminal Court and the Security Council”, in Lattanzi, F. and Schabas, W. eds. Essays on the Rome Statute of the International Criminal Court, il Sirente, p.67 at 70-1.

itself. But writes Schabas,¹⁴ the secret of the success of the ICC appears to lie with its complimentary jurisdiction. “Indeed, we might ask in hindsight whether sixty ratifications would have been achieved so quickly had the broad German proposal actually been adopted. The problem with the German scheme of universal jurisdiction is that it left little incentive for States to join the Court. One way or another, whether or not they ratified, if the Court was based on universal jurisdiction, crimes committed in their territory would be subject to the jurisdiction of the Court in any case.”¹⁵

In 1945 the United Nations Charter conferred on the Security Council the primary responsibility to ensure international peace and security – Article 39. However, judging by the record of its success, the strategy of using “measures not involving force” – Article 41, complemented if necessary by “action by air, sea, or land forces” – Article 42, may become less attractive to the ICC strategy of prosecuting where the threats posed to international peace and security fall also under Article 5 of the Statute of the ICC. Historians commonly refer to the twentieth century as the bloodiest in man’s recorded history.

In conflict situations like the SADC, land issue human rights discourse empowers the objective victim(s) i.e. everyone whose inherent dignity is at issue over the subjective victim(s) who come to the table with only one claim in mind – their own. More importantly, it raises the question of methodology and procedure.¹⁶ If the human rights culture provides the authority to intervene in conflict situations to uphold the inherent dignity of mankind, what standard(s) does one apply in the effort constructively¹⁷ to resolve past and continuing social injustices that are rooted in colonial or some such other similar experience of States? Social injustice has long been recognised as a cancer that threatens fulfilment of man and society’s possibilities. The *humwe* principle appears well suited to this task. Its

¹⁴ Schabas, W. (2002) “International Criminal Court: The Secret of its Success”, Criminal Law Forum, p.1.

¹⁵ Ibid at 5.

¹⁶ Questioning the consistency with the goal of humanitarian intervention of materials and procedures used by NATO in the Balkans and the Middle East, see Chigara, B. (2001) “Humanitarian Intervention Missions: Elementary Considerations, Humanity and the Good Samaritans”, Australian International Law Journal, pp.66-89.

¹⁷ The International Labour Organization’s (ILO) constitution targets social justice in the workplace as a means of achieving international peace and security in the world while the Statute of the newly established International Criminal Court targets achievement of international peace and security through prosecution of crimes of the most serious concern to mankind. In the end, both agendas target security of individuals through protection of different fundamental freedoms.

unrivalled potential to placate the mischief at the heart of the land issue with minimal violation if any, of the inherent dignity of the parties to the dispute, lies in its alignment to the notion of social justice which is consistent also with the aspirations and substantive principles of the International Human Rights Movement which seeks to promote, to protect and to ensure respect for the inherent dignity of human beings without distinction whatsoever. Nonetheless, *humwe's* restorative, distributive and preservative qualities alone are not sufficient constructively to engage the Southern African Development Community's (SADC) land issue. To meet the requirement of sufficiency, SADC land reform programmes must ensure market efficiency, by which is meant two things, namely:

- 1) Development of sustainable supply of agricultural products and creation of domestic and international markets for the same.
- 2) Restore/preserve capacity to feed their populations and to supply external markets with food and food products.

To compete in the international marketplace, the agrarian industries that result from the land reform programmes of affected States must also demonstrate sustainable industrial flexibility that benefit both intra and inter-State trade. For instance, landholders should be equipped with skills and financial possibilities that enable them to switch crop production to suit market demand. If the market requires roses, paprika and other spices, instead of the more traditional crops, to the extent that the savannah climate allows, or innovations possible that enable such undertakings, land owners should be able to respond to such market changes. This calls for a new type of peasantry, i.e. one that is sufficiently trained, skilled and motivated. That is a peasantry that also sustains conceptions of land as the ultimate property. Failure to achieve that efficiency may result in economic failure of this largely agrarian economy, triggering instability. In turn, that may jeopardise the SADC's ultimate goal of progressively harmonising Member States' microeconomic policies towards establishment, incrementally, of a free trade zone, a customs union and ultimately full economic union with integrated monetary and fiscal systems and a regional parliament by the year 2034.¹⁸ In its 2001 Trade and Development Report, the United Nations Conference on Trade and Development (UNCTAD) recommended establishment of such regional economic unions as a crucial first step in

¹⁸ Discussing the creation, purpose, functions and objectives of the SADC, see Chigara, B. (2001-2002) "Trade Liberalisation: Saviour or Scourge of SADC Economies", *The University of Miami International and Comparative Law Review*, vol. 10 Special Issue, pp.7-21.

any effort of developing States to break away from dependence on the Bretton Woods financial system,¹⁹ whose architecture appears to be insensitive to their particular interests. If that view is correct, then in order to achieve its goal of full economic union with integrated monetary and fiscal systems and a regional parliament by the year 2034, it appears that as well as implementing *humwe*, SADC States ought also to engage other strategies that reinforce its strengths as well as plug its holes. But what might these strategies comprise? What additional burdens might their attachment to *humwe* immediately impose on the land reform processes that are unfolding in the SADC? How might these strategies if at all feasible, be integrated into the land reform programmes of affected States without undoing the benefits and potential harvests of *humwe*? This chapter analyses *humwe*'s capacity to efficiently resolve the land issue in SADC States. It examines *humwe*'s social justice agenda and human rights pedigree against the backdrop of international microeconomics that inevitably interact with it. It argues for strategies to be attached to *humwe*'s agenda that complement *humwe* to achieve: (1) market competitiveness of the SADC, (2) market efficiency of the SADC, and (3) sustainability of the SADC economy. No matter how just land reform programmes are that target social mischief rooted in colonial or some such other similar historical experience of States, unless they also target creation or institution of an efficient and competitive economy, they are doomed to penalise their societies until efficient and competitive ones are substituted in their stead. The reason for this is simple. We live in a world of globalising processes that impose particular limitations on any one State's capacity to do as it pleases under the cloak of sovereign independence, particularly in economic and human rights matters. The international human rights system whose reach is constantly elongating is one such process, and the globalisation of industry and trade another, and environmental responsibility yet another. Together these systems present challenges that compel sovereign independent States to act not only according to their national self-interest²⁰ but also according to international expectation.

4.2. *Humwe's Human Rights Pedigree*

¹⁹ See United Nations Conference on Trade and Development, U.N. Trade and Development Report, p.118, UN Doc. UNCTAD/TDR 2001, U.N. Sales No. E.00.II.D:10 (2001) at <http://www.unctad.org/en/docs/tdr01ch5.en.pdf> at 118.

²⁰ Examining the grip on State practice of 'state interest' see Henkin, L. (2nd ed. 1979) *How Nations Behave*, Columbia University Press, New York.

Chapters One and Two of this book showed that the SADC's land issue originates in the injustice of forced expropriation of native land by colonial regimes of Germany, the United Kingdom, France and Portugal respectively. The unequal access to land that resulted perpetuated a stranglehold of economic dominance of the native majority by a small racial group of white immigrants. It severely restricted native participation and contribution to the national economy by making them wage labourers on what was formerly their own land. The social injustice was compounded by the fact that in the agrarian economies of the SADC, the majority of the population live off the land. In this sense it denied natives access to a survival resource. Thus, redress of what is in many cases nearly a century of unequal access to land is inevitable. *Humwe's* appeal in that effort lies in both its social justice agenda and its human rights pedigree.

4.2.1 *Humwe and Social justice*

Social justice, the idea upon which the legitimacy²¹ of *humwe* may be said to proceed from, is a people oriented idea because to describe it, "... we must look at what the people themselves think".²² This immediately raises the question whether social justice poses therefore, the danger of political knockouts that are based on temporal populism. According to Miller, social justice theory has always been, and must always be, a critical idea - one that challenges us to reform our institutions and practices in the name of greater fairness.²³ *Humwe's* rejection of private property rights that were forcibly and immorally instituted under the shield of colonialism and its insistence on a fairer basis of allocating amongst members of a political community, human survival resources, including land, immediately aligns it to the dictates of social justice, i.e. equity and popular will of the people. In democratic States the popular will of the people is a useful tool in guarding against abuse of political power. However, it can foster also and perpetuate tyranny of the majority over their minorities. Partly in recognition of this, the Human Rights Movement has stepped in with development of "minority group rights" intended to ensure enjoyment of group rights by minority groups whose interests easily could be

²¹ Franck defines legitimacy as a norm's pull of its addresses towards voluntary compliance. See Franck, T. (1990) *The Power of Legitimacy Among Nations*, Oxford University Press, New York/Oxford. See also Chigara, B. (2001) *Legitimacy Deficit in Custom: A Deconstructionist Critique*, Ashgate, Aldershot/Brookfield USA/ Singapore/ Sydney.

²² Miller, D. (1999) *Principles of Social Justice*, Harvard University Press, Cambridge, Massachusetts/ London, England, p.ix.

²³ *Ibid.* p.x.

overwhelmed by the majority. Article 27 of the International Covenant on Civil and Political Rights (1966) (ICCPR) provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. In the Lovelace case,²⁴ the Human Rights Committee, (HRC) the supervisory organ that monitors State compliance with their obligations under the ICCPR considered whether a *Maliseet* Indian had lost her rights and status as an Indian following her marriage to a non-Indian as claimed by Canada's Indian Act contrary to Article 27 of the Convention. Acts of Parliament are a good example of popular will of the people expressed through their parliamentary representatives. If the Indian Act was correct, then the applicant would no longer *inter alia* be entitled to live on the *Tobique* Indian reserve where she had lived with her parents. Consequently, she would no longer be able to return to settle after her divorce. The HRC ruled that although the right to live on a reserve is not guaranteed by Article 27 of the ICCPR as such, and although the Indian Act did not directly interfere with the functions that are expressly stated in the Article, the right of Sandra Lovelace to access her native culture and language "in community with the other members" of her group, had been violated because there was no place outside of the *Tobique* Reserve where such a community existed. The HRC after consideration of other relevant issues concluded that Canada had breached Article 27 of the Covenant.²⁵ In General Comment 23, on Article 27 (Fiftieth session, 1994)²⁶ the HRC emphasised the distinctive and obligatory nature the minority rights contained in that Article. It stated that:

- 1) the Article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.

²⁴ (24/1977) See also Harris, D.J. (5th ed. 1998) *Cases and Materials on International Law*, Sweet & Maxwell, London, pp.684-686.

²⁵ On the jurisprudence of Article 27 of the ICCPR see also *Kitok v Sweden* (197/1985) – no violation; *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* (167/1984) – violation; *J.E. Lansman et al. v. Finland* (671/1995); *Hopu and Bessert v France* (549/1993).

²⁶ Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994).

- 2) the right protected under Article 27 should not be confused with the right of peoples to self-determination proclaimed in Article 1 of the Covenant. Further, the obligations placed upon States parties under Article 27 should not be confused with their duty under Article 2.1 to ensure the enjoyment of the rights guaranteed under the Covenant without discrimination and also with equality before the law and equal protection of the law under Article 26.
- 3) “The Covenant draws a distinction between the right to self-determination and the rights protected under Article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the Articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol.”
- 4) “The enjoyment of the rights to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that Article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of native communities constituting a minority.”
- 5) The rights protected under Article 27 are distinct from the guarantees under Articles 2.1 and 26. “The entitlement, under Article 2.1, to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority. In addition, there is a distinct right provided under Article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction, irrespective of whether they belong to the minorities specified in Article 27 or not. Some States parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.”
- 6) The terms used in Article 27 indicate that the persons designed to be protected are those who belong to a group and who share in

common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from Article 2.1 are also relevant, since a State party is required under that Article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under Article 25. A State party may not, therefore, restrict the rights under Article 27 to its citizens alone.

- 7) Article 27 confers rights on persons belonging to minorities which “exist” in a State party. Given the nature and scope of the rights envisaged under that Article, it is not relevant to determine the degree of permanence that the term “exist” connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.
- 8) The right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the Covenant. In particular, it should be distinguished from the general right to freedom of expression protected under Article 19. The latter right is available to all persons, irrespective of whether they belong to minorities or not. Further, the right protected under Article 27 should be distinguished from the particular right which Article 14.3 (f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14.3 (f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings.

- 9) Although Article 27 is expressed in negative terms, it nevertheless recognizes the existence of a “right” and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.
- 10) Although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of Articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.
- 11) With regard to the exercise of the cultural rights protected under Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of native peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.
- 12) The Committee observes that none of the rights protected under Article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.
- 13) The Committee concludes that Article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival

and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.

The Human Rights Movement appears keen to ensure that expression of popular wills in political communities, whatever form they take – legislation, protest, etc., are not allowed to overwhelm the dignity of their minority communities. This balance of ensuring that a fixed political community is able to affect the actions of its own government on the one hand, and guaranteeing of minority rights on the other, underlines the interdependence of the value that we call “human dignity” in that the realisation of one’s dignity as a human being is linked to his respect for others’ human dignity. The realisation of my human dignity therefore depends on the extent to which I facilitate others realisation of their own dignity. Social justice for its part advocates popular will of the people that is tempered or mitigated by considerations of fairness. Therefore, not any popular idea of the people will do. Only those ideas that target greater fairness will do. The question this raises is what is fairness? And who determines what is fair in each case? Dworkin²⁷ defines fairness as “... procedures and practices that give all citizens more or less equal influence in the decisions that govern them”. Both Dworkin and Miller appear to premise assessment of fairness on pre-existence of a fixed political community whose governmental authority is sensitive to manifestations of popular will of the people. Such a perception of fairness presupposes:

- 1) existence of a political community,
- 2) an agency (government) to give effect to that will,
- 3) cooperation of the agency’s institutions in carrying through that will, and
- 4) democratic governance or some such type of egalitarian governance because where citizens did not have opportunity to express their will, i.e. where there were no procedures and

²⁷ Dworkin, R. (1990) *Law’s Empire*, Fontana Press, London, pp.164-5. Discussing Dworkin’s triad of justice, fairness and integrity, see Rivers, J. (1999) “The Interpretation and Invalidity of Unjust Laws”, in Dyzenhaus, D. (ed) *Recrafting the Rule of Law: The Limits of Legal Order*, Hart Publishing, Oxford, p40 at pp.58-65.

practices through which citizens could influence decisions that governed them, it would be difficult to talk of fairness.

Assuming one could distinguish definitively all those States that were democratic from those that were not, fairness so determined would be difficult to assess in non-democratic States because the question whether a population had opportunity to influence the decisions that govern it pits citizens against their governments. Fairness so determined would be difficult to establish where a State's human rights practice as determined by United Nations Human Rights Treaty Bodies for instance was unimpressive. International human rights law has evolved standards that can assist us in determining the question whether a population has opportunity to influence the decisions that govern it. Human rights have been described variously as universal minimum standards that apply against domestic social institutions to uphold the sanctity of human dignity across variations in cultures and conceptions of social justice.²⁸ The emerging right to democratic governance is recognised in major treaties of the United Nations. Article 21 of the Universal Declaration of Human Rights (1948) refers to the right of individuals to participate in the governance of their country through participation in periodic and genuine elections to be held by secret vote or by equivalent free voting procedures. Article 25 of the International Covenant on Civil and Political Rights (1966) entrenches this principle in a treaty that has a supervisory organ that monitors State compliance with previously agreed standards.²⁹ Nonetheless, Article 13 of the African Charter on Human and Peoples' Rights (1981) – the regional human rights protection system for Africa severely restricts and waters down this principle, pointing to an almost insipid reluctance among African leaders to submit themselves to the will of the electorate – what Mazrui³⁰ in his Reith lectures describes as the “African Condition” that resists positive social and political development at its own peril. Still, commentators³¹ write about the emerging customary law right to

²⁸ See Beitz, C.R. (1999) “International Liberalism and Distributive Justice: A Survey of Recent Thought”, *World Politics* vol. 51 No.2 p.269 at 272.

²⁹ For commentary on the remit and efficacy of the Human Rights Committee, see McGoldrick, D. (1991) *The Human Rights Committee: Its Role in the development of the International Covenant on Civil and Political Rights*, Clarendon Press, Oxford.

³⁰ Mazrui, A. (1980) *The African Condition*, Heinemann Educational Books Ltd, London, p.xv.

³¹ See Franck, T. (1992) “The Emerging Right to Democratic Governance”, *AJIL*, vol. 46 p.86; Chigara B. (2003) “*The Right to Democratic Entitlement: Time to make real the United Nations promise of democracy?*” *Mediterranean Journal of*

democratic governance. This raises the question about the quality that we should attach in cases that appear to reflect expression of the popular will of the people to influence the way in which they are governed, when in fact it is their government that covertly obliges sections of its citizenry to put on such appearances of popular will on the one hand while at the same time prohibiting expression of dissent by those opposed to such tactics. The Zimbabwe land invasions were preceded by several months of riots in urban centres. The riots pointed generally to a disaffection of the populace with economic and political management of the country.³² Consequently, resort by President Mugabe's government to the land issue at a time when it was facing mounting political rejection of the electorate has been perceived by many as a diversionary tactic intended to focus public attention on a very emotive and desperate issue – the land issue, while at the same time distracting them from their effort to hold the government to account for its mismanagement of the economy as they had started to do. Therefore, while the land issue is an appropriate matter for the determination of affected SADC States at any time that they choose, it is difficult in Zimbabwe type cases to argue that it was the popular will of citizens and not governmental manipulation of citizens that was at issue. For instance it is widely reported that the Zimbabwe national army orchestrated the wave of farm invasions that occurred from 2000 onwards³³ by transporting to target farms the invaders, and supplying them with food rations and even firearms.

Dworkin contrasts fairness with justice, which "... is concerned with the decisions that standing political institutions, whether or not they have been chosen fairly, ought to make". In this sense and to the extent that it empowers them collectively to influence decisions that govern them, fairness is people oriented. Fair practice is legitimate to the extent that its subjective origin, i.e. influence of citizens over the decisions that govern their lives endears voluntary compliance of the same people to whom it is attributable. Justice on the other hand, appears to have no regard to its own legitimacy whatsoever, relying exclusively on the political force of established institutions. Where procedures and practices deny citizens the

Human Rights, vol.7 No.1; Fielding, L.F. (1995) "Taking the next step in the development of new human rights: The emerging right of humanitarian assistance to restore democracy", *Duke Journal of Comparative and International Law*, vol. 5 p.329.

³² See "Zimbabwe Riots Intensify"

<http://news.bbc.co.uk/1/hi/world/africa/976286.stm> (visited 27/11/02)

³³ See "Army set up farm occupations, says insider", at

<http://www.guardian.co.uk/zimbabwe/article/0,2763,217478,00.html> (visited 27/11/02)

chance to equally influence the way they are governed, i.e. where there is no fairness, judicial institutions can serve to perpetuate unfairness. This raises the question of the quality to be attributed to judgments of the High Court of Zimbabwe on the constitutionality of the farm invasions and the orders it gave in *The Commercial Farmers Union v. Comrade Border Gezi and others*.³⁴ A major task that immediately confronts States emerging from apartheid regimes is how to turn around institutions of the State that had been raised to work against the majority of the population³⁵ and whose practice and norms are opposed to the will of that majority, so that they begin to serve those they once victimised and ostracised. It is precisely for this reason that some theorists³⁶ argue that social justice's importance lies in its requirement of the elimination of institutionalised domination and oppression. Could the law courts of Zimbabwe, only twenty years after independence, and with only minimal cosmetic change to both the bench and the stock of laws to refer to, be said to be competent enough to intervene in the resolution of one of the most fundamental issues in the colonial encounter of natives and settlers – access to land? Should the beneficiaries of apartheid be allowed to use these courts which once served to oppress the majority, now to maintain social injustices that the judicial system under apartheid helped to nurture? The answer to both these questions must be in the negative because of the obligation in civilised societies, not to obey morally iniquitous laws.³⁷ This was affirmed by both the German Federal Court of Justice (Criminal Division) and the German Federal Constitutional Court when the legality and constitutionality was contested of the convictions of former East-German border guards,³⁸ and of members of the East German Defence Council³⁹ that were responsible for

³⁴ Case No. H.C. 3544/2000 HE. See <http://www.samara.co.zw/cfu/courtorder.htm>. Discussed in Chapter 2.

³⁵ See Harvey, R. (2000) *The fall of apartheid: the inside story from Smuts to Mbeki*, Palgrave, New York.

³⁶ See Miller, D. (1999) *Principles of Social Justice*, Harvard University Press, Cambridge Massachusetts, p.15.

³⁷ Discussing the long-entangled issue of the connection between law and morality, see Hart, H.L.A. (2nd ed. 1994) *The Concept of Law*, Clarendon Press, Oxford, pp.153-212; Alexy, R. (1999) "A Defence of Radbruch's Formula", in Dyzenhaus, D. (ed) *Recrafting the Rule of Law: The Limits of Legal Order*, Hart Publishing, Oxford, pp.15-38; Rivers, J. (1999), "The Interpretation and Invalidity of Unjust Laws", Dyzenhaus, D. (ed) *Recrafting the Rule of Law: The Limits of Legal Order*, Hart Publishing, Oxford, pp.40-65.

³⁸ See for instance the decision of the European Court of Human Rights in *K.H.W. v. Germany*, Case No. 37201/97.

³⁹ See *Steletz, et al. v. Germany*, Case Nos. 34044/96; 35532/97; 44801/98.

the border regime that resulted in approximately 261 deaths between 13 August 1961 and 6 February 1989 of people that died while attempting to flee from East Berlin to go to West Berlin. The official death toll, according to the Federal Republic of Germany's prosecuting authorities, was 264. Higher figures have been advanced by other sources, such as the "13 August Working Party" (*Arbeitsgemeinschaft 13. August*), which speaks of 938 dead. In any event, the exact number of persons killed is very difficult to determine, since incidents at the border were kept secret by the GDR authorities. For most of the Cold War period the border was heavily secured by anti-personnel mines and automatic-fire systems (*Selbstschussanlagen*). Many of the people who tried to cross the border to reach the West subsequently lost their lives, either after triggering anti-personnel mines or automatic-fire systems or after being shot by East-German border guards. These cases examined the interpretation and validity of unjust laws. In the main, the defendants, all of whom had been charged with being indirect principals in the commission of intentional homicide associated with the deaths of East-Germans who attempted to flee across the border separating East and West Germany rested their cases on the defence of reliance on statutory authority, and State regulation and practice. The Federal Constitutional Court held that the reliance of the East German border guards was illegitimate and their convictions were safe because:

... the strict and absolute protection of reliance presupposed the normal case of an act committed in the Federal Republic under conditions of democracy, the separation of powers and the protection of fundamental rights. The criminal law in such circumstances in broad terms satisfied the requirements of substantive justice. While it was in principle right to apply East German law, that law could not give rise to legitimate reliance where it enacted gross injustice, in particular by criminalizing serious wrongdoing (i.e. homicide) but then exempting certain acts, allowing soldiers to shoot on innocent and unarmed citizens⁴⁰

The defendants appealed to the European Court of Human Rights, arguing that their trials and convictions by the newly reunified German Courts for murders arising from the lethal use of force at the East German border constituted *ex post facto* procedures in violation of Article 7(1) of the European Convention on Human Rights. Article 7(1) provides that:

⁴⁰ Paraphrased in Rivers, J. (1999), "The Interpretation and Invalidity of Unjust Laws", Dyzenhaus, D. (ed) *Recrafting the Rule of Law: The Limits of Legal Order*, Hart Publishing, Oxford, pp.40 at 55. (Emphasis added.)

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No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

They also relied on Articles 1 and 2(2) of the Convention. They argued that German Courts had breached Article 103(2) of the basic Law on account of the fact that they had refused the appellants to plead a ground of justification provided for at the material time in the GDR's provisions on the border policing regime [*Grenzregime*], as interpreted and applied by the GDR authorities. On 22 March 2001, a Grand Chamber of the European Court of Human Rights issued its judgment in the consolidated applications of *Streletz, Kessler and Krenz v Germany*.⁴¹ The Court held that the previous convictions by German Courts and the sentences imposed did not constitute a violation of Article 7(1) of the Convention which prohibits *ex post facto* criminal proceedings. Regarding the law, the Court observed that:

- 1) the basic rule is that the provision of criminal law must be both accessible to and foreseeable by the party that now stands convicted of a crime
- 2) the individual must know from the wording of the relevant provision and if need be, with the assistance of the Court's interpretation of it, what acts and omissions will make him criminally liable
- 3) the post-unification German courts applied the criminal law of the former East Germany to the cases, pursuant to the rules established by the German Unification Treaty of 31 August and Unification Treaty Act of 23 September 1990
- 4) the East German criminal law provisions were substituted for the West German criminal law provisions making it punishable to be an indirect principal to an intentional homicide - *Anstiftung zum Totschlag* - Articles 26 and 212(1) because they were more lenient
- 5) the convictions of the post-unification German courts were based also on international law, particularly the rights to life - Articles 2 and 6, and freedom of movement – Article 12 of the International Covenant on Civil and Political Rights (1966) which East Germany had ratified in 1974.

⁴¹ Case Nos. 34044/96; 35532/97; 44801/98.

The Court concurred with the Regional Court's finding that the applicants could not justify their actions by pleading Section 27(2) of the GDR's State Borders Act (*Grenzgestez*) which, in practice, had been used to cover the killing of fugitives by means of firearms, automatic-fire systems and anti-personal mines because such State practice "flagrantly and intolerably infringed elementary precepts of justice and human rights protected under international law". The Court reasoned that neither of the complaints against German Courts well-founded because:

- 1) contrary to the appellants' claim, Article 103(2) of the Basic Law had not been infringed because that provision was an expression the principle of the rule of law which forms the basis for the use of civil rights and liberties by guaranteeing legal certainty, by subjecting State power to statute law, and by protecting trust. In addition, the principle of the rule of law includes, as one of the guiding ideas behind the Basic Law, the requirement of objective justice. In the sphere of the criminal law, these concerns relating to the rule of law are reflected in the principle that no penalty may be imposed where there is no guilt. That principle is at the same time rooted in the human dignity and personal responsibility which are presupposed by the Basic Law and constitutionally protected by Articles 1(1) and 2(1) thereof, and to which the legislature must have regard when framing the criminal law. It also underlies Article 103 (2) of the Basic Law in that it secures these aims by allowing conviction only for acts which, at the time when they were committed, were defined by statute with sufficient precision as criminal offences. It further prohibits the imposition of a higher penalty than the one prescribed by law at the time when the offence was committed. In the interests of legal certainty and justice, it provides that in the sphere of the criminal law, which permits extremely serious interference with personal rights by the State, only the legislature may determine what offences shall be punishable. Article 103(2) of the Basic Law thus reinforces the rule of law by strictly reserving law-making to Parliament.
- 2) The citizen's trust is earned by the fact that Article 103(2) gives him the assurance that the State will only punish acts which, at the time when they were committed, had been defined by Parliament as criminal offences, and for which it had prescribed specific penalties. That allows the citizen to regulate his conduct, on his own responsibility, in such a way as to avoid committing a punishable offence. This prohibition of the retroactive application

of the criminal law is absolute... It fulfils its role of guaranteeing the rule of law and fundamental rights by laying down a strict formal rule, and in that respect it is to be distinguished from other guarantees of the rule of law.

- 3) Article 103(2) of the Basic Law protects against retroactive modification of the assessment of the wrongfulness of an act to the offender's detriment. Accordingly, it also requires that a statutory ground of justification which could be relied on at the time when an act was committed should continue to be applied even where, by the time criminal proceedings begin, it has been abolished. However, where justifications are concerned, in contrast to the definition of offences and penalties, the strict reservation of Parliament's law-making prerogative does not apply. In the sphere of the criminal law grounds of justification may also be derived from customary law or case-law. Where grounds of justification not derived from written law but nevertheless recognised at the material time subsequently cease to be applied, the question arises whether and to what extent Article 103(2) of the Basic Law likewise protects the expectation that they will continue to be applied. No general answer to that question need be given here, because in the instant case a justification – based partly on legal provisions and partly on administrative instructions and practice – has been advanced in circumstances that make it possible to restrict the absolute prohibition of retroactiveness in Article 103(2) of the Basic Law. Article 103(2) of the Basic Law contemplates as the normal case that the offence was committed and falls within the scope of the substantive criminal law of the Federal Republic of Germany, as shaped by the Basic Law, and that it is being judged in that context. In this normal case the criminal law, having been enacted in accordance with the precepts of democracy, the separation of powers and respect for fundamental rights, and therefore meeting in principle the requirements of objective justice [*materielle Gerechtigkeit*], provides the rule-of-law basis [*rechstaatliche Anknüpfung*] necessary for the absolute, strict protection of trust afforded by Article 103(2) of the Basic Law. (bb) This principle no longer applies unrestrictedly in that, as a consequence of reunification, and as agreed in the Unification Treaty, Article 315 of the Introductory Act to the Criminal Code, taken together with Article 2 of that Code, provides that GDR criminal law is to be applied when criminal proceedings are brought in respect of offences committed in the former GDR. That

rule is a consequence of the Federal Republic's assumption of responsibility for the administration of criminal justice in the territory of the GDR; it is accordingly compatible with Article 103 § 2 of the Basic Law, since citizens of the former GDR are tried according to the criminal law that was applicable to them at the material time, the law of the Federal Republic in force at the time of conviction being applied only if it is more lenient. However, this legal situation, in which the Federal Republic has to exercise its authority in criminal matters on the basis of the law of a State that neither practised democracy and the separation of powers nor respected fundamental rights, may lead to a conflict between the mandatory rule-of-law precepts of the Basic Law and the absolute prohibition of retroactiveness in Article 103(2) thereof, which, as has been noted, derives its justification in terms of the rule of law [*rechtsstaatliche Rechtfertigung*] in the special trust reposed in criminal statutes when these have been enacted by a democratic legislature required to respect fundamental rights. This special basis of trust no longer obtains where the other State statutorily defines certain acts as serious criminal offences while excluding the possibility of punishment by allowing grounds of justification covering some of those acts and even by requiring and encouraging them notwithstanding the provisions of written law, thus gravely breaching the human rights generally recognised by the international community. By such means those vested with State power set up a system so contrary to justice that it can survive only for as long as the State authority which brought it into being actually remains in existence. In this situation, the requirement of objective justice, which also embraces the need to respect the human rights recognised by the international community, makes it impossible for a court to accept such justifications. Absolute protection of the trust placed in the guarantee given by Article 103(2) of the Basic Law must yield precedence, otherwise the administration of criminal justice in the Federal Republic would be at variance with its rule-of-law premisses [*rechtsstaatliche Prämissen*]. A citizen now subject to the criminal jurisdiction of the Federal Republic is barred from relying on such grounds of justification; in all other respects the principle of trust continues to apply, every citizen enjoying the guarantee that if he is convicted it will be on the basis of the law applicable to him at the time when the offence was committed.

- 4) Nor can the appellants argue that, having accepted that a justification could be disregarded, the Federal Court of Justice had still not answered the question whether and in what circumstances the act thus held to be unlawful was punishable... To establish punishability there is no need here for recourse to supra-positive legal principles [*überpositive Rechtsgrundsätze*]. Reference need only be made to the values which the GDR itself took as the basis for its criminal law. At the material time Articles 112 and 113 of the GDR's Criminal Code absolutely prohibited the intentional taking of human life and marked the seriousness of such offences by prescribing severe punishment. If, for the reasons discussed above, there is no admissible ground of justification for a homicide, the definition of the offences in the above-mentioned provisions of criminal law makes such a homicide a punishable criminal offence.

This judgment compels analysis of the connection between positive laws and principles of morality or justice, discoverable by human reason without the aid of revelation. It suggests that when positive laws conflict with these principles, they become invalid – “*Lex iniusta non est lex*”. An analogous argument is that law courts of SADC States could not confer legitimacy on claims of exclusive legal title to farms that were created under apartheid because the German Federal Constitutional Court required that for such reliance to be had:

- 1) Those titles ought to have been fashioned *under conditions of democracy* where the fundamental rights of everyone concerned were recognised and protected. This can hardly be said to have been the case in apartheid Rhodesia, South Africa, Namibia, etc. where laws were passed to facilitate forcible removal of natives from land that had always lived on and dependent upon for their livelihood.
- 2) *Gross injustice* must not result directly from upholding those titles, which is of course what would happen if the law courts insisted on maintaining the land structures established under apartheid.
- 3) *Substantive justice* broadly needs to be seen to be done. Upholding land structures erected under apartheid would undermine the requirement of substantive justice in that while international law prohibited apartheid, and the international community worked tirelessly to overcome it, law courts of former apartheid of the SADC blindly and fervently sustain the

structures of injustice that remain. International law insists that native title to land subsists and endures beyond colonial conquest. However, the High Court of Zimbabwe insists that private title of commercial farmers is superior.

It appears therefore that where judicial systems of States emerging from tyrannical government are called upon to resolve fundamental issues of continuing social injustice rooted in colonial or some such other similar historical experience of the State, mere application of the positive law may not be sufficient, particularly where the overwhelming will of the people opposes the outcome of the application of positive law. Arguably, this is the hallmark of democracy: the people determining the way they shall be governed. But if *humwe* is predicated on equality of access to fundamental resources to all, and enforcement of the collective will of the majority, that triggers also the question of the limit of the will of the people, and the rightful limit to the sovereignty of the individual over himself. This is an old question that philosophers have attended with some illuminating observations.

4.2.2 Humwe, law, and morality

Writing in the middle of the nineteenth century Mill argued that "... everyone who receives the protection of society owes a return for that benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest".⁴² Although failing States often abuse citizens and other persons on their soil - tourists, immigrants, etc., the State system has emerged as the best protector of individual freedom and dignity.⁴³ There is therefore a sense in which individuals have a personal interest in the continued existence of their States. This is practical, logical and necessary for continuance of local, national, regional and the international community. The survival of any community depends in large measure on the relative actualisation of its goals expressed through its self-interest. Every member of the community has a duty therefore to contribute towards realisation of the minimum level

⁴² Mill, J.S. (1859) *On Liberty*, p.141.

⁴³ Projecting the impact on the State system of the growing tide of regional and global organising and ordering patterns, see Held, D.(1998) "Democracy and Globalisation" in Archibugi, D. et al. *Re-imagining Political Community: Studies in Cosmopolitan Democracy*, Polity Press, Oxford, pp.11-27. Discussing moral cosmopolitanism's alignment to the State system, see Beitz, C.R. (1999) "International Liberalism and Distributive Justice: A Survey of Recent Thought" *World Politics*, vol.51 No.2 p269 at p.287.

of communal life necessary for the continuance of the community. More successful communities are marked generally by an above average success rate in ensuring their self-interest. Decline and demise of social entities begins with their failure to ensure protection of their critical self-interest. In the SADC, Mill's fine line of conduct is summed up in *humwe*'s practice which seeks to enhance the welfare of all agents by seeking equitably to distribute among them those finite life enabling resources present in any one State, and also to impose upon each and every agent the duty to assist their neighbour eke a reasonable quality of life – the neighbour principle. That fine line compels in any political community reflection of what others are doing, and how it affects others, and also the boundaries of the sovereignty of the individual over himself and the limit of the will of the people. In this sense *humwe* is both a moralising agent and obligating factor. Perceived this way, *humwe* confounds Austin's⁴⁴ distinction of laws improperly so called (morality) and laws properly so called (positive law), and represents the Hobbesian⁴⁵ deity of law and morality according to which law and morals are identical. *Humwe* attenuates the force of law to the service of morality so that morality ceases merely to appeal to the conscience of the addressee, but to his obligations that are backed by the force of the law. Arguably, it is when the gap between a political community's fundamental morals and its positive law is smallest that laws are perceived by their addressees to be most just and therefore most legitimate and therefore readily to be complied with. The Scandinavian Realist School of thought examines also the distinction between law and morality. It postulates that a political community's morals are fashioned to a large extent by law. "It is the regular use of force and propaganda associated with it that establish moral standards".⁴⁶ In this sense the habitual use of legal force for nearly one hundred years of colonial domination of the SADC served to fashion and impose on the majority a property, social and economic morality that privileged exclusive white minority interests and subjugated black majority interest. That morality substituted itself for *humwe* which had been fashioned by decisions of village headmen - *sabhuku*, regional headmem – *sadunhu*, and tribal chiefs – *ishe*. Those decisions were backed by restitutionary damages and other sanctions.⁴⁷ The perception by the ostracised majority of the incompatibility

⁴⁴ See Austin, J. (1954) *The Province of Jurisprudence Determined*, Weidefeld and Nicolson, London.

⁴⁵ Discussing Hobbes, law and morality, See Freeman, M.D.A. (7th ed. 2001) *Lloyd's Introduction to Jurisprudence*, Sweet & Maxwell, London, p.868.

⁴⁶ *Ibid.*

⁴⁷ African literatures bear ample evidence of this. See for example Achebe, C. (2001) *Things Fall Apart*, Penguin in association with Heinman, London, where

of their own morality with the colonial law compelled many to abandon careers and other opportunities and risk their very own lives by joining the guerrilla movements that sought to unseat through violent means the illegitimate governments and their morals that had been fashioned by their laws. Of course some morals may predate the moment of law, and as empiricists have convincingly argued that “if we view society at any particular stage of its development, we do find a moral sense urging particular standards of conduct as right or just, even though the law may take a contrary or neutral view”.⁴⁸ However, until the law embraces such moral senses and stamps its authority on them and their significance, its potential is wasted, just as *humwe*’s significance was put to waste when it was supplanted by the SADC colonial authorities’ own morality of exclusivity and privity which was backed by a catalogue of laws that they fashioned and enforced. Enlightened self-interest is the basis of land reform⁴⁹ programs whose hair-raising travails are unravelling in the SADC. The re-appearance of *humwe* as the dominant philosophy in management of fundamental life-enabling finite resources of SADC States shows gradual and incremental embrace by the laws of SADC States of a morality (*humwe*) that has been urged by the powerless majority throughout the colonial period but rejected by the powerful minority. This created a huge gap between that which was moral and legal and that which was illegal and moral. The compatibility, and even fusion of laws of a State and the morality that is urged is a crucial first step in establishing a legitimate legal order. In the SADC, resort to *humwe* in the effort to settle past and continuing social injustices rooted in colonial or some such other similar historical experience appears to make that crucial first step. The connection between law and morality discussed above suggests that law and morality are inextricably linked to each other. In fact, they appear to feed off each other so that when that interdependence is compromised, i.e. when law becomes insensitive to moral urges of particular standards of conduct as just, the risk is taken that an unhealthy, illegitimate law results that is opposable to the interests of the people it must serve. Restoration of that relationship, appears to have begun in the SADC will follow a course that is probably more painful than if that link had not been previously broken

the rising tribal star Okonkwo is banished from his village and has to go into exile for a specified period for having beaten up his younger wife during the week of peace. “Even if you had found her lover on top of her, that would still not have entitled you to beat her up during the week of peace.”

⁴⁸ Freeman, M.D.A. (7th ed. 2001) *Lloyd’s Introduction to Jurisprudence*, Sweet & Maxwell, London, p.869.

⁴⁹ Discussing enlightened self-interest as the basis of law reform, see Freeman, *ibid.*

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because it is not human nature to give up positions of privilege and power voluntarily. It is usually the case that the status quo perceives itself to be the legally justified and therefore the victim of that which is not legal and just. The land issue places affected SADC States beyond Mill's⁵⁰ idea of perfect freedom according to which,

as soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age and the ordinary amount of understanding). In all cases there should be perfect freedom, legal and social, to do the action and stand the consequences.

Therefore, intervention of the law in the effort to resolve social injustices that are rooted in colonial or some such other similar historical experience of States is best when the law is consonant with the morality of the day on the issue that is targeted, and worse when it is not. Because the stock of property laws readied for resolution of such conflicts is by virtue of its origin opposed to natives' wishes for equitable redistribution of a fundamental resource, the Courts may not be the best forums for resolving such problems until the laws to be applied have been amended to accommodate prevalent morality and wishes of the majority.

4.2.3. Humwe and distributive justice

Rawls⁵¹ writes that the primary subject of justice is the basic structure of society: the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. *Humwe* as property dogma tackles the basic structure of agrarian economies of the SADC by seeking to undo the effects of the colonial basic structure that fixed social positions into which men were born into and from which their expectations of life were to a large extent determined. Two arguments can be made for justice reform programmes that target the basic structure fashioned in foreign lands by colonial administrations.

⁵⁰ Mill, J.S. (1859) *On Liberty*, p.141-2.

⁵¹ Rawls, J. (revised ed. 1999) *A Theory of Justice*, Oxford University Press, p.6.

The first is that the inequalities perpetuated by these basic structures are not only manifestly unfair but also pervasive. According to Rawls,⁵² such structures affect men's initial chances in life even if they cannot possibly be justified by any appeal to the notions of merit or desert." For this reason, any theory of social justice ought in the first instance to address both the processes that sponsor the inequalities and the inequalities themselves. *Humwe* would start by reducing ownership of life enabling resources to one titleholder – "us all" or everyone's - for all time, with "trusteeship titles" bestowed on all individuals. In this sense *humwe* is consistent with *laissez-faire* redistributive theorists' arguments that the initial appropriation of resources occurring in nature ought to be limited by some principle of equality. Steiner,⁵³ writes that persons who appropriate more than an equal share impose an unjust distribution on some or all of those that have appropriated a less than equal portion. Trusteeship titles would establish the right to an equal portion of the limited resource upon which their life depended for every adult concerned. That would in turn lead to the right to redress where such a portion was unavailable. This right to redress "carries over into a world in which there are no more unowned things: in a fully appropriated world, where each person's original right to an equal portion of initially unowned things amounts to a right to an equal share of their total *value*"⁵⁴ and therefore a right to compensation where that right has or can not be satisfied. The State therefore has the duty to establish such a "redress fund" where victims can dip into and into which those that currently hold more than their minimal equal portion must pay a fee proportionate to their oversize. Beitz correctly observes that "Because every living adult at any given time has a right to an equal share of resources, the value of an equal share fluctuates with population size. So there is a more or less continuous need for compensatory redistribution. Second, on this view, there is no right of inheritance; when a person dies, that person's possessions become unowned and revert to the redress fund".⁵⁵ Trusteeship titles to land would give holders:

- 1) the exclusive right to use land that was not in another's use,
- 2) the duty to surrender through established channels, actual land that was not under the holder's use only if another had need of some,

⁵² Ibid. p.7.

⁵³ Steiner, H. (1994) *An Essay on Rights*, Blackwell, Oxford, p.268.

⁵⁴ Ibid. p.271.

⁵⁵ Beitz, C.R. (1999) "International Liberalism and Distributive Justice: A Survey of Recent Thought" *World Politics*, vol.51 No.2 p269 at p.282.

- 3) the right to seek more land provided that one had exhausted one's initial capacity and still had need for more, and
- 4) the right to be treated equally and like anyone else *viz* land claims and land use.

That would guarantee all those concerned that they would not be impeded but assisted in their effort to live off the finite resources of their geographically fixed political community and ensure security of the dignity of agrarian communities. It would ensure that both the minimum standards of equity necessary in a civilised community are realised, and that enterprising members have every opportunity to exercise their talents. In this sense *humwe* is consistent with aspects of the liberal tradition of distributive justice according to which distributive responsibility of resources that belong to "us all" lies with the State.⁵⁶ The utility of distributive justice theory lies in that it seeks to inform a

range of choices whose outcomes bear on the well-being of individuals located in societies other than our own. These include, for example, choices about individual conduct such as whether to donate to Oxfam; the policies of our own government concerning for example, foreign aid or immigration; the policies of international institutions and regimes (rules of international trade, international monetary policy, environmental controls, labour standards, conditions on multilateral aid and structural assistance); the constitutions of international institutions, as distinct from their policies; and the policies of non-governmental organizations. Recognising the potential consequences of these choices, it is natural to wonder what moral considerations should guide our judgment.⁵⁷

The second, which is premised on *laissez-faire* liberalism, is that distributions are not just if they have been arrived at from a previous distribution that itself was not just. "A distribution is just when it has been arrived at from a previous distribution that itself was just, through a series of transactions that have not violated anyone's rights."⁵⁸ Under this model of distributive justice, a preceding distribution must be examined to test whether it resulted from a process that respected everyone's rights; and the one before it, and so on, all the way back to the beginning, when resources occurring in nature were initially appropriated for private use. This test

⁵⁶ Discussing the subject of international distributive justice, see Beitz, C.R. (1999) "International Liberalism and Distributive Justice: A Survey of Recent Thought" *World Politics*, vol.51 No.2 pp.269-96.

⁵⁷ *Ibid.* p.270-1.

⁵⁸ *Ibid.* p.279.

would condemn as unjust all distribution of resources in the SADC because the basic structure ensured that from the first distribution to the present, the welfare and interests of a racial minority were privileged over those of the majority. This resulted in the physical, mental humiliation of the black majority and dehumanisation of the elite white minority who were led to believe that vice was virtue, and virtue, evil.⁵⁹ Contrary to their fellow Laissez-faire liberals, *Status quo theorists* hold that:

whatever injustices may have occurred in the first appropriation will have been rectified subsequently, perhaps as a result of many generations of economic growth and innovation. There is therefore no argument for redistribution to rectify inequalities in benefits derived from resources. *Laissez-faire redistributivists*, argue that it may be necessary for the state to intervene to rectify the effects of injustices in earlier appropriations of unowned things, either by redistributing control over resources or by compensating those who have less with transfer payments from those who have more.⁶⁰

The hope that is suggested by *laissez-faire Status quo theorists* that social evolutionary processes would mitigate injustices authored by initial and successive distributive injustices supported by political and legal force unless of course, they favour also revolution rather than reformation is at best illusory. Reformation is constructed by human beings operating at their optimal excellence whereas revolution, whatever its target, manifests human beings relying on their basest instincts. According to Martin Luther King, the means through which human beings attain their objectives are themselves seeds that will blossom and flourish in their midst even after realisation of their goal. Literature on the topic suggests that redistributive arguments are regarded as being the more plausible form of the *laissez-faire* theory and the more pertinent to questions of global economic and environmental justice.⁶¹ In this sense the justiciability of a distribution depends on how it came about. This historical perspective of justice typically holds that “considerations of liberty argue against most political forms of intervention in market processes except when required to remedy the effects of prior violations of liberty. (Therefore) ... laissez-faire liberalism involves the definition and justification of the rights that market

⁵⁹ For a discussion of the legal allocation of resources according to racial origin, and the empowerment of one racial group and disempowerment of others, see Chapters One and Two above.

⁶⁰ Ibid.p.281.

⁶¹ Ibid.

transactions should respect”.⁶² Affected SADC States appear to have a very strong case for reforming the basic structures of their agrarian industries particularly because historically, their distribution of advantages among the population manifest injustice in that from the initial distribution to the present one, the rights of the majority to own an equal portion of land to live off were not fully recognised. Instead the black populations were forcibly shifted from their fertile land onto semi desert land and made squatters in the land of their birth. Because individuals are entitled to benefit equally from their country’s resources, resource inequalities should be compensated for, but “in ways that encourage or at least do not obstruct the processes of economic and social transformation through which a society must pass in order to develop the capacity to satisfy its people’s material needs.”⁶³ Of course how this might occur is as much a question of development policy as it is a juristic one because of its potential to affect private property rights of individuals, and institute a new or revised social structure.

4.2.4. *Humwe, Equity and Restoration*

What is *humwe*’s objective? Briefly, it seeks to rewrite the basic structure of SADC States by negotiating and instituting a more equitable distribution of resources so that:

- 1) every member of society has a chance to participate in, and contribute to their economy,
- 2) to ensure that the division of economic advantages is acceptable to most of the population – both a legitimating and peace inculcating factor in any society,
- 3) to ensure that no-one feels that they or any others have been taken advantage of, or forced to give in to claims that they do not regard as legitimate.

⁶² Ibid. p.279

⁶³ Beitz, C.R. (1999) “International Liberalism and Distributive Justice: A Survey of Recent Thought” *World Politics*, vol.51 No.2 pp.269 at 286.

Except in a few cases, it is almost impossible, a century after colonization to discover whom exactly was moved from an exact location on the map and must therefore be restored to their piece of land. Grave cites and other archaeological prints may already have been tempered with so that an accurate and incontestable restoration of traditionally held land may result in fictitious justice. Besides, even if an accurate restoration was possible of land previously alienated from particular communities, their populations have grown so much that they no longer could fit into the same “shoe of land” as a community fifty or as in some cases, more than a hundred years later. Moreover, *humwe*’s “us all” *zeitgeist* encompasses all sections of the SADC community, and not just the dispossessed black majority. *Humwe*’s point of departure appears to be equal treatment for everyone and equal opportunity to everyone. Therefore, all those with an interest in farming could ask their governments for an equal portion of land to live off, and that includes any commercial farmer that had “lost” his farm.

4.3. *Humwe*: a Force for all Seasons?

It is common knowledge that all theories idealise. *Humwe* imagines certain qualities about human nature that may not so easily be justified. Are human beings individually and collectively naturally altruistic that they dispose themselves always towards fairness and equity? If this assumption were disproved, or placed in serious doubt, or shown merely to indicate utopian aspirations, what then? If it is correct to describe society as a cooperative venture for mutual advantage and as a theatre typically marked by conflicts as well as an identity of interests⁶⁴ then the human altruism supposed in the *humwe* principle is shown to be limited and may therefore not adequately attend social conflict situations such as the SADC land issue.

4.3.1 Humwe’s deficit

⁶⁴ Hill, writes that “There is an identity of interests since social cooperation makes possible a better life for all than any would have if each were to try to live solely by his own efforts. There is a conflict of interests since people are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share”. Hill R.P. et al. (2001) “Global Consumption and Distributive Justice: A Rawlsian Perspective”, *Human Rights Quarterly*, vol. 23 No.1, p.171.

Humwe's rationale is manifestly clear simple and fair. It is a principle that fits Dworkin's idea of a solution that is "... so obviously fair and sensible that only someone with an immediate contrary interest could disagree with it".⁶⁵ Because any one population has only a finite amount of land at its disposal, its allocation to members of the community and access to it ought not to prejudice even the weakest among those that have need of it. In particular, it must be accessible to those that rely on land for their survival. Those united in their basic need for land (both peasants and career farmers) have a duty to ensure that none among their membership is disadvantaged, to the extent that they may have to reduce their own allocation so that everyone that has need of it has a share proportionate to that of his peers. In this sense *humwe* appears to target protection of the inherent dignity of all. Moreover, the theory of social justice on which the legitimacy of *humwe* is premised requires that the central institutions that serve a particular political community cooperate with the agency (the government) in its effort to achieve the declared will of the people. Miller writes that social justice views society as "... an organism in which the flourishing of each element requires the cooperation of all the other members, and the aim of social justice is to specify the institutional arrangements that will allow each person to contribute fully to social well-being".⁶⁶ This requirement of *humwe*'s is consistent with both principles of Rawls'⁶⁷ theory of justice which provide that:

- 1) every person must have the largest political liberty compatible with a like liberty for all – equality in the assignment of basic rights and duties.
- 2) inequalities in power, wealth, income, and other resources must not exist except in so far as they work to compensate the worst-off members of society.

Rawls⁶⁸ writes that "These principles rule out justifying institutions on the grounds that the hardships of some are offset by a greater good in the aggregate. It may be expedient but it is not just that some should have less in order that others may prosper". Rawls' rejection of inequalities among members of the same political community and insistence on equality is opposed by some sections of the libertarian movement that argue that people's freedom to enjoy their legally acquired resources is so extensive

⁶⁵ Dworkin, R. (6th ed. 1991) *Taking Rights Seriously*, Duckworth, London, p.151.

⁶⁶ See Miller, D. (1999) *Principles of Social Justice*, Harvard University Press, Cambridge Massachusetts, p.4 discussing Hobhouse's elements of social justice.

⁶⁷ Rawls, J. (revised ed. 1999) *A Theory of Justice*, Oxford University Press, p.13

⁶⁸ *Ibid.*

that it leaves no room for practices advocated by social justice.⁶⁹ Nonetheless, its practice is evident in *humwe*, which rejects any attempt to justify unequal access and distribution of a community's finite life enabling natural resources. Thus, the argument is sometimes made that land redistribution programmes will hurt SADC's agrarian economies because peasant farmers who lack both the training and implements enjoyed by the commercial farmer will harvest less than half of what was previously harvested each season. This it is argued will reduce foreign currency earnings for the region, and have knock-on effects on other sectors of the economy. But what both *humwe* and Rawls' theory of justice as fairness suppose is that the preservation of the inherent dignity of mankind is more basic in the list of human needs than the need to earn thicker slices of foreign currency. Measuring social goods by the financial gain that may arise is myopic because it ignores the fact that a liberated self-respecting person is more capable of attaining self-actualisation than one that is not. Motivational theorists⁷⁰ cite Mahatma Ghandi and Martin Luther King Jr. as good examples of self-actualised individuals (the goal to which rational beings should aspire to) because of their passion for equity, justice and peace. Foreign currency cannot purchase the relative peace and security required for other human endeavours to occur. Equity, justice, and freedom possibly can. Therefore, *humwe* appears to apply to the land issue because of its credentials of equity, fairness and justice - attributes that the land issue in SADC States lacks.

Humwe applies to the SADC's land issue not only because of its theoretical consistency with the social justice agenda, but also for natural progression reasons. Because it regulated property rights in the SADC to the general satisfaction of all concerned until introduction by the particular colonial empires of the private property agenda that severely restricted its application and development, it could be said that *humwe* itself had been hijacked. During that hijack, the private property agenda that substituted *humwe* ironically served also to emphasise *humwe's* relevance to the emerging new property rights. Sallis⁷¹ writes that all major philosophical

⁶⁹ Discussing Rawls theory of justice as fairness, see Hill, R.P. et al. (2001) "Global Consumption and Distributive Justice: A Rawlsian Perspective", *Human Rights Quarterly*, vol. 23 No.1 pp.171-87; Dworkin, R. (6th ed. 1991) *Taking Rights Seriously*, Duckworth, London, pp.150-83; Beitz, C.R. (1999) "International Liberalism and Distributive Justice: A Survey of Recent Thought", *World Politics* vol. 51 No.2 pp.269-96; Miller, D. (1999) *Principles of Social Justice*, Harvard University Press, Cambridge, Massachusetts/ London, England, p.13.

⁷⁰ For a discussion of Maslow's motivational theory see Chapter 3.

⁷¹ Sallis, J. (1987) *Deconstruction and Philosophy, the Texts of Jacques Derrida*, The University of Chicago Press, Chicago/London, p.4.

concepts - being, essence, the good, the One, truth, logos, etc. are values of unbreachable plenitude and presence. "Concepts are not point-like simplicities, because in order to be what they are, they must be demarcated from other concepts to which they thus incessantly refer. In addition to such referentiality to other concepts with which they form binary oppositions, they are, moreover, caught in systems and conceptual chains." Theneuissen⁷² argues that we experience "communicative freedom" when we realise that an idea experience its opposite not as boundary but as the condition for its own generalisation. Instead of perceiving "A" and "B" as a pair of independent determinant ideas it is possible to show that the pair are internally related first negatively, in their contrastive relationship with that which yields their self-definition, and then positively, as the belonging together in and through that which makes them what they are.⁷³ The limits of the private property agenda imposed on *humwe* oriented SADC communities are manifesting themselves through the region's land crises which also emphasise the relevance of *humwe* to the land issue. Because *humwe* has been constrained if not ostracised for nearly a century, its elements have not developed as naturally as they would have done but for the intervention of empire powers in the region. This is significant for two reasons. First, the contention that *humwe* applies to the land issue will now have to be determined against international standards that did not exist when colonial territories were carved out; standards that would have perhaps proscribed colonial conquest of other territories, slavery, apartheid, etc. In 1946, The United Nations Charter (UNC) imposed the duty on States not intervene in the internal affairs of other States – Article 2(4). This is still the case in spite of the current trench warfare over the implications of the ever-changing doctrine of sovereignty in international relations.⁷⁴ Jurisprudence has developed that makes compensation obligatory where the State seizes private property of individuals.⁷⁵

⁷² Quoted in Cornell, D. (1992) *The Philosophy of the Limit*, Routledge, London, p.15.

⁷³ See Chigara, B. (2001) *Legitimacy Deficit in Custom: Towards a Deconstructionist Critique*, Ashgate, Aldershot, Chapter 4.

⁷⁴ Discussing the legitimacy and legality of humanitarian intervention missions in international law see Wheeler, N.J. (2001) "Legitimizing Humanitarian Intervention: Principles and Procedures", Chigara, B. (2001) "Humanitarian Intervention Missions: Elementary Considerations, Humanity and the 'good samaritans'", *Australian International Law Journal*, pp.66-89; Kwakwa, E. (1995) "Internal Conflicts in Africa: is there a Right of Humanitarian Action?" *African Yearbook of International Law*, p.9.

⁷⁵ See *Kuwait Airways Corp v Iraq Airways Co.* [2001] 1 Lloyd's Rep. 161; *Iran-US Claims Tribunal* (1984) 5 Iran-USCTR 251; Davies, M. (2001) "The Effect in

International human rights regimes and non-governmental human rights watch groups have emerged in the last half century that police State compliance with the minimum human rights standards that they have signed up to. The intrusive lens of the media machine now provides twenty-four hour news access about events as they happen anywhere in the world. Collectively these agents work tirelessly to uphold the new international morality. Jealously they guard its reputation. Therefore, *humwe* can only ill-afford some of the real and practical mistakes from which other States and regional blocs have often made turning points that determinedly focused their collective *zeitgeist* towards fulfilment of their hopes. Any one of these agents or some or all of them will pounce on any significant challenge to that morality. It is just like the demand being imposed in various and sometimes subtle ways on developing countries by their developed counterparts that their path to industrial development if they ever will reach that standard, should manifest “clean and sustainable” habits when developed countries themselves relied on environmentally unsustainable strategies to attain their privileged positions but with the result that the shared universal environmental resources – the atmosphere and lithosphere’s capacity to sustain human life has severely been reduced. Secondly, development of philosophies with as much promise for human progress as human rights and democracy on the one hand, and those with bleak hopes for peace and security as fascism and apartheid on the other, does not occur overnight. It is a gradual process, with its own checks and balances that surprise its monitors as well as its addressees, challenging to commit themselves one way or the other before moving on to the next phase. Necessarily, it is an evolutionary and natural process that often suffers or benefits from the ashes of a single or a collective of similar catastrophic experiences. Evolution of the international human rights regime for instance appears to have been catalysed by the gruesome events that led to the Second World War. Those events demonstrated the human race’s capacity for evil as well as its tenacity to resist that evil. They taught us among other things that the capacity for evil needed closely and seriously to be suppressed. Only at our own peril do we become complacent at watching against it. This creates the difficulty that in cases where States are seeking to undo and have begun undoing unjust basic structures of their constitution that were imposed on them by previous apartheid or dictatorial regimes, regardless of the approaches they adopt to

Private International Law of a Breach of Public International Law by a State Actor”, *Melbourne Journal of International Law*, vol2 No.2 p.253; Harris, D.J.(5th ed.1998) *Cases and Materials on International Law*, Sweet & Maxwell, London, pp.601-16.

do that, among those trained to watch out for intolerable human evil, some will immediately scream and shout at the top of their voices “foul”, “illegal”, “evil”, “unjust” etc. Their hysteria is matched in those situations only by their previous silence about the injustice sought to be undone while it remained enthroned. Nevertheless, they scream and shout.

The private property agenda opposed *humwe*'s ethos of communal ownership of resources that everyone needed and depended upon for their survival. From this opposition resulted almost instantaneously, a tension between the social, economic and political dynamics of *humwe* on the one hand, and the private property agenda on the other. However, that tension was never resolved because it was not in the colonial authorities' interests after conquering a territory to negotiate and reason with the natives about how to proceed. For the Western empires Military conquest meant also conquest of the native's “*inferior*” way of life although that way of life had resulted from careful synchronisation of the native with his own environment that the colonial master knew nothing about. It meant also conquest of his philosophies and aspirations that were expressed through his relationship with his land. Similar arrogance is pouring out of land crises that are playing themselves out in Zimbabwe and threatening in South Africa and Namibia. Manifest in both scenarios is failure by the instigators and stakeholders to recognise that part of their dignification as human beings is dependent on their recognition, respect and preservation of their perceived “*foe's*” dignity. Of course, more than a century later *humwe*, which has constantly starred in the eye, the private property agenda, is now challenging it for reinstatement as the dominant principle to be applied where land rights are concerned. The tension between the two must now be resolved. As will be discussed later, although its reinstatement as the dominant principle in redistribution of land is a positive development, *humwe* could not regulate land rights for all time in the SADC.

The private property agenda pursued in the SADAC under colonial governments vigorously promoted apartheid and dehumanised fixed political communities. At the height of apartheid in Rhodesia, South Africa and Namibia, even such communal facilities as public toilets, civic gardens, high streets, pavements, etc. were said to belong to whites only and not as *humwe* (us all) preferred, for them to be shared by all members of the fixed political community. The political and even legal rejection of *humwe* and misapplication of the private property doctrine resulted in the emerging communities of Southern Africa an artificial and unsustainable basic structure that fully opposed the fact that the dignity of all human beings is

interdependent – more so that persons belonging to the same fixed political community. To borrow from Martin Luther King Junior⁷⁶:

As long as there is poverty in the world I can never be rich, even if I have a billion dollars. As long as diseases are rampant and millions of people in this world cannot expect to live more than twenty-eight or thirty years, I can never be totally healthy even if I just got a good checkup at Mayo Clinic. *I can never be what I ought to be until you are what you ought to be. This is the way our world is made. No individual or nation can stand out boasting of independent. We are interdependent.*

The land issue manifests a constitutional deficit in that it was colonial legal titles that placed nearly all of the SADC's land that has the most potential for agricultural production in the hands of a small white elite, and crowded the majority native population in land with the least agricultural potential. However, colonization is now prohibited under international law. The first Gulf War was justified on the grounds that Iraq had annexed a sovereign independent State, Kuwait. We observed in Chapter Two that customary international law holds that where territory is *terra nullius*, the occupying forces have no other rights to take notice of because no one else has rights over the land. But where a people have been conquered, the international convention of "conquest and continuity" applies. The institutions, laws and rights of the conquered people subsist until an act of the conqueror changes that position. The conqueror can always extinguish the option of discontinuing previous institutions and laws of his new subjects by recognizing them as valid.⁷⁷ Where legislation of the colonial authority protects or reserves traditional land rights, as did the 1895 joint declaration of the British Government and the British South Africa Company that 2.2 million acres of land should be reserved for native occupation according to their tribal custom, and the Southern Rhodesia Government's Land Apportionment Act (1930) which reserved 30 percent of agricultural land for the 1.1 million Africans; such legislation serves to acknowledge and to re-enforce continuing native title to land. Therefore, private land titles held by commercial farmers are subject to frustration of superior claims of native people.⁷⁸ This has been held to be the case in several national

⁷⁶ King, C.S (ed. 1984) *The Words of Martin Luther King*, Fount, London, p.21. (emphasis added)

⁷⁷ See Dodds, S. (1998) "Justice and Indigenous Land Rights", *Inquiry*, 41 No.2 p.187, at p.191.

⁷⁸ Discussing competing conceptual structures of native peoples' claim-rights, see especially Kingsbury, B. (2001) "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law",

jurisdictions⁷⁹ and confirmed by jurisprudence of the Human Rights Committee (HRC).

In *J.E. Länsman et al. v Finland*⁸⁰ the HRC considered the question whether government grant of licences to quarry in an area traditionally occupied by the Samis violated its obligations to ensure that the *Sami* minority group continued to exercise its right to enjoy its own culture guaranteed under Article 27 of the International Covenant on Civil and Political Rights (ICCPR). The applicants had argued that their right to enjoy their own culture guaranteed under Article 27 of the ICCPR would be violated if government's plans to introduce quarrying for a rare and special stone from the area where they had lived in and carried out reindeer husbandry from time immemorial were allowed to proceed. They argued that the contract signed between the Arctic Stone Company and the Central Forestry Board would not only allow the company to extract stone, but also to transport it right through the complex system of reindeer fences to the *Angeli-Inari* road. This would adversely affect, if not ruin, one of the community's enduring traditions - reindeer husbandry. The HRC established first that the *Sami* community were a minority in the Article 27 sense, and second that reindeer husbandry was an essential element of their culture. It noted that economic activities may come within the ambit of Article 27 if they are an essential element of the culture of an ethnic community.⁸¹ It held that quarrying on the slopes of Mt. *Riutusvaara*, in the amount that had already taken place, did not constitute a denial of the authors' right, under Article 27, to enjoy their own culture particularly because the interests of the *Muotkatunturi Herdsmens'* Committee and of the applicants were considered during the proceedings leading to the delivery of the quarrying permit, and the applicants consulted during the proceedings, and that reindeer herding in the area did not appear to the Committee to have been adversely affected by such quarrying as has occurred.⁸² This decision suggests that where governments actually consult with the community leaders in order to reach a decision that is later

in Alston, P. (2001) *People's Rights*, Oxford University Press, pp.69-110. He writes that some legal claims raised by indigenous peoples are *sui generis* and have a distinct conceptual structure. *Ibid.* at p.70.

⁷⁹ Including Australia, Canada and New Zealand.

⁸⁰ 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994).

⁸¹ See also *Apirana Mahuika et al. v. New Zealand*, 547/1993 (10 December 1992), U.N. Doc. CCPR/C/70/D/547/1993, para. 9.3.
Kitok v. Sweden, 197/1985 (27 July 1988) UN Doc. Supp. No. 40 (A/43/40) paragraph 9.2.

⁸² para. 9.6.

regarded by the target community as a breach of their rights, unless that consultation was a sham, claims of governmental breach of the community's human rights may be difficult to sustain, particularly where no significant damage to the interests of the target community can be seen to have occurred.

The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In this connection, the Committee observes that Article 27 does not only protect *traditional* means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking Article 27 of the Covenant. Furthermore, mountain *Riutusvaara* continues to have a spiritual significance relevant to their culture. The Committee also notes the concern of the authors that the quality of slaughtered reindeer could be adversely affected by a disturbed environment.⁸³

A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in Article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under Article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27.⁸⁴

The question that therefore arises in this case is whether the impact of the quarrying on Mount Riutusvaara is so substantial that it does effectively deny to the authors the right to enjoy their cultural rights in that region. The Committee recalls paragraph 7 of its General Comment on Article 27, according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or, as in the instant case, reindeer husbandry, and that measures must be taken "to ensure the effective participation of members of minority communities in decisions which affect them".⁸⁵

However, the issue in the case was not the ownership of the land in question, but the protection of a right that attached to its use. In resolving this question, the Committee restricted itself to that question alone although

⁸³ para. 9.3. See also *Apirana Mahuika et al. v. New Zealand*, 547/1993 (10 December 1992), U.N. Doc. CCPR/C/70/D/547/1993, para.9.4.

⁸⁴ para. 9.4.

⁸⁵ para. 9.5.

it had noted earlier in the proceedings that "... the question of ownership of lands traditionally used by the *Samis* is disputed between the Government and the *Sami* community".⁸⁶ Would the Committee have reached a similar decision if there were no ownership dispute in the background, and the land belonged to the minority group in question? Two cases are instructive. The first is *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*.⁸⁷

In that case, Chief *Ominayak*, the leader and representative of the *Lubicon Lake Band* – a Cree Indian band living within the borders of Canada in the Province of Alberta, alleged violation by the Government of Canada of the Band's right to self-determination and by virtue of that right, the Band's right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence. The *Lubicon Lake Band* is a self-identified, relatively autonomous, socio-cultural and economic group. Its members have continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometres in northern Alberta since time immemorial. Since their territory is relatively inaccessible, they had had, until then, little contact with non-Indian society. Band members speak Cree as their primary language. Many do not speak, read or write English. The Band continues to maintain its traditional culture, religion, political structure and subsistence economy. By the Indian Act of 1970 and Treaty 8 of 21 June 1899 (concerning aboriginal land rights in northern Alberta), the Canadian government recognized the right of the original inhabitants of that area to continue their traditional way of life. General international law regards this type of action as entrenching native claims to land whatever else the settler administration does because where the colonizer through legislation protects or reserves traditional land rights, such reservations are an acknowledgment and re-enforcement of continuing native common law land rights or native title.⁸⁸ Therefore, the Band appeared to have a *prima facie* claim to the territory they held. However, despite these laws and agreements, the Canadian Government allowed the provincial government of Alberta to expropriate the territory of the *Lubicon Lake Band* for the benefit of private corporate interests (e.g. leases for oil and gas exploration). The claimant argued that this action of the government of Canada:

- 1) violated the Band's right to determine freely its political status and to pursue its economic, social and cultural development, as guaranteed by Article 1, paragraph 1, of the ICCPR;

⁸⁶ para. 2.2

⁸⁷ 167/1984 (26 March 1990) UN Doc. Supp. No. 40 (A/45/40)

⁸⁸ See Chapter 2.

- 2) violated Article 1, paragraph 2, which grants all peoples the right to dispose of their natural wealth and resources;
- 3) risked destruction of the Band's environment which had already begun and was going unabated.⁸⁹ As a consequence, it undermined the Band's economic base and deprived the Band of its means to subsist, and of its enjoyment of the right of self-determination guaranteed in Article 1 of the ICCPR. He wrote:
“... the diet of the people has undergone dramatic changes with the loss of their game, their reliance on less nutritious processed foods, and the spectre of alcoholism, previously unheard of in this community and which is now overwhelming it As a result of these drastic changes in the community's physical existence, the basic health and resistance to infection of community members has deteriorated dramatically. The lack of running water and sanitary facilities in the community, needed to replace the traditional systems of water and sanitary management is leading to the development of diseases associated with poverty and poor sanitary and health conditions. This situation is evidenced by the astonishing increase in the number of abnormal births and by the outbreak of tuberculosis, affecting approximately one third of the community.”⁹⁰

Therefore, the issue was whether the recent expropriation by the Government of the Province of Alberta of the Band's land for commercial interest (e.g. leases for oil and gas exploration) constituted a violation of the Band's right “to enjoy its own culture”.

A technical difficulty arose in that the applicant, being an individual, could not invoke “self-determination” as an individual cannot invoke the Committee's jurisdiction under the Optional Protocol when the alleged violation concerns a collective right.⁹¹ The Committee resolved this problem in favour of the applicant by taking a proactive approach to enforcement of Convention. It argued that because the ICCPR recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights, and because the facts as submitted might raise issues under other Articles of the Covenant, including Article 27, and to the extent that the author and other members of the *Lubicon* Lake Band were affected by the events which the author has described, “these issues should be examined on the merits, in order to determine whether they reveal violations of Article 27 or other Articles of

⁸⁹ See para.9.1.

⁹⁰ See para.23.2.

⁹¹ See para.13.3.

the Covenant”.⁹² This flexibility of the *quasi-judicial* supervisory organ to deduce from the facts presented in a communication complaints about possible breaches by the State of its Conventions obligations that the applicant had not himself foreseen is remarkable. On the one hand, it may serve to ensure the widest possible monitoring of States parties compliance with the Convention if every communication is given such a thorough and detailed combing, going beyond the exact breaches alleged by the applicant. This might also explain the two to three-year delay period in hearing a case by the Committee. States might opt to remedy complaints before they reach the Committee’s thorough and detailed examination table where the facts presented by the applicant may reveal worse than they first thought. It is not the case that States would rather not know the extent to which they fall short of their obligations under the ICCPR and therefore how much more they need to do locally in order to rise to the standards of the ICCPR, merely that States would much rather not attract the stigma in the international community of “human rights abuser”. As President Mugabe is perhaps coming to terms with, the range of penalties that that may attract; who delivers them, and in what package, etc., may all be too surprising and bewildering. On the other hand, it might encourage “fishing applications” that are based only on the hope that the Committee will find something that will stick. Were this to occur, then it would choke up the system, and delay deserving cases from receiving a quicker hearing. Development of jurisprudence on the ICCPR would become patchy and not smooth and elongated. Notwithstanding, the Committee decided on 22 July 1987, that the communication was admissible in so far as it might raise issues under Article 27 or other Articles of the Covenant. Although the applicant had not requested a territorial rights decision in favour of the the *Lubicon* Lake Band, but a mere declaration that:

- 1) The Band’s existence was seriously threatened by the oil and gas development that had been allowed to proceed unchecked on their traditional hunting grounds and in complete disregard for the human community inhabiting the area;
- 2) Canada was responsible for the current state of affairs and should therefore co-operate in its resolution in accordance with Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights;

The HRC held that historical inequities and certain more recent developments threaten the way of life and culture of the *Lubicon* Lake

⁹² See para. 13.4.

Band, and constitute a violation of Article 27 so long as they continue. Therefore, the State party should rectify the situation by a remedy that the Committee deems appropriate within the meaning of Article 2 of the Covenant.⁹³ This decision rejects the proposition that where the colonizer through legislation initially protects or reserves traditional land rights he can then at a later date, undo continuing native common law land rights for reasons that may add to the general welfare of the State. In his individual opinion, *Nisuke Ando* favoured the privileging of economic interests over social, cultural and other interests and the pursuit of inferred majority interests over those of the minority. Although he acknowledges that it is not impossible that a certain culture is closely linked to a particular way of life and that industrial exploration of natural resources may affect the Band's traditional way of life, including hunting and fishing, he thought that:

the right to enjoy one's own culture should not be understood to imply that the Band's traditional way of life must be preserved intact at all costs. Past history of mankind bears out that technical development has brought about various changes to existing ways of life and thus affected a culture sustained thereon. Indeed, outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of the society as a whole. For this reason I would like to express my reservation to the categorical statement that recent developments have threatened the life of the Lubicon Lake Band and constitute a violation of Article 27.

*However, in J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia,*⁹⁴ the Committee required that such an application of Article 27 required firm evidence of a relationship between the claimant's way of life and the lands covered by their claim. The HRC observed that "Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture."⁹⁵

The claimants were members of the Rehoboth Baster Community, descendants of indigenous *Khoi* and Afrikaans settlers who originally lived in the Cape, but moved to Namibia in 1872. They were governed by their "paternal laws," which provided for the election of a Captain, and for rights and duties of citizens. The community which numbers some 35,000 people occupied a total surface area of some 14,216 square kilometres south of Windhoek. In this area the Basters developed their own society, culture,

⁹³ See para.33.

⁹⁴ 760/1997 (6 September 2000) U.N. Doc. CCPR/C/69/D/760/1997

⁹⁵ *Ibid.* para10.6.

language and economy, with which they largely sustained their own institutions, such as schools and community centres. Their independence continued throughout the German colonial reign of Namibia, and was recognized by South Africa when it became the mandatory for South West Africa. The claimants had alleged that the land of their community had been expropriated and that, as a consequence, their rights as a minority are being violated since their culture is bound up with the use of communal land exclusive to members of their community in violation of Article 27 of the Covenant. Namibia had gained independence on 21 March 1990. In 1996, the Government enacted the law on regional government which effectively brought to an end the 124 year-long existence of Rehoboth as a continuously organised territory. The territory is now divided over two regions, thus preventing the Basters from effectively participating in public life on a regional basis, since they are a minority in both new districts. The HRC held that "... although the Rehoboth community had borne distinctive properties as to the historical forms of self-government, the authors have failed to demonstrate how these factors would be based on their way of raising cattle. The Committee therefore finds that there has been no violation of Article 27 of the Covenant in the present case."

*Apirana Mahuika et al. v New Zealand*⁹⁶ arose out of the Government of New Zealand's introduction of the Fisheries' Settlement – a revision of longstanding Maori Fisheries Treaty rights of 1840 which had hitherto guaranteed "The full exclusive and undisturbed possession of their lands, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession..."⁹⁷ The applicants claimed *inter-alia* that New Zealand's the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 breached the State party's obligations under the Treaty of Waitangi. In this context, the claimants argued that the right to self-determination under Article 1 of the Covenant is only effective when people have access to and control over their resources. They argued further that the proposals contemplated in the Fisheries' Settlement threatened their way of life and the culture of their tribes, in violation of Article 27 of the Covenant particularly because their traditional culture comprises commercial elements and does not distinguish clearly between commercial and other fishing. They claim that the new legislation removes their right to pursue traditional fishing other than in the limited sense preserved by the law and that the commercial aspect of fishing is being denied to them in exchange for a share in fishing quota. The Treaty of Waitangi (Fisheries Claims)

⁹⁶ 547/1993 (10 December 1992), UN Doc. CCPR/C/70/D/547/1993

⁹⁷ *Ibid.* para.5.1.

Settlement Bill 1992 became law on 14 December 1992. The preamble to the Act states that:

The implementation of the Deed through legislation and the continuing relationship between the Crown and Maori would constitute a full and final settlement of all Maori claims to commercial fishing rights and would change the status of non-commercial fishing rights so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect but would continue to be subject to the principles of the Treaty of Waitangi and give rise to Treaty obligations on the Crown.

The Act provides *inter-alia* for the payment of NZ\$ 150,000,000 to Maori, and states in section 9, that “all claims (current and future) by Maori in respect of commercial fishing are hereby finally settled” and accordingly:

The obligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interests of Maori in commercial fishing, or the quantification thereof, All claims (current and future) in respect of, or directly or indirectly based on, rights and interests of Maori in commercial fishing are hereby fully and finally settled, satisfied and discharged.

An agreement between the Maori and the Government had led to the Settlement. The effect of the Settlement was threefold. First it entrenched the Quota Management System introduced by the Government in a bid to ensure sustainability of the resource although both the Waitangi tribunal which enforced the 1840 Treaty between the Crown and the Maoris and the New Zealand High Court and Court of Appeal had in several decisions between 1987 and 1990 found it to be in conflict with the Treaty of Waitangi because it gave exclusive possession of property rights in fishing to non-Maori in breach of s. 88(2) of the Fisheries Act 1983.⁹⁸ Secondly, it ensured that the Maori had greater access to a greater percentage of quota, effectively guaranteeing them possession of the fisheries. Thirdly, regarding commercial fisheries, Maori authority and traditional methods of control as recognised in the Treaty were replaced by a new control structure, an entity in which the Maori not only had the power to safeguard

⁹⁸ Ibid. para.6.3.

their interests in fisheries but also effectively to control the industry.⁹⁹ In regard to non-commercial fisheries, the Crown obligations under the Treaty of Waitangi continued, and regulations were made that recognised and provided for customary food gathering.

The HRC considered the question whether the claimants' rights under Article 27 of the Covenant had been violated by the Fisheries Settlement, as reflected in the Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. It reiterated that economic activities may come within the ambit of Article 27, if they are an essential element of the culture of a community and that the right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. It reasoned that Article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology. In this case the legislation introduced by the State affected, in various ways, the possibilities for Maori to engage in commercial and non-commercial fishing. The question is whether this constituted a denial of rights. The Committee reminded itself that:

A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in Article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his own culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under Article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27.¹⁰⁰

The HRC concluded that the facts before it did not reveal a breach of any of the Articles of the Covenant,¹⁰¹ but that the Government of New Zealand had a continuing duty to ensure that the cultural and religious significance of fishing for Maori received due attention in the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act.¹⁰² What is clear from these cases is the fact that:

⁹⁹ Ibid. para.9.7.

¹⁰⁰ Ibid. para. 9.4.

¹⁰¹ Ibid. para.10.

¹⁰² Ibid. para.9.9.

- 1) Continuing native claims to land that they have lived off from time immemorial are not easily extinguished. On the contrary they are enduring. Quite apart from property law related doctrines, emergent doctrines of international human rights law such as article 27 cultural rights can be invoked in support of native claims to land.
- 2) The HRC's jurisprudence insists that the right of members of a minority to enjoy their culture under Article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples.
- 3) Where the rights protected under Article 27 of the ICCPR connect with economic interests rooted in native claims to property rights, a rearrangement of such property rights by the State in close consultation with the indigenous group¹⁰³ does not violate those initial rights where the impact of the intervention is not substantial enough effectively to deny the community the right to enjoy their cultural rights,¹⁰⁴ or where intervention of the State actually resulted in greater economic empowerment and greater control of the "resource" by the target community

In the HRC's jurisprudence the significance of property rights that derive from native claims to property lies in the utilisation of their economic potential to the particular community, so that where those rights are marginally disturbed by intervention of the State, the bigger economic context is preferred to the smaller exclusive one. For *humwe* inspired land reform programmes, the bigger context appears to be economic viability of affected SADC States and with that, the SADC itself, so that mere land redistribution that does not excite economic regeneration opposes one of the central tenets of the human rights agenda, i.e. preservation of the dignity of the human spirit. For this reason, *humwe* inspired land redistribution programmes ought to carry with them a much bigger agenda, the exploitation of economic value and potential of the land. This is

¹⁰³ Paragraph 7 of the HRC's General Comment on Article 27 states that minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or, as in the instant case, reindeer husbandry, and that measures must be taken "to ensure the effective participation of members of minority communities in decisions which affect them".

¹⁰⁴ See *Länsman et al. v. Finland*, 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994) para. 9.5.

consistent with the much debated right to development, especially for developing countries.

4.3.2 *The right to Economic Development*¹⁰⁵

Claims of the existence in international law of the right to development are commonplace. However, the “sources” of this right show who its chief protagonists are, and by their ambivalence, silence or opposition to it, whom its adversaries are. Orford¹⁰⁶ observes cunning by developing States which involves attempts to invoke the right to development against accusations of repressive government and a reckless abdication by developed States of their influence in the development of its content and procedural properties. She writes that:

The right to development has become something of a mantra for States seeking to justify the privileging of economic development over human rights and to legitimise repressive or authoritarian policies. The right is equally systematically resisted by industrialised States seeking to ensure that their corporations and investors are not constrained in their operations in the South

This suggests a polarisation of opinion with developing countries arraigned in support of it and most developed countries united in their opposition to it has marked out an intellectual site of contestation over the presumed right. The answer to this problem according to Orford does not lie in walking away from the debate about how to move the right forward because that would leave interpretation and application of the said right to the very same people that cunningly want to use it to legitimise their brutal and repressive regimes.

Earliest recognition of the said right occurs in resolutions of the United Nations Commission on Human Rights (the Commission). Given that resolutions of UN organs except those of the Security Council have no legal effect in international law, this perhaps shows to the weakness of claims to the existence of this right. In Resolution 4 (XXXIII) of 21 February 1977 the Commission, which examined among other things impediments to the realisation of economic, social and cultural rights particularly in developing countries declared that there was a right to

¹⁰⁵ For a thorough discussion of its underpinnings, proposed remit and difficulties with, see especially Orford, A. (1999) “Globalisation and the Right to Development”, in Alston, P. ed. *Peoples’ Rights*, Oxford University Press, pp.127-84.

¹⁰⁶ *Ibid* at 133.

economic development. Four years later, in Resolution 36 (XXXVII) of 11 March 1981 a Working Group of Government Experts on the right to development was established. In Resolution 1989/45 of 6 March 1989 the Commission requested the UN Secretary-General to facilitate a global consultation process regarding the realisation of the right to development as a human right. A global consultation meeting was held in Geneva from 8 to 12 January 1990 that examined the right to development as a human right. The meeting “reaffirmed that the right of individuals, and groups to take decisions collectively, to choose their own representative organizations and to have freedom of democratic action, free from interference was fundamental to democratic participation” and emphasised that participation was crucial to the realisation of the right to development.¹⁰⁷ More importantly, the meeting linked the right to development with social justice. It lambasted development strategies oriented only towards economic growth and financial for failing to a large extent to achieve social justice and exhorted the UN to take the lead in promoting the right to development.¹⁰⁸ The UN Declaration on the Right to Development¹⁰⁹ of 4 December 1986 brought to the top of the UN agenda, developing countries’ concerns about development and world order. In 1993, the World Conference on Human Rights described the right to development as both universal and inalienable and also integral to the fundamental human rights.¹¹⁰ It is now regularly reaffirmed in resolutions of both the UN General Assembly and of the Commission on Human Rights. Article 22 of the African Charter on Human and Peoples’ Rights¹¹¹ imposes on States the duty, individually or collectively to ensure the exercise of the right to development. In spite of their verbal enthusiasm for development, except for a few, the majority of African States are lumped at the bottom end of the hierarchy of developed States and again for a few, top the list of repressive regimes in the world. Their leaders by and large use public office following the example demonstrated by their colonial masters - to create an elite upper class that oppresses the majority.

Development implies change. If that change results in regression of social conditions, it may be difficult to justify. Desirable change seeks always to build on present gains rather than to multiply the social minuses. Since the collapse in 1999 of the land reform pact between the United

¹⁰⁷ *Ibid.* at 131.

¹⁰⁸ *Ibid.* at 132.

¹⁰⁹ UN Doc. A/41/53 (1987)

¹¹⁰ See Article 10 of the Vienna Declaration and Programme of Action (1993), 32 I.L.M. 1661.

¹¹¹ 21 I.L.M.59.

Kingdom and the Zimbabwe Government for instance¹¹² and the beginning of violence against commercial farmers in the name of land redistribution, Zimbabwe has consistently topped the list of “fastest shrinking economy in the world” in spite of occurrence in other parts of the world in the same period of financial disasters, natural disasters and complex financial scandals that rocked investor confidence. These include the collapse of the Argentine economy in 2001, scandals in the United States involving major companies in 2002, terrible and economically crippling wars in the Democratic Republic of Congo and Sierra Leone. One report suggests that since 1999, the Zimbabwe national economy has contracted by as much as 15%, inflation has vaulted above 50%, and direct foreign investment has all but evaporated.¹¹³ This suggests a real deficit in Zimbabwe’s developmental strategy to weed out past and continuing injustices directly connected to her colonial experience because this strategy has eaten up all her political, social and economic gains since independence from the UK in 1980. A former model for race relations in the world, Zimbabwe has now become a pariah State whose leadership is not welcome anywhere outside Africa because their policies promote abuse of human rights.

4.3.3 *Land Use*

I noted in chapter one that land’s elemental qualities are beyond dispute. These qualities are helped on by the fact that man has not yet mastered the divine art of creating land, and also by land’s qualities of utility and indestructibility, which distinguish it from other, more perishable forms of property. For all societies these qualities make land commerce’s engine. Even virtual companies require a physical desk-space, a chair and at least one computer from which to indulge their fancy, not to mention multinational companies whose involvement with any country is usually heralded by purchase of vast acres of land on which to conduct their businesses. The housing market, in spite of its turbulence, is generally regarded to be among the “safest” investments for retirement plans, capital investment, etc. For agrarian communities economic success has always thrived on the cooperation between commercial banks and private title-holders to land who have used their land as security for the financing of developmental projects ranging from chicken, pig, cattle, and sheep rearing

¹¹² See Chapter 1.

¹¹³ See “Zimbabwe economy” at http://www.geographyiq.com/countries/zi/Zimbabwe_economy_summary.htm (viewed on 04/04/03)

to the rearing of more exotic species such as crocodile, ostrich and other game animals. Tourist resorts and lodges financed by loans secured on private land titles abound. Associated with this has been the growth in insurance finance services, transport service, catering services, entertainment industry and training of personnel involved with all these sectors. The raising of tea, tobacco, citrus, sugar and other plantations depended very much on the cooperation of banks that were ready and willing to finance those projects on loans secured on the private land-titles of the borrowers. Through this cooperation between banks and commercial farmers the potential for land use has been released and countries like Zimbabwe became known as “the bread basket of Africa”, exporting all over the world, corned beef, yoghurt, butter, all forms of milk, sugar, corn, citrus fruit, rose flowers, ostrich meat, etc. Therefore, the possibility of persons who hold land to use that land as security for bank loans that finance projects targeted at exploiting the economic potential of SADC economies should form a necessary part of the equation to resolution of the land crisis in the region. The possibility of drawing bank loans for economic development and economic regeneration programmes is arguably the strongest quality of land as property because even with the most fertile square mile of it on earth, without the resources to exploit it to its fullest potential, the title holder remains impoverished, even tormented. Unless the titles that result from dissolution of private individual land-titles are equipped to sustain the cooperation between landowners and banks that has served to spark off several other related service industries that combine with the agriculture industry to inspire economic success of the region, the SADC’s land reform programme is doomed to fail. So what should the new land titles that are for the most part replacing the private individual land titles contain in order to sustain the cooperation of commercial banks?

If the current land reform programmes in the SADC are going to compliment economic growth and prosperity, a minimal form of land registration will need to occur of every plot of land held in trust under *humwe*. Given that the landless peasants for whom commercial farms have been appropriated have not the financial means to purchase land, and are merely receiving some, communal trusteeship titles should be created for their lifetime, with the option to develop it into a private individual title by purchasing the former title from their community. The ultimate goal would be twofold. The first, would be the eventual conversion of all communal trusteeship titles into private individual titles because that would be the only incentive through which holders would be encouraged to undertake meaningful land development programmes and projects that lasted beyond their own life expectancy because inheritance rules would not apply to

communal trusteeship titles. Inheritance of communal trusteeship titles would violate the equal opportunity principle according to which all members of the community of ripe age had equal access to an equal portion of land to live off. Besides, passing on to an heir that which is communally owned confuses private and public property. Also, the community would forfeit without any benefit accruing thereto, its right to assign and re-assign land that belongs to it on a first come first served basis. The idea of a “redress fund” would appear to address the conflict between leasing land for life and the need by trusteeship owners to develop that land in order to derive from it maximum benefit. A person that invested for argument’s sake the equivalent of half a million pounds sterling into a piece of land would wish to exploit his investment beyond his own life and that of his grand-children. The second would be establishment of a “redress fund”. The money derived from converting a plot of land from communal trusteeship title to private individual title would go into a “redress fund” from which community members could derive some form of benefit for having forfeited land to the emergent landowners. That benefit could take several forms. For instance, it could create an investment fund from which any member of the community who had a project that the community regarded as beneficial to its interests could borrow a loan. Projects funded through such schemes would eventually enable those still on communal trusteeship titles to convert to private individual title, enriching further the redress fund which eventually would become so big that with the end of communal trusteeship title, a fund would have been established that could fund a wide range of investment projects that the community approved of. It would provide opportunity for people to explore their agricultural talents and open up very healthy competition in the community, as everyone would have only themselves to blame for their lot and not the government, a former colonial master, the World Bank, or any other scapegoat. That would in turn create a new class of entrepreneurs in the community, who also enriched the “redress fund”. With another layer of post-emergent entrepreneur industrialists would come a new category of economists and service providers. This form of social engineering would still be premised on *humwe*. The *humwe* social engineering paradigm would maintain and maximise the nexus between economic development and private capital funding very much needed in these agrarian communities. *Humwe’s* land redistribution agenda so pursued would become the bedrock of SADC States economic reform and industrial development. It would reduce and even perhaps annihilate the hitherto stifling dependence of SADC economies on the Bretton Woods financial institutions and empower psychologically, generations of native Africans with self-belief. It would

extinguish the expectation among citizens that solutions to their problems lay beyond themselves, in the custody of some generous donor from the Western world. It would create local wealth those of the empowered local people and offer lasting opportunities that could not be compared with the transient foreign investors which fold up and fly away at the slightest hint of an economic sneeze. Of course the success of the *humwe* social engineering paradigm would depend in large measure on the ability of its operatives to efficiently managing the “redress fund”. In a region where corruption and nepotism are devils that people appear increasingly to accept as unavoidable evils, *humwe*'s social engineering project may yet succumb to the same vices. SADC States are not peculiarly different from other States in this sense, just that others may have already made more progress than themselves in fighting these evils. The US has adopted legislation (the Foreign Corrupt Practices Act¹¹⁴ (FCPA)) prohibiting, and indeed criminalizing bribes made by national businesses to foreign officials in order to obtain business. The FCPA grew out of abuses primarily of government contractors which came to light in the early to mid 1970s, in which bribes were used to obtain business in both developed and developing countries. In the United Kingdom, the doctrine of individual and collective ministerial responsibility applies to make Ministers accountable or answerable to Parliament.¹¹⁵ This doctrine is arguably foremost in the tools of the British constitution intended to protect the integrity of government and public faith in the system. That corruption is a worldwide problem is evidenced also by adoption on 16 December 1996 by the General Assembly of the United Nations of the Declaration against Corruption and Bribery in International Commercial Transactions.¹¹⁶ The General Assembly is the main deliberative organ of the United Nations and comprises of representatives of all Member States, each having only one vote. This paved the way for adoption approximately a year later by the 29 member States of the Organization for Economic Cooperation and Development (OECD), of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.¹¹⁷ Wilder and Ahrens¹¹⁸ write that the true cost of corruption worldwide is unknown, but it certainly runs into billions of dollars. Bribery tends to:

¹¹⁴ Pub L No 95-213, 91 Stat 1494 (1997)

¹¹⁵ See McEldowney, J.F. (2nd edn 1998) Public Law, Sweet & Maxwell, London, pp.95-103.

¹¹⁶ GA Res 51/191 (86th ple. Mtg), UN Doc A/Res51/191 (1996).

¹¹⁷ OECD Doc DAFFE/EME/MR(97) 20.

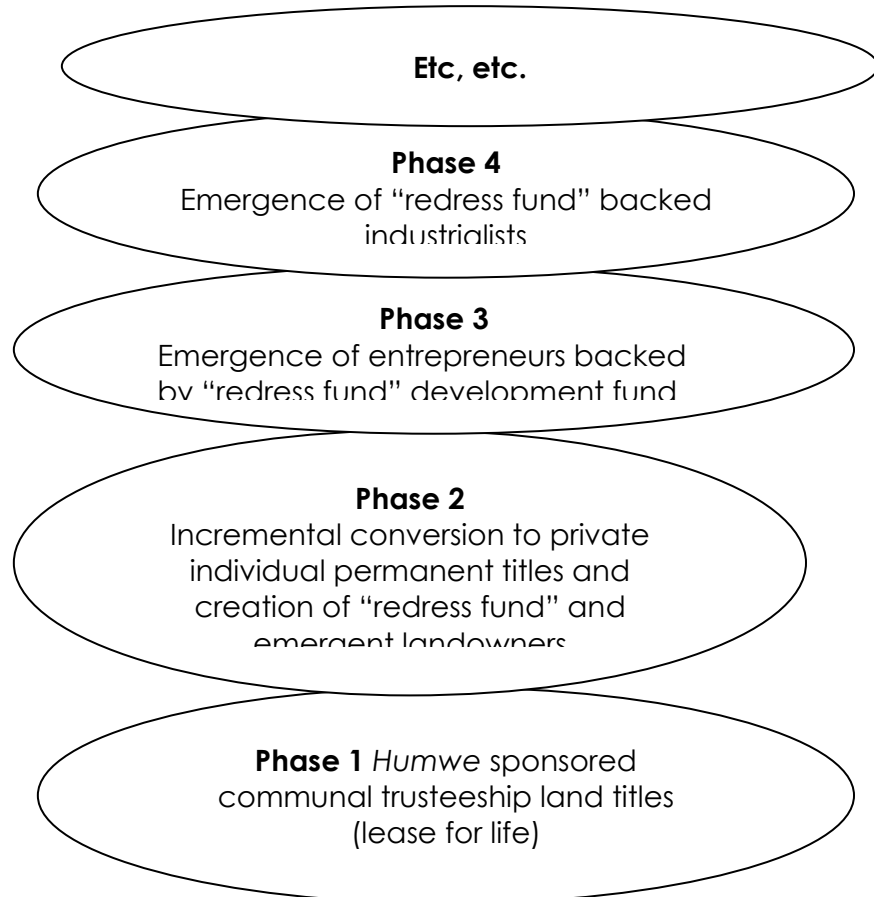
¹¹⁸ Wilder, M. and Ahrens, M. (2001) “Australia’s Implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions”,

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- 1) Distort grossly the tendering for public contracts, resulting in over-cost projects and shoddy work
- 2) Distort prioritisation of projects, often resulting in “white elephant” investment projects
- 3) Divert money from public accounts to private individuals and often into foreign bank accounts
- 4) Undermine equity, efficiency and integrity in the public service
- 5) Burden business with an extra layer of costs which increases the level of uncertainty in doing business in countries with high corruption.

However, if these and other related evils can be mustered, the *humwe* social engineering paradigm offers what is perhaps and arguably the best hope of equitably redistributing economic advantages in the SADC, and of liberating the SADC economy from the Bretton Woods financial institutions – itself a proven critical step to real and lasting economic development.

Table 4.1 ***Humwe Social Engineering Paradigm***



4.4. ***Humwe and Globalisation***

Literature on the subject confirms positions¹¹⁹ that affirm “globalisation” and others that contest trade liberalisation in the strongest terms. One view is that we already live in an increasingly integrating order where social and economic processes operate predominantly at a global level. According to this view, national and political communities are inevitably decision takers. Another view is that the quality and reach of States’ sovereign independent status is now far more robust than ever. According to this view, unprecedented international economic interaction has been facilitated by States themselves which retain control over it with an impressive range of political options that they continue to fashion and strengthen. Held¹²⁰ rejects both of these positions because they ask the wrong question, i.e. has globalisation occurred or not, and what are the consequences if it has? That approach is limited partly because it perceives globalisation as a one off event that becomes a reality at a definite point rather than a continuing process that is facilitated by processes of globalisation. He dismisses conceptions of globalisation that are not sensitive to the historical variation in forms of globalisation and their variable impact on politics. The economic integration that we call globalisation is only the latest example of what has been happening for ages. Calitz¹²¹ writes that modern economic globalisation is the latest manifestation of an erratic pattern of economic integration which has occurred in leaps and bounds over the years. In Roman times, monetary integration was far more advanced than in modern Europe, when the dinarius was used as a currency in an area, which today covers parts of more than 40 countries in Europe, North Africa and Asia. More recently, (1870 – 1930), the pound sterling was the currency of a part of the world which today represents more than 50 countries, including India which has a population of one billion – almost one quarter of the world population. The difference between modern day economic globalisation and previous versions of it is that:

- 1) it appears not to be driven by an imperial power though the role and function of the United Nations’ financial institutions including the

¹¹⁹ For a succinct summary, see Held, D. (1998) “Democracy and Globalisation” in Archibugi et al. *Re-imagining Political Community*, Polity Press, Cambridge, pp.11-27.

¹²⁰ *Ibid*, p.13.

¹²¹ Calitz, E. (2000) “Fiscal Implications of the Economic Globalisation of South Africa”, *The South African Journal of Economics*, Vol.68 No.4 p.564 at p.565. Discussing the potential effect on the SADC of the new WTO trade liberalisation regime, see Chigara, B. (2001-2002) “Trade Liberalisation: Saviour or Scourge of SADC Economies”, *The University of Miami International and Comparative Law Review*, vol. 10 Special Issue, pp.7-21.

International Monetary Fund(IMF) and the World Bank is difficult to exonerate from imperial force machinations,

- 2) it does not require a military offensive aimed at a stable expansion of territory,
- 3) “the major agent of economic integration is a spectacular drop in the cost of communications and information Global communication at falling cost presents competition to governments because it influences the views and behaviour of residents and reduces the scope for authoritarianism, paternalism and government without accountability”,¹²²
- 4) it occurs at an unparalleled scale, attracting participation of State entities, multinational companies, financial institutions, residents and foreigners of States, international mobility of capital, technology and sometimes labour,
- 5) it produces devastating effects, winners and losers, affluence and abject poverty,
- 6) it compounds labour migration, in that an estimated 120 million people find themselves outside their countries of birth, a high proportion even if we discount political refugees,
- 7) it is perceived by many to be irreversible.¹²³

But even if we attributed globalisation to a set of forces that exclusively or mutually facilitated it, we would still need to identify those processes that catalyse, expedite or result in it in order to better understand it and also to assess its potential or real impact on *humwe* inspired projects. According to Held¹²⁴ globalisation is a spatial phenomenon that lies on a continuum with “the local” at one end and “the global” at the other. Firstly, this disassociation of the local from the global is problematic because the exclusiveness that it suggests is almost entirely impossible in today’s world as the local is at once the global. Secondly, globalisation suggests many chains of political, economic and social activity that are becoming interregional or intercontinental in scope.

[It] suggests that there has been an intensification of levels of interaction and interconnectedness within and between States and societies. What is noteworthy about the modern global system is the stretching of social relations in and through new dimensions of activity and the chronic intensification of patterns of interconnectedness mediated by such phenomena as modern communication networks and new information technology. It is possible to distinguish different historical forms of globalisation in terms of 1) the extensiveness of networks of relations and

¹²² Ibid. p.566.

¹²³ Ibid. p.568.

¹²⁴ Held, D. (1998) “Democracy and Globalisation” in Archibugi et al. Re-imagining Political Community, Polity Press, Cambridge, p.13.

connections; 2) the intensity of flows and levels of enmeshment within the networks; and 3) the impact of these phenomena on particular communities. ... [It] is neither a singular condition nor a linear process. ... [It] is best thought of as a multidimensional phenomenon involving diverse domains of activity and interaction, including the economic, political, technological, military, legal, cultural and environmental.

Globalisation so understood necessarily imposes on national, regional and inter-regional policy decisions requirements that are, ignored at the particular risk of economic, social and political failure. Arguably, the political force of globalisation is the one factor that every nation must first consider before adopting any economic stance. In particular, it is the political force of globalisation that dominates the social construction of *humwe*, and with it, its prospects of success or failure – literally meaning poverty or provision in the SADC. Thus, transfer of commercial farms to peasants who have neither the capital nor expertise to produce the wheat, tobacco, nuts, sunflower and other products at the volume that commercial farmers had habitually produced has been regarded by many as economic suicide in both the short and long terms. This suicidal image of *humwe* has in general fed Western criticism of the *humwe* project. However, Southern States have generally accepted *humwe* as a necessary outgrowth of colonial injustices. To this extent the political force of globalisation masters *humwe* in that it creates the social imprimatur of the latter, thereby determining its social force. In economic terms social force often equals economic persuasion. States with low social force command very little or no respect among foreign investors. For example, at the peak of the United Nations' long battle against apartheid in South Africa, few foreign investors wished to be associated with South African business. Few international companies openly admitted to trading directly with South Africa, or wanting to invest in that country while apartheid continued. The political force of globalisation reigned in on the South African government's choice to pursue apartheid. The long-term result was that economic forces of the world were adjusted to repel South African business interest. This contrasts sharply with popular appeal in the West to South African produce after 1994.¹²⁵ Globalisation's political forces thus shaped the international social imprimatur of South Africa's economic potential. This resulted in a South Africa with a far inferior economic, social and political ranking than her

¹²⁵ Discussing the European Union's special trade agreement with South Africa even to the detriment of the Southern Africa Development Community, see Chigara, B. (2001-2002) "Trade Liberalisation: Saviour or scourge of SADC Economies", *University of Miami International & Comparative Law Review*, vol 10 pp.7-21.

potential suggested. For this reason it would benefit *humwe* engineered projects that seek to undo social injustices that are rooted in colonial or some such other similar historical experience of a State to seek to carry with them the political forces of globalisation. If this is correct, then from the offset globalisation imposes its own pre-requisites on the SADC's *humwe* inspired land reform project that can not be ignored or side-stepped if political, economic and social prosperity of the region is to be maintained or developed further. But what are these pre-requisites, and how may their inclusion affect the *humwe* paradigm discussed above? Who and what should determine both their form and their content?

4.5. Globalisation and land reform programs

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Increasingly, market forces are becoming the cardinal focus of national and regional economic management. Surrender to market forces is routinely urged by international financial institutions and by donor countries to target States. Armatya Sen, urging intellectual engagement rather than surrender to markets and their appeal, lure, force, and virtues writes that “The virtues of the market mechanism are now standardly assumed to be so pervasive that qualifications seem unimportant. Any pointer to defects of the market mechanism appears to be, in the present mood, strangely old fashioned and contrary to contemporary culture”.¹²⁶ Generally speaking, market efficiency is what States are fighting to achieve in order to secure the nod of transnational corporations (TNCs) that now dominate international commerce and trade ahead of their competitors. State practice shows that in order to both enhance their competitiveness and to secure markets for their goods in a world where competition is forever growing more and more fierce, States with similar economic standards or aspirations are ganging up to form economic unions. Examples include the European Union, the North Atlantic Free Trade Agreement (NAFTA), the Commonwealth States (CS), the Association of South East Asian Nations (ASEAN), Oil and Petroleum Producing Countries (OPAC), Southern African Development Community (SADC), Economic Community of Western African States (ECOWAS), Preferential Trade Area for East and Southern Africa and the Preferential Trade Area for East and Southern Africa (PTA). States that are not enthusiastic about market efficiency risk economic decline, failure or suicide while those that embrace it stand a much better chance compared to their competitors of enhancing economies. A few more employed citizens often translate into a few more votes at the next parliamentary election for the government of the day while a few more unemployed citizens often translate into disfavour with the electorate at the next election. Barring a bizarre freak election result, a ticking economy arguably always is a vote winner. Little wonder then that States appear to be in competition to prostitute themselves to TNCs. In particular, developing countries that are perhaps least suited to open up their economies so that local producers can compete with external producers appear confused about how to deal with the situation. On the one hand, international financial institutions on whom they depend for economic loans often make it a condition of their assistance that they liberalise their markets, i.e. remove all trade barriers that protected native business interests and ensure equal treatment in the market place of external products and service providers. The World Trade Organisation’s (WTO) cardinal policies of Most favoured Nation (MFN) Treatment and Nationality Principle (NP) are designed to ensure this result

¹²⁶ Sen, A. (1999) *Development as Freedom*, Oxford University Press, p.111.

among States Parties.¹²⁷ With nowhere else to turn to for these much needed loans, developing countries always end up accepting any, and all conditions – making for one-sided contractual agreements where the lender imposes his will over the borrower. But as Ghandi reminded his people at various points in the struggle for independence from colonial rule, there is dignity without measure in the wearing of a piece of self-spun cloth, no matter how inferior it may appear in comparison to a foreign-spun one that causes widespread poverty, pain and despair in the land. Risking long-term establishment of locally based entrepreneurship for short-term immediate hedonist gratification is never in the long-term interest of the hedonist. But the choice for developing countries is not merely one between protection of home-grown economies on the one hand, and opening-up of their markets to foreign competition under the banner of “trade liberalisation” on the other. The success or failure of any business idea depends not just upon its intention, but also on the availability of all the resources required to set it in motion, particularly finances. Margaret Thatcher once remarked that “No-one would have remembered the Good Samaritan if he had had only good intentions. He had money as well!” Most developing countries have a fair share of natural and human resources. However, most of them lack the liquid flow of cash - the missing link - required to harness natural resources, human resources and business intention to pursue a viable commercial project. In search of this link developing countries submit themselves to the requirements of anyone that will relieve them of pressures of all sorts. The main one is electoral de-selection. Just like their developed counterparts in developed States, citizens of developing States have discovered and are utilising their power to make governments work for them by threatening them with electoral deselection. Most governments now live under the constant fear of the wrath of a disgruntled electorate, except in failed and failing States that are averse to any form of democratic governance. This has its problems. It has the potential to pressure governments into using short-term fixes that serve only to worsen the country’s economic fortunes. For instance, no longer able to pay for Zimbabwe’s petroleum needs, President Mugabe is reported to have “mortgaged” to the Libyan leader vast acres of Zimbabwe’s prime-agricultural land in exchange for petroleum oil. While this might have quelled street riots and protests against his government for only a short while, it was only a quick fix that has not sufficiently addressed the general economic collapse of the Zimbabwean economy. Zimbabwe needs to

¹²⁷ Discussing the WTO’s general agreement on trade in services see Arup, C (2000) *The New World Trade Organization Agreements*, Cambridge University Press, pp. 95-143.

rehabilitate its economy into the world economy rather than alienate itself through activities that globalisation's political force ascribes the stigma of unacceptability. That only courts economic disfavour of other States, regional groups and in the end, the collapse of the target State. What this suggests is that both unequal land distribution and *humwe* sponsored land grab policies are inimical to SADC States in a globalising world where the political force of globalisation, like a guardian angel of universal standards of "*fairplay*" ruthlessly operates instantly to penalise any threat to those universal standards. States that prefer to take their time to learn this lesson risk making unnecessary mistakes with grave consequences for their citizens, particularly where human rights and humanitarian law are at issue. But what are these standards of *fairplay* according to which the SADC should stick in its effort to undo past and continuing injustices in their communities that are traceable only to colonial experience of their territories?

4.5.1. Fairnes, Humwe and Neutrality

Koskenniemi¹²⁸ writes that every important social conflict demonstrates dual claims for the honouring of rights. I would say that complex social conflict situations, like the land issue in the SADC, manifest often multi-faceted claims for the honouring of rights.¹²⁹ Our familiarity with legal systems that seek to declare out rightly a winner and a loser in each contest before a hearing has numbed our sensitivity to the full extent that we respect the rights that arise from social conflicts. Consequently, we narrow our determination of the rights to be prioritised to either "A" or "B". Dispute resolutions arrived at in this way are potentially violent in that they fail to acknowledge also those claims that fail to make the general dual category of "A" and "B". This failure itself:

- 1) leaves the dispute only partially resolved, and
- 2) festers more social conflicts until the previously neglected interests are finally addressed and resolved.
- 3) confirms what Bevan¹³⁰ calls the schizophrenia of our age, by which he means that as more and more people

¹²⁸ "The effect of rights on political culture", in Alston, et.al. eds. (1999) *The EU and Human Rights*, Oxford University Press, p.99 at p.107

¹²⁹ The contest for the label of "ultimate victim" in the land issue is discussed in detail in the previous chapter.

¹³⁰ Bevan, A.H. (1992) *Alternative Dispute Resolution*, Sweet & Maxwell, London, p.v

are aware of their rights, and as those rights become more numerous, fewer and fewer people are able to enforce them particularly because even when litigation results in a just decision, “ it rarely if ever provides complete recompense for the victorious party, and all too often the protagonists feel that they have been completely abandoned in a sea of incomprehensible legal, tactical and procedural complexities, in which their despairing cries are drowned, even if they are heard”.

From this observation is gained the view that resolution of complex social conflicts such as the land issue that is rooted in colonial or some such other similar experience of States requires a fine combing that does not necessarily seek to prioritise one set of rights over another – usually a reversal of fortunes among the parties – but to reconcile them so that the rights claims of all concerned are acknowledged. Acknowledgment of the rights claims of all stakeholders is in itself both a recognition and a declaration of the inherent worth of each of the parties involved. Of the dispute resolution strategies in operation in most legal cultures,¹³¹ alternative dispute resolution (ADR) strategies appear more suited than others to the model being contemplated here because of its determination to attend issues between the parties which often fail to make the dualist category of “A” and “B”. Crowter¹³² defines ADR as a process where by agreement, parties to a dispute submit their differences to the consideration and decision of one or more independent persons of their own choosing. “Arbitration has the force of law and generally an arbitrator’s decision, called an award, can be enforced in the courts just as a judgment of the Court.”¹³³ It is inherently a private procedure where only the parties to the arbitration agreement and their representatives can attend any arbitration hearing or meeting. The press and the public are excluded. Thus, the pressure not to lose or, to insist on full justification is reduced and people can weigh more realistically one another’s positions against theirs and accede more easily to compromise, which they would not otherwise do under intense publicity of the media. Lauded by its proponents¹³⁴ for

¹³¹ Arbitration Act 1996(Commencement No.1) Order (S.I. 1996 No.3146 c.96) (United Kingdom)

¹³² Crowter, H. (1998) Introduction to Arbitration, LLP, London, p.1.

¹³³ Ibid.

¹³⁴ See for example Sutton et al. (1997) Russell on Arbitration, Sweet and Maxwell, London; Newman, P. (1999) Alternative Dispute Resolution, CLT Professional Publishing; Crowter, H. (1998) Introduction

offering affordable, speedy, simple resolutions where all the major stakeholders play a major part in the resolution of the problem and above all, the satisfaction that each of the parties has had their day in court, ADR contrasts sharply with civil litigation which is costly, time consuming, worrying and extended. In civil litigation parties often feel that they have surrendered ownership of their dispute to lawyers that are equipped confidently to walk the threatening corridors of unfamiliar architecture that makes up court buildings, and skilfully to convert their dispute into the language of the Court and to decipher into common language, the Court's discourse on their dispute. However, social injustices, the types of which are under consideration here are by their nature property of all sections of their societies and everyone in the particular society has an inherent interest in their resolution. Therefore, they already are in the public domain. They defy the element of privacy said to facilitate and catalyse the "compromise" that facilitates agreement among stakeholders through ADR. The struggle for the label of "ultimate victim" in the status quo or threatened change among stakeholders demonstrates the public nature of conflicts that depict social justice issues. This makes ADR ill-suited for these kinds of disputes. Nonetheless, its spirit of seeking to attend and reconcile both the dominant and the lesser interests remains relevant if not instructive to resolution of social justice issues particularly because of its pursuit of compromise that results in the recognition and justification of the rights of all concerned. In this way it acknowledges and reinforces the inherent dignity of all rights claimants. That achievement placates substantially problems consequent upon resolutions based on the dualist categorisation of conflicts that ignore claims of parties that fail to make the general category of "A" or "B". Failure to placate such problems can fester perpetually other undesirable problems that are not conducive to peace and security of the State. Often it is the majority that make rights claims against a minority that holds privileges against the majority created by a previous social order. Often the minority are reluctant to honour these rights claims in full because to do so would, in their view undermine their own rights claims. This typifies rights claims as a conflict between right-as-freedom and right-to-security. In this dichotomy, if the State's authority to intervene to prevent landlessness is conceptualised in terms of a right to land, then the landless peasants' right to land is privileged over the commercial farmers' right to security of property. According to Koskenniemi,¹³⁵ rights talk alone is not adequate in these kinds of situations to resolve the conflicting interests of disputants

to Arbitration, LLP, London.

¹³⁵ "The effect of rights on political culture", in Alston, et.al. eds. (1999) *The EU and Human Rights*, Oxford University Press, p.99 at p.107-8.

because:

The boundaries of freedom and security cannot be drawn from any intrinsic or essential meaning of the relevant rights. On the contrary, the debate over where such boundaries should lie reflects back on culturally conditioned ways of thinking...

Justification for the imposition of constraint in a morally agnostic society may often seem to lie in the need to limit freedom by the freedoms of others. If your use of freedom creates harm for me, such use is prohibited. [However] the formal principle of preventing "harm to others" merely shifts focus to the concept of harm and fails to indicate which of the competing conceptions of harm should be preferred.

The object of land distribution in the SADC is not merely to achieve equal access to land but to dethrone the cycle of poverty perpetuated by previous property arrangements that created the land issue. The right of anyone to buy land and to hold it in any quantity exercised by the commercial farmers who now claim against SADC governments the right to security of their property, ignores the harm inflicted on the majority in the enjoyment of that right. Enjoyment of that right resulted in a minute elite that ended up owning the best land in the region, which also has the most potential for agricultural production. The magnitude of that harm shows in that commercial farmers are the dominant force in the agrarian economies of member States of the SADC. They also produce the staple food crops that peasant farmers could produce for themselves but for their landlessness. Thus, the peasant farmer is forced to depend on the commercial farmer for work to buy food crops that he could produce for himself. That dependency undermines the inherent dignity of the peasant by limiting his chances to develop creatively and to interact with his human capacity and potential. Culturally, the native people interacted creatively with their environment, exploiting its resources as well as developing them and preserving them.¹³⁶ Therefore, there is a sense in which upholding security of land rights against SADC governments serves to uphold and to perpetuate harm of the majority by a minority. But so too would a total reversal of fortunes between the commercial farmers and the peasants. Only a recognition of both their interests will do. *Status quo* theorists already argue that even the slightest adverse alteration in the balance of land distribution in the region will affect economic output of the region. That they argue unnecessarily would "harm" SADC economies. But security of an economy that perpetuates social injustices of a discredited and foregone era is hardly something to argue for, particularly as its violence on the majority defies

¹³⁶ See chapter 2 fn.18.

reason because of its defiance of pursuit of fairness. They argue also, particularly in the case of South Africa that the land which they occupy was *terra nullius* when invading colonialists first occupied it. Therefore, landless peasants cannot now argue that their position is affected by their possession of that land. Besides ignoring the fact that pursuing the policy of equal access to land for all now would empower the whole nation as it tapped into the potential of previously ostracised citizens that are anxious to participate in, and to contribute to the economy, this story line appears to foreclose the possibility of dialogue with the aggrieved landless who in Zimbabwe's case resorted to violent overthrow of several farmers from their properties and self-enthronement as the new masters of the land. Positioning theory has shown that often conflicts are sustained by the adoption by the hostile parties of conflicting story lines, in the light of which incompatible and irresolvable contradictions in meanings have become entrenched. A "position" is understood as a cluster of rights and duties with respect to the acts one is enabled to accomplish as an occupant of a position.¹³⁷

Positioning theory offers a way of getting at the underlying presumptions that sustain such misunderstandings and the conflicts that stem from them [It evaluates whether] ... what people are taken to mean by what they say and do is partly a matter of what the various people involved in a social episode believe that persons of this or that category are entitled to say or do. Such entitlements are called "positions". Children, for instance, are usually not accorded the same speaking rights as adults. They are positioned as recipients of disciplinary admonitions rather than as sources of them.¹³⁸

¹³⁷ Harre, R. and Slocum, N. (2003) "Disputes as Complex Social Events: On the use of Positioning Theory", *Common Knowledge*, vol.9 No.1 p100 at 105.

¹³⁸ *Ibid* at 102.

With every position goes a story line, a narrative assumed to justify the teller. In the 2003 impasse in the Security Council on whether the use of force should be authorised in order to compel Iraqi finally to comply with the UN's requirement that it disarms itself of weapons of mass destruction (WMDs), the United States (US) appeared to entrench its arguments for war by wrapping itself up in the banner of "renowned world liberator". From this position, it sought to categorise States that opposed its demand for war on Iraqi as ungrateful beneficiaries of its heroic efforts. The US referred in particular to the human sacrifice it paid in the liberation of France from the clutches of Nazi Germany, and Germany itself from a tyrant. But positioning is itself often averse to reason and fairness. Harre and Slocum write that while in many cases, people are satisfied with their rights, "in other cases, the distribution of rights and duties can be challenged. The simple protest "It's not fair!" can frequently be heard as a challenge to implicit positioning."¹³⁹ The view that because the US has in the past sacrificed so much to rid Europe of a tyrant and in the immediate aftermath of that process invested financially to rebuild Europe does not qualify it to order everyone else to comply with its view on present issues. If the Americans were right in 1945, does it mean that they forever will always be right? Story lines are intended by their narrators to justify claim rights that are declared in retrospect and in anticipation. The danger is that often positions that are fanned by these narratives are subjective unilateral declarations of claim rights, which in a conflict situation oppose in unflinching terms, the story line of the other disputant. Thus, they potentially can lockout efforts to edit them, which might then bring parties to the dispute close enough to make compromises that amicably resolve the dispute. The difficulty with positioning theory is that it relies on categorisation which itself reinforces positions because positions are relative to one another. Taking on the position of nurse may serve to position someone else as a patient, whether or not he or she wants that position. Because positions are clusters of rights, duties and obligations to perform specific acts, they create expectations, beliefs and presuppositions. Therefore, in anticipation of a dispute players strategically may start to manoeuvre for the moral high ground - strategic positioning. Or at the outbreak of a dispute, participants immediately begin the scramble to occupy the moral high ground - reactive positioning. This adds onto the tensions and number of conflicts to be resolved because in some cases, positioning sets up a complimentary or antagonistic pattern of rights and duties.¹⁴⁰ If the battle for the moral high ground peaks before resolution is

¹³⁹ Ibid.

¹⁴⁰ Ibid. at 107

achieved of the main dispute, depending on the forum of the dispute, the decision makers may feel constrained to reach a decision that would not oppose the corresponding resolution of the battle for the moral high ground. This could not happen for instance in English Courts where judges must give reasons in law for the decision that they have reached. Alternatively, the forum could choose to balance the outcome by rewarding the disputant that has lost in the battle for the moral high ground with some form of compensation for their social loss. It is not uncommon for legal decisions to appear on the opposite end of society's moral power. But pursuing this kind of balance in the final outcome of disputants' fortunes, particularly where culturally, this is perceived to be socially desirable. In sum, positioning theory alerts us to the difficulties that are set in any effort to resolve disputes that reflect past and continuing social injustices which are traceable to colonial or some such other similar experience of a State. First, stakeholders adopt and publicise narratives that are intended to justify the positions that they use to create and fight the dispute. These narratives are set within the parties' own frames of reference. Within such reference parties may be able to present a self-consistent and valid argument. However, because parties' frames of reference are different, neither argument can as such override the other. According to Judge Fitzmaurice,¹⁴¹ there cannot be a solution to the problem in this kind of situation "unless the correct - or rather acceptable - frame of reference can first be determined; but since matters of acceptability depend on approach, feeling, attitude, or even policy rather than correct legal or logical argument, there is scarcely a solution along these lines either". Secondly, they categorise themselves and others in the conflict in accordance to their subjective position that they hope will at the end of the dispute reflect "objectivity". This categorisation is inimical to dispute resolution in that it ascribes expectations of justification, beliefs of who is right and who is wrong, and more importantly rights and obligations among the disputants even about who has the right to set the parameters of the dispute and the terms of the dispute etc. Thirdly, positioning encourages appeal to the local and international audiences for the moral high ground, which poisons opportunities for moving disputants towards compromise. Because social justice disputes are complex social events that embrace historical, economic and political issues, their resolution can be achieved only through

¹⁴¹ *Golder v. United Kingdom*, ECHR (1975) ECR 17. Arguing that the question whether or not a conflict is seen as a rights problem and what rights may seem relevant depends on the language we use to structure the normative field in focus, see Koskeniemi, M. (1999) "The Effects of Rights on Culture", in Alston et al. (eds.) *The EU and Human Rights*, Oxford University Press, p.99 at 106.

compromise that acknowledges the inherent dignity of all concerned and the need to uphold that dignity and not to reject it – something that adoption of unbending positions can not facilitate. This balancing effect can only occur when parties drop their rigid narratives, come out of their strategic and reactive bargaining positions, drop their right-claims and march to another place. According to Koskenniemi,¹⁴² this is a place

... “beyond” rights, a place that allows the limitation of the scope of the claimed rights and their subordination to “some pattern,” or range of patterns, of human character, conduct and interaction in community, and the need to choose such specification of rights as tends to favour that pattern, or range of patterns. In other words, we need some conception of human good, of individual flourishing, in a form (or range of forms) of common life that fosters rather than hinders such flourishing. [According to the European Court of Human Rights, this pattern is clear from the understanding that] The fundamental rights recognised by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of these rights, in particular in the context of a common organization of the market, provided that these restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights¹⁴³

From this understanding of the quality of human rights as policies that must be weighed against other policies, and which may be made to defer to policies of greater weight than themselves, is gained the understanding that the policy of holding land inequitably among people that are dependant on agricultural activities for their livelihoods is in itself an injustice that threatens the dignity of all concerned. The majority of people in the SADC need land to work in exactly the same way that fish need water to survive. Therefore, the policy of securing everyone’s access to land appears to be more important than that of ensuring the security of land titles procured during or through discredited social arrangements. But determination of which policy should be privileged over another does not in itself rid the State of the duty to act fairly in the application of the preferred policy. The requirements of the duty to be fair are generally divided into two general principles, the rule against bias and the right to a fair hearing.

4.5.1.1. *The rule against bias*

¹⁴² Ibid. at 109.

¹⁴³ See Case 5/88, *Wauchauf* [1989] ECR 2639.

The rule against bias was restated in the House of Lords by Lord Browne-Wilkinson in *ex parte Pinochet Ugarte No.2*.¹⁴⁴ The contention was that there was a real danger or reasonable apprehension or suspicion that Lord Hoffman, who had been a member of the majority 3:2 decision of the House of Lords that had determined whether or Senator Pinochet had immunity from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of State, might have been biased because he was a member and chairman of Amnesty International Charity Ltd, a body that carried out Amnesty International's charitable purposes. Amnesty International had acted as a third-party intervenor in the proceedings.

... it is alleged that there is an appearance of bias not actual bias. The fundamental principle is that a man may not be a judge in his own cause. The principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. ... this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias.

The requirement to guard against bias sustains the principle of equality of arms and is common to all legal systems worthy of that name. The High Court of Australia in *Webb v The Queen*¹⁴⁵ held that:

In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation

¹⁴⁴ [2001] 1 AC 119, House of Lords.

¹⁴⁵ Per Mason C.J. and McHugh J. (1994) 181 C.L.R. 41 at 50-52.

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of bias, the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality. The test of “reasonable likelihood” or “real danger” of bias tends to emphasise the court’s view of the facts

Once reasonable apprehension about the impartiality of social injustice resolution strategies and mechanisms have arisen, the best course of action is to start the whole thought process all over again about how best to resolve the conflict. Previously, courts applied different tests but the *reasonable apprehension test*, which emphasises the role of public perception on the dispensation of justice, appears to have taken root as the cardinal test for compliance with the requirement of impartiality in most common law countries.¹⁴⁶ In *Reg v Gough*¹⁴⁷ the House of Lords specifically rejected the *reasonable suspicion test* and the cases and judgments which had applied it in favour of a modified version of the *reasonable likelihood test*. The emergent land reform policies of the SADC that are themselves a reaction to a past and continuing social injustice *viz* access to land on racial lines are in real danger of offending the test of impartiality, and with that, denying legitimacy to those processes. International consequences of that can be dire. In Zimbabwe for instance, the cause of the landless has been championed by “war veterans” that have appeared before the law courts, physically threatened judges that gave decisions that went against them on this issue, and then removed commercial farmers from their premises. This has made them parties to the land dispute, and persons with a proprietary interest in the outcome of the dispute and finally, judges and administrators of the land dispute. Unbiased balancing of disputants’ interests that is conducive to fairness in the resolution of opposing claim-rights is eliminated from the whole process where it appears that a party to the dispute stands the chance of enjoying extra-judicial advantage in the matter. So too is compromise that is necessary to move the dispute from subjective positions that insist on honouring of rights and expectations regardless of the “new” injustices that might result. Instead, the strategic narrative of the “war veterans” and the position that it entrenches, and the expectations, beliefs and claims that it insists on ride rough shod over those of their co-disputants - hardly a means of resolving disputes after emergence of the universal human rights culture in the last half century. Whereas the doctrines of sovereign equality of States and non-interference in the internal affairs of States are among the fundamental doctrines on which international law has been raised, the

¹⁴⁶ Ibid. para. 70.

¹⁴⁷ [1993] AC 646

human rights movement which evolved much later has now fettered these principles by establishing that the way in which a government treats its own citizens is now a legitimate matter of international scrutiny on the part of governments and human rights non-governmental organizations.¹⁴⁸ Thus, the legitimacy of strategies and mechanisms (ultimately policies) adopted to resolve past and continuing social injustices of any kind must still be assessed by requirements of fairness and justiciability rendered imperative by the human rights movement because it is also this culture of human rights that alerts us to the existence of past and continuing social injustices in any given situation. Therefore, resort to strategies and mechanisms that are inconsistent with the objectives of the human rights movement (HRM) is hazardous particularly for three reasons. First, it opts out of the game plan of the HRM, which is to expose social injustices in order humanely and legally to resolve them and not merely to reverse them and create new ones in their stead. The HRM objective in conflict situations is to try and achieve “dignity equilibrium”. Secondly, the means to a goal are themselves seeds of social engineering, sown in the pursuit of the goal only to flourish among us long after we have achieved our goal. Therefore, to use rape, murder, plunder, ethnic cleansing and all the other abuses that appear to have characterised land reform policy in Zimbabwe, is to surrender Zimbabwe’s social and political fortunes to the same practices long after the scourge of unequal access to land has been forgotten about. Thirdly, it appears to be an implicit admission of failure at the highest level, i.e. failure politically to imagine an approach to the problem that is consistent with twenty-first century HRM morality. We give in to the basest of our instincts when the lights of our reason fail. Under the influence of our basest instincts, we sow in social terms, the seeds of our own destruction. The land reform policies emerging in the SADC appear to revolt also against the second of the requirements of the legal standard of fairness – the right to a fair hearing.

4.5.1.2 . *Audi alteram partem - the right to a fair hearing*

¹⁴⁸ See also Chigara, B. (2002) *Amnesty in International Law: The legality under international law of national amnesty laws*, Longman, pp.125-62; Wheeler, N.J. (2001) “Humanitarian Vigilantes or Legal Entrepreneurs: Enforcing Human Rights in International Society” in Caney, S. and Jones, P. *Human Rights and Global Diversity*, Frank Cass, Ilford, pp.139-60; Legomsky, H (2001) “The United Nations and the Protection of Human Rights”, *Washington University Journal of Law & Policy*, pp.7-15.

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In *Ridge v Baldwin*, Lord Ridge stated that jurisprudence on dismissal cases falls into three categories,¹⁴⁹ namely, dismissal of a servant by his master - which commercial farmers that have been forcibly moved off their land are not; dismissal from an office held during pleasure - and commercial farmers could not be said to have been holding their farms as a leisure activity; and dismissal from a position where there must be something against a person to warrant their dismissal - which is the position of occupied by commercial farmers throughout the SADC. Regarding property rights, *Cooper v Wandsworth Board of Works*,¹⁵⁰ upheld also in *Ridge v Baldwin*, ruled that where statutory authority is relied upon to evict an owner as has happened in Zimbabwe recently, the authority applying such authority must show that they had notified the owner of their intention to apply the statute against them, and given the owner sufficient time to prepare and present their case against such action. In that case, an owner brought an action against the board with statutory authority to demolish any building erected and to recover the cost from its owner. He argued that the board had exercised its authority without giving him an opportunity to present his case. In spite of the board's argument that their discretion to order demolition was not a judicial discretion and that any appeal should have been to the Metropolitan Board of Works, the court unanimously decided in favour of the owner. This requirement to hear an owner before reaching a decision whether or not to exercise statutory discretion against them privileges negotiation and a balancing of interests. It rejects positioning that rejects all manner of reason. It acknowledges the rights of both parties to the situation. Of course, the hope of all negotiation is not capitulation of one of the parties to the table and affirmation of the other's position. Complex negotiation often target compromise of concerned parties in various areas of the argument with the hope of reaching an acceptable outcome to all the parties. The benefits of realising a satisfactory measure of fairness in resolution of past and continuing social justice directly connected to colonial or some such similar experience of the State are endless. They include attributes that developing countries in particular would consider extremely invaluable, namely,

- 1) Promotion of reliance on the law and justice systems which limits resort to blood feuds etc. A nation that has lost its reliance on the law and legal systems to settle issues is akin to a man that has lost his soul. He has no peace, stability or hope.

¹⁴⁹ [1964] AC 40, House of Lords

¹⁵⁰ (1863) 14 CBNS 180

- 2) Inculcation of the rule of law in the fabric of the State system – the only reliable means to guarantee human freedoms and inspire hope for a free, democratic and stable State.
- 3) Promotion of human rights and respect for the inherent dignity in all persons.
- 4) Economic, moral and political support of nations with similar aspirations.

It goes without saying that strategies to resolve past and continuing social justice directly connected to colonial or some such similar experience of the State that are not guided by the twin tracks of fairness discussed above risk plunging the State in the doldrums of doom-and –gloom.

4.5.2. The requirement of sustainable use of natural resources

The United Nations' policy on use of natural resources is manifest in declarations of its organs, particularly the General Assembly,¹⁵¹ multilateral negotiations and agreements and actual practice of States. It has as its source, an unlikely dynamic, i.e. decolonization and numerical growth of decolonised States to make a majority in the General Assembly.¹⁵² This majority enabled developing States to elevate economic development issues to the very top of the UN's agenda. In particular, newly independent States that joined the UN soon became disillusioned with among other things, the Bretton Woods financial architecture and its objectives. Orford¹⁵³ writes that "Many of those States took longer to join the General Agreement on Tariffs and Trade (GATT), and those who did received few benefits from the initial GATT rounds." Their effort to reform the international financial institutions did not succeed.

Attempts to address development issues through the Economic and Social Council (ECOSOC) led to the formation of the United Nations Conference on Trade and Development (UNCTAD) as an organ of the

¹⁵¹ See United Nations General Assembly Declaration on the Right to Development, 4 December 1986, GA Re. 41/128, UN Do. A/41/53 (1987)

¹⁵² This resulted in the super powers referring to the UN Security Council issues that they had previously referred to the General Assembly where they feared revolt of the newly decolonised States. Discussing the tensions this created in international relations, see Churchill, R.R. and Lowe, A.V. (1991) *The Law of the Sea*, Manchester University Press, p.180.

¹⁵³ Orford, A (2001) "Globalisation and the Right to Development" in Alston, P. (2001) *Peoples' Rights*, Oxford University Press, pp.127-184 at 129.

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General Assembly, where wider issues of international economic relations were to be addressed. Efforts to have development issues addressed in an integrated way through the major international economic institutions, however, did not succeed. Attempts to reform the IMF, the World Bank and the GATT were remarkably unsuccessful.

Clawed out of the mouths of an international regime that appears to be opposed to their economic liberation it is hardly surprising that although it is recognised in several UN instruments, opposition to the notion of the right to development has continued, and the meaning of “development” itself has become an issue of contention. However, since 1989 the World Bank, and then other multilateral development banks, have sought to integrate the issue of environmental impact and assessment into their lending policies.¹⁵⁴ This is significant for two reasons. First, it marks a departure from the earlier polarisation on north south lines of the meaning of the right to development since its emergence in late 1970s. This demonstrates that the right to development has become an increasingly important part of the United Nations human rights agenda even though it had not previously been adopted with equal enthusiasm by international economic institutions.¹⁵⁵ Secondly, this approach appears to implement the recommendations of the Brundtland Commission¹⁵⁶ that prioritised inter-generational equity. The Commission required that all States:

- 1) meet the needs of the present without compromising the ability of future generations to meet their own needs, and
- 2) define the goals of economic and social development in terms of sustainability¹⁵⁷

¹⁵⁴ See Boyle, A. and Freestone, D. (1999) *International Law and Sustainable Development*, Oxford University Press, p.10.

¹⁵⁵ Orford, A (2001) “Globalisation and the Right to Development” in Alston, P. (2001) *Peoples’ Rights*, Oxford University Press, pp.127-184 at 128.

¹⁵⁶ World Commission on Environment and Development, (1987) *Our Common Future*, Oxford University Press, New York.

¹⁵⁷ *Ibid.* at 43.

Concerns for a global policy that linked sustainable development to the concept of intergenerational equity has a long history.¹⁵⁸ However, development of multilateral standards for its implementation is more recent. The Declaration of the United Nations Conference on the Human Environment (1972)¹⁵⁹ which established man's responsibility to protect the environment and the Earth's natural resources, appears to have provided a significant standard benchmark for the standardisation of development and environmental issues. It required in Article 2 that "The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate". In Article 1, the Convention condemned apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination as factors that facilitated environmental damage and degradation. In particular the crowding of ninety-five percent of an agro-economy based peasantry together with its livestock in less than ten percent of the land with the least potential for agricultural use in Rhodesia overwhelmed the land's capacity to sustain human life of the area reserved for native use and quickly reduced it to semi-desert status. This made the status quo both unacceptable and unsustainable. The United Nations Conference on Environment and Development¹⁶⁰ (UNCED), commonly known as the Earth Summit, was held in Rio de Janeiro in June 1992. Representatives of 178 governments gathered to negotiate an environmental bill of rights that would govern economic and environmental behaviour of peoples and nations. This resulted in:

¹⁵⁸ Rachel Carson(1962) *Silent Spring* "brought together research on toxicology, ecology and epidemiology to suggest that agricultural pesticides were building to catastrophic levels. This was linked to damage to animal species and to human health. It shattered the assumption that the environment had an infinite capacity to absorb pollutants". See <http://www.law.ecel.uwa.edu.au/intlaw/environment.htm> (visited 25/03/03).

¹⁵⁹ United Nations Conference on The Human Environment: Final Documents, 11 I.L.M. 1416 (1972)

¹⁶⁰ 31 I.L.M. 814 (1992).

- 1) the Rio Declaration on Environment and Development - an agreement of 27 principles that govern States parties' conduct with regard to use of the environment and development issues;
- 2) Agenda 21 - a detailed action blueprint on specific issues relating to sustainable development; the Convention on Biological Diversity which seeks "... to conserve biological diversity, promote the sustainable use of its components, and encourage equitable sharing of the benefits arising out of the utilization of genetic resources. Such equitable sharing includes appropriate access to genetic resources, as well as appropriate transfer of technology, taking into account existing rights over such resources and such technology",¹⁶¹ and
- 3) the Framework Convention on Climate Change,¹⁶² which sets out to protect the climate system for present and future generations by stabilizing greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.¹⁶³

¹⁶¹ See <http://sedac.ciesin.org/entri/register/reg-170.rrr.html> (viewed 25/03/03)

¹⁶² See http://unfccc.int/resource/conv/conv_004.html (viewed 25/03/03)

¹⁶³ Article 2.

In common with most other multilateral agreements, the Rio Declaration begins by paying homage to States by emphasising their sovereign authority to determine issues within their territories. Principle 2 of the Rio Declaration (the Declaration) affirms the United Nations Charter sovereign right of States to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of their national jurisdictions. Immediately after that, the Declaration goes into issues that articulate the Declaration's focus. Principles 3 and 4 collectively fetter discharge of the sovereign right of States in Principle 2 by introducing the requirement that States ought equitably to meet developmental and environmental needs of present and future generations. The effect of these two principles is to direct substantially how States exercise their sovereign right to exploit the natural resources within their own territories. Ultimately, States are enjoined as trustees to their territories, to balance present economic and developmental needs with those of succeeding generations. Weiss¹⁶⁴ writes observes both an acceptance by States of this obligation and an encouraging interest to enforce them.

In 1972, countries were debating whether environmental protection and economic development were consistent or antithetical to each other. ... Since 1972, nearly every country has adopted one or more pieces of environmental legislation. In addition, there are more than 870 legal instruments in which at least some provisions are concerned with environmental issues.

¹⁶⁴ See Weiss, E.D. (1992) Introductory Note to the United Nations Conference on Environment and Development, 31 I.L.M. 814 .

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This is the backdrop against which affected SADC States are conducting their land reform process. A backdrop that prioritises States' international environmental law obligations of intergenerational equitable protection of the inherent dignity of human beings. Principle 1 of the United Nations Conference on the Human Environment (1972) suggests that that dignity requires and must be safeguarded by the guarantee of "... the fundamental right to freedom, equality and adequate conditions of life, an environment of quality that permits a life of dignity and well-being" and in return for that man " bears a solemn responsibility to protect and improve the environment for present and future generations". From this is gained the view that SADC States that are reconstructing property rights within their territories have an obligation under international law to ensure that their reforms are consistent with the requirement to protect and improve the environment for present and future generations. Changes in access to resources necessarily result in transformation of the economy and society. Planning and managing that change should be tempered by the need for social equity between generations as well as equity within each generation.¹⁶⁵ This need-based theory of economic development is of course problematic *viz* the idea of inter-generational equity because it assumes determinability of the needs of both present and future generations. Of course functional physiological needs like the need for clean air, a balanced lithosphere and atmosphere are givens at any time, but generic economic needs are more difficult to predict than that. Investing millions of pounds in the wrong product can be as costly as preserving a commodity no one will care about the future. But land's qualities of indestructibility, and limited supply for every nation coupled with man's dependency on it, particularly in agrarian economies of developing States, makes it a prime sustainable development issue. Of course there is no unity about what is meant by sustainable development¹⁶⁶ but that does not altogether obliterate the idea. In fact some ideas are so complex, multi-faceted and so broad that the definitional exercise loses effect with them because no attempt to generalise them can succeed. Sustainable development raises at once issues about poverty reduction, population size, ethics in technological development and its application, employment, trade etc. That no agreement has been reached yet on its definition points perhaps to the enormity and cumbersomeness of the idea but not to its redundancy.

¹⁶⁵ See World Commission on Environment and Development, (1987) *Our Common Future*, Oxford University Press, New York, p.43.

¹⁶⁶ The Brundtland Report observed that arriving at a commonly accepted definition of sustainable development remains a challenge for all the actors in the development process. *Ibid.*

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Besides, there is nothing unusual about such delay. Although the crime of aggression was included among Article 5 crimes of the Statute of the International Criminal Court in 1998, States and the International Law Commission were yet to agree its definition in spite of over fifty years of debating it.

To sum up, an efficient land reform policy in affected SADC States is one that recognises that States' sovereign right to determine within their own territories, the exploitation and development of their natural resources is a fettered one. International law now obliges States to ensure that their developmental policies do not degrade the quality of both the people they are intended to serve and the environment. It obliges States to adopt environmentally sound programmes that develop and sustain the environment in order to achieve intergenerational equity in the utilisation of natural resources. That requirement supersedes any other requirement particularly because it guarantees intergenerational quality of life by preventing or limiting environmental degradation. This hardly needs emphasising to SADC States most of which have direct experience of desertification in areas previously reserved for native communities under policies that created the current land crisis. Adoption of inefficient land reform programmes whilst attempting to redress the inequitable land distribution authored by colonial authorities may soon result in desertification of the land being re-allocated as well. That is a grim prospect that must be avoided.

Political abuse of the land issue to divert attention from economic failure of governments results in counterproductive, destabilising, random, unstructured and misguided land-grab, and conflict-flaring situations. It explodes rather than address an issue on which agro-based economies and their populations depend on. It compounds national problems that went before the said explosion, creating economic, social and political instability for the State and its neighbours as people are forced to relocate for all sorts of reasons. For this reason it may be said to be senseless. Whereas the previous landholders had legal titles that they could lease, sell or use as surety for loans that provided capital for land developmental programmes, the misguided, unstructured random politically motivated land-grab situations do not offer such opportunities at all. Water projects, forestation programmes and research into innovative means of technologically utilising land are abandoned in favour of outdated methods that threaten environmental degradation and international law's policy of intergenerational equity. Surely they threaten economic collapse of these agro-based economies. Absence of land management and development initiatives means certain degradation of the human environment that must be cared for in order for it to care for its users and succeeding generations.

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- 4.6. A strategy for efficient resolution of past and continuing social injustices that are rooted in colonial or some such other similar experience of States: A proposal**

If we accept that the world of exclusive sovereignty and intractable independence has largely given way to the present one of pooled sovereign competences and interdependence across a whole range of human experiences, then we might accept also that isolationist policies are the least efficient means of conducting national affairs in the new world. Yet the rhetoric surrounding political decisions regarding the land issue in the SADC suggests that its leaders like to both embrace the new world scheme when it suits them, and to turn away from it when their actions are at variance with *opinio communitatis*. *Opinio Communitatis* refers to rules of international law that are widely supported by States.¹⁶⁷ International law prohibits in the strongest terms possible assertions of racial superiority.¹⁶⁸ It is averse to the practice of ethnic cleansing.¹⁶⁹ The Daily Telegraph¹⁷⁰ quotes President Mugabe describing himself in the context of his land reform policy as the Hitler of the time. "I am still the Hitler of the time. This Hitler has only one objective, justice for his own people, *sovereignty* for his people, recognition of the *independence* of his people, and their right to their resources." This isolationist approach to conduct of national affairs is most unfortunate because in many cases, resolution of particular national situations depends on, and is influenced by unsynchronised events happening elsewhere in the world and over which affected States have no control over whatsoever. This reliance on others that we have no sovereign authority over but on whose choices resolution of our own circumstance depends, is the reason for the departure in recent times from monolithic conceptions of sovereignty to that of shared sovereign competences which recognises and privileges strategies of national conduct that facilitate interdependence of States and of their citizens. Nations can no longer escape the fact that they exist in a context of perpetual co-existence and interdependence with others and that co-operation with others is as vital as competition which characterises that relationship. Indeed nations have come to realise that environmental concerns can only be addressed collectively, and that no nation can do so single-handedly, whatever resources may be at its disposal. They have come to accept too that

¹⁶⁷ See Lee, R. (1995) "Rule Making in the United Nations: *Opinion Communitatis*" New York University Journal of International Law and Politics, vol. 27 No. 33 p.571.

¹⁶⁸ See Chigara, B. (2002) *Amnesty in International Law: The legality under International Law of National Amnesty Laws*, Longman, London, pp.125-62.

¹⁶⁹ NATO's intervention in Kosovo in 1999, was prompted by President Milosevic's policy of ethnic cleansing against sections of his population.

¹⁷⁰ See " 'Hitler' Mugabe launches revenge terror attacks" at <http://www.dailytelegraph.co.uk/news/main.jhtml?xml=/news/2003/03/26/wzim26.xml&sSheet=/news/2003/03/26/ixworld.html> (visited 01/04/03)

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cooperation with one another for mutual good does not preclude their competition against one another for the hand of those that can secure or provide employment opportunities for their nationals. Acknowledgment of this reality by those responsible in the SADC for land reform policy would benefit thinking about the targets that *humwe* sponsored reforms should meet. International business that every nation longs to attract onto its shores, international organizations that promote protection of human rights standards, and civilised society in general is averse to *humwe* inspired land reform policies, which are characterised by violent crimes that are subject matter of the ICC, human rights abuse, unfair procedures, ethnic cleansing of the society, create instability and poverty and undermine land's utility, as much as much as they are adverse to maintenance or creation of new racist institutions in any national community. For this reason, the economic and social progress of any State depends not on indulging in policies that alienate and isolate the State from the support of other States but in adopting policies that favour promotion and protection of the dignity of its inhabitants. Undoing past and continuing injustices that are linked to its colonial or some such similar experience of the State is itself no licence to social and economic vagrancy. In fact it is something that requires humility of its executioners because international law requires them to apply standards and practices that are immune to the processes that authored the injustice in the first place. It requires discovery of human values at their best and not at their worst. At best, human beings are fair, equity oriented and protective of their fellow human being's dignity. At worst they are destructive, insensitive dimwits. Creatively applied by disciples of the universal human rights culture – which is what international law obliges governments and offers them immunity from prosecution for” – *humwe* should be adapted to ensure:

- 1) Those social, political and economic gains of previous years do not go to waste.
- 2) Healing occurs of nation's social hurt arising from years of the said social injustice.
- 3) Creation of a more cohesive society.
- 4) Efficient use of natural and human resources to create sustainable domestic and international markets for agricultural products of the State and its region.
- 5) Sufficiency of food production.
- 6) Practices that guarantee sustainable development.
- 7) Practices that pursue the policy of seeking to achieve intergenerational equity.
- 8) Retention of land's utility as property and capital venture.
- 9) Protection of the inherent dignity of all persons concerned with that agenda.
- 10) Effective dissemination of the objectives of the reform programme and its contribution to the overall responsibility of the State to its citizens, its geographic region and the wider international community.
- 11) Skills training for the "new peasant farmer of the 21st century" who holds and uses land in trust to future generations and to present international concerns

Guaranteeing of these attributes would reinforce *humwe's* legitimacy among all parties involved and also within the international community, which has the power to approve or disapprove of the effort during and after its resolution. By seeking to protect the inherent dignity of every single stakeholder in the land issue, *humwe* land reform policy that is tempered by these attributes ultimately protects the whole national community from further social injustice. By managing the problem without taking ownership of it, *humwe* land reform agendas tempered by these attributes empower stakeholders by inspiring confidence in the resolution at which they arrive. By making stakeholders work together to reach a settlement, *humwe* land reform agendas tempered by these attributes give stakeholders ample opportunity to discover each other's suffering, pain and experience of their collective situation. Such understanding can deal with the pain that would otherwise trigger an insatiable quest for revenge by whoever feels hard done by the whole experience. It delegitimises hate opportunists that may prefer either to uphold the status quo or completely to reverse the tables in favour of the abused majority. This would result in an efficient *humwe* principle that preserved those social, political and economic gains of previous years, facilitated healing of the nation's social hurt arising from years of the said social injustice, created a more cohesive society, targeted sustainable intergenerational equity in the exploitation and development of both human and natural resources, retained land's utility as property and capital venture, and above all protected the inherent dignity of all persons concerned with that agenda by empowering them access to land and equipping them with skills that enabled them efficiently to interact with that resource – *humweefficiency*. *Humweefficiency* should substitute *humwe* practice because events in Zimbabwe show that unbridled *humwe* practice, in spite of its virtues of social justice, distributive justice and restorative justice, is open to abuse which undermines notions of equality among inhabitants and allows for unnecessary destabilisation of the social, political and economic order of society, widespread human rights abuse, corruption, devaluation of land's utility as property and general social decay – what we might call *deficient humwe practice* that is also inconsistent with the human rights culture that now dominates all other cultures known to man. By alienating those that might otherwise have been eager to invest in the country, *deficient humwe practice* appears to oppose economic development of the SADC. By compromising food production and supply in the region, *deficient humwe practice* stupifies the noble goal of equitable access to land. Absence of land management training programmes for peasants being offered land previously held by commercial farmers suggests that intergenerational equity and sustainable development

are remote issues in *deficient humwe practice*. With time, more and more land might be lost to desertification while more and more people clamour for pieces of land from which to eke a living in these agrarian economies. This casts *deficient humwe practice* as an unlikely tool for successful reform of past and continuing social injustices that are connected to colonial or some such other similar experience of States and *humweefficiency* as its most suited replacement. Situations of social injustice mirror possibilities of social justice that they have been privileged over. War could be said to mirror both the absence and possibility of peace. In the shadows of the discord of apartheid South Africa for instance, lay the possibility of a symphony of an integrated inter-racial democratic country. Whether that has or will be achieved is open to debate. South Africa must resolve the past and continuing injustice of inequitable distribution of the one resource that determines the welfare of all its inhabitants: land. This must happen in better fashion than has occurred in Zimbabwe. South Africa is arguably Africa's most affluent nation and has a much higher price to pay if its land reform policy goes Zimbabwe's way. South Africa and Namibia would do well to adopt *humweefficiency* instead of *deficient humwe practice*.

4.7. Conclusion

This chapter analysed *humwe's* capacity efficiently to resolve the land issue in SADC States. It examined *humwe's* social justice agenda and human rights pedigree against the backdrop of the international microeconomics that inevitably interact with it. It argued for strategies to be attached to *humwe's* agenda that complement *humwe* to achieve: (1) market competitiveness of the SADC, (2) market efficiency of the SADC, and (3) sustainability of the SADC economy. It observed that we live in a world of globalising processes that impose particular limitations on any one State's capacity to do as it pleases under the cloak of sovereign independence, particularly where economic and human rights issues are concerned. It discussed requirements imposed by global factors such as environmental protection and preservation and the notion of intergenerational equity on land reform policy of SADC States. It concluded that these requirements present challenges which compel sovereign independent States to counterbalance their national self-interest¹⁷¹ with international expectation, also known as *opinio communitalis*. It considered that the ultimate

¹⁷¹ Examining the grip on State practice of 'state interest' see Henkin, L. (2nd ed. 1979) *How Nations Behave*, Columbia University Press, New York.

objective of the SADC is to progressively harmonise Member States' microeconomic policies towards establishment, incrementally, of a free trade zone, a customs union and ultimately full economic union with integrated monetary and fiscal systems and a regional parliament by the year 2034, and concluded that it is in the interest of the organization that land reform strategies adopted by member States facilitate realisation of this objective. It showed that in spite of its human rights pedigree, *humwe* had inherent defects that cast it as a lame candidate in the effort to resolve past and continuing injustices connected to colonial or some such other historical experience of States. In spite of its virtues of social justice, distributive justice and restorative justice *humwe* is open to abuse that undermines notions of equality among inhabitants and allows for unnecessary destabilisation of the social, political and economic order of society, widespread human rights abuse, corruption, devaluation of land's utility as property and general social decay – what we might call *deficient humwe practice*, which is also inconsistent with the human rights culture that now dominates all other cultures known to man. By alienating those that might otherwise have been eager to invest in the country, *deficient humwe practice* appears to oppose economic development of the SADC. By compromising food production and supply in the region, *deficient humwe practice* stupifies the noble goal of equitable access to land. Absence of land management training programmes for peasants being offered land previously held by commercial farmers suggests that intergenerational equity and sustainable development are remote issues in *deficient humwe practice*. With time, more and more land might be lost to desertification while more and more people clamour for pieces of land from which to eke a living in these agrarian economies. It considered how, if at all *opinio communitalis* might influence or affect *humwe* dynamics. It proposed the theory of *humweefficiency* that combines requirements of *opinio communitalis* with *humwe's* virtues in order to limit, or if possible, get rid of *humwe's* inherent defects altogether and to mobilise its force for good in the effort to resolve justiciably and efficiently past and continuing injustices that are rooted in colonial or some such other similar experience of States. It argued that efficient resolution of the land issue that is linked to colonial or some such other similar experience of the State is constrained by international law's requirements of economic development of States that meets the requirements of intergenerational equity, sustainable development and also submits to the dictates of the universal human rights culture that has become the world's dominant culture. Journalists talk about this culture. States' legislative acts refer and defer to this culture. Historians, economists and even criminals and prisoners talk about this

culture and invoke duties and rights that judicial systems of civilised nations recognise. This is clear evidence of the dominance of human rights culture in the contemporary world.