

Farm Workers on Private Agriculture Land Holdings: A Pathway to the Common Settlement of a SADC Land Issue

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1.0 Introduction

The SADC region initiative on land policy, the SADC Land Reform Support Facility (SLRSF),² presents an opportunity for addressing the peculiarly Southern African agrarian problem that pits land owners against workers referred to in this paper as the farm workers' question.³ A view is taken here that there is a common acknowledgment among public and private institutions within the region of the existence of the farm worker's question and also for action to be undertaken towards the settlement of this question. The contemporary private estate in the SADC region is characterised by tension filled contradictory claims. On the one hand private estate owners seek to validate the status quo and particularly the extent to which their legal rights over private estate land have been exercised. On the other hand an amorphous group representing a variety of interests, including farm workers, advance a variety of 'genuine' counter-claims which challenge the extent private estates owners have exercised their legal rights over private estate land.⁴ A common feature in the socio-political history of the SADC Region countries is the encounter with western colonial capitalism and associated social, economic and legal disruptions it left in its wake. The process and consequences of the

2 <http://www.sadc.int/fanr/environment/landreform/index.php> (accessed 16 March 2010)

3 The Southern African Charter on Land, Labour and Food Security, African Journal of Political Science, 1997, vol. 2 (2), 118-31

4 From a legal perspective, one of the cardinal features of the farm workers' question is whether the farm workers have secure tenure and whether their interests are to be considered proprietary. The private estate land holdings in the SADC region are referred to by a variety of terms including farms, commercial farms, private estates and estates. Similarly, the expression farm worker is intended to capture a range of agriculture workers including employees, sharecroppers, the tenant worker and the labour tenant. This is not an exhaustive list. For Comparative discussion of the tenant worker and the labour tenant see Sibona Banda, Land Law Reform: A Comparative Analysis of South Africa's Labour Tenancy Contract and Malawi's Tenant Worker's Contract, Oxford University Commonwealth Law Journal, 6 (2), 2006, 201 For a discussion of commercial farm workers of Zimbabwe see Blair Rutherford, Working on the Margins: Black Workers, White Farmers in Zimbabwe, New York: Zed Books, 2001

colonial encounter on the social groups of the SADC region including the farm workers class are well documented.⁵

A particularly notable feature that distinguishes the SADC region's social and political history – from, for example, West African European colonialism – is the region's experience of settler colonialism.⁶ European migration to the SADC region gave rise to an insatiable demand for land earmarked for private estate agriculture. In response the colonial state built a complex regime of legal instruments which facilitated the dispossession and enclosure of land resulting in the loss of access to land by significant sections of the indigenous population.⁷

As a consequence this indigenous population's capacity to exercise authority over land, in both the legal and physical senses, became deeply impaired. Furthermore, this indigenous population experienced transformation of their position from communities with independent livelihoods to communities leading livelihoods dependent on the whims of a class that had assumed legal control over land categorized as private land.⁸ A poignant illustration of this transformation is provided by the emergence on the private estates of the farm workers class which is defined by the possession of historically determined insecure and non-registrable rights and interests in land characterized as personal and non-proprietary.⁹ The legacy of this history on the contemporary production

5 For Malawi see J McCracken, *Planters, Peasants and the Colonial State: The Impact of the Native Tobacco Board in the Central Province of Malawi*, 9 *Journal of Southern African Studies*, 1983, 172 and J McCracken, *Share-Cropping in Malawi: The Visiting Tenant System in the Central Province C. 1920–1968*, in Centre of African Studies, University of Edinburgh, 'Malawi: An Alternative Pattern of Development', 1985, Seminar Proceedings No 25, Centre of African Studies, University of Edinburgh, Edinburgh, 35; For South Africa see Collin Bundy, *The Rise and Fall of the South African Peasantry*, London: Heinemann, M. Hathorn and D. Hutchison, *Labour Tenants and the Law*, in C. Murray and C. O'Regan (eds), *No Place to Rest: Forced Removals and the Law in South Africa*, 1990, Cape Town: OUP, 194 and A. Dithake, *Labor Tenancy and the Politics of Land Reform in South Africa*, in R. Levin and D. Wiener (eds), *No More Tears: Struggles for Land in Mpumalanga, South Africa*, Trenton: Africa World Press, 1997, 226.

6 Harry Bernstein, *Rural Land and Land Conflicts in Sub-Saharan Africa*, in Sam Moyo and Paris Yeros (eds) *Reclaiming the land: The Resurgence of Rural Movements in Africa, Asia and Latin America*, 2005

7 *Ibid.* See also Harry Bernstein, *Rural Land and Land Conflicts in Sub-Saharan Africa*, op cit 85-86; Ben Chigara, *From Oral to Recorded Governance: Reconstructing Title to Real Property in 21st Century Zimbabwe*, (2001) 30 *Common Law World Review* 36, and Issa Shivji (2000) *Contradictory Perspectives on Rights and Justice in the Context of Land tenure reform in Tanzania*, in Abdullahi A An-Na'im (ed.) *Cultural Transformation and Human Rights in Africa*, New York: Zed Books, 2000, 192, 195-6

8 *Ibid.*

9 The expression 'rights and interests' is here used to describe entitlements other than and distinct from legally recognized rights and interests which are capable of binding third parties and also assigned to third parties. This description as a

relations on the private estate in the SADC region is an unhappy one and on occasion characterized by violent confrontation. For the most part the private estates maintain a picture of serenity which masks an undercurrent of despair, discontent and hopelessness among farm workers.

This chapter aims to examine the situation of the farm worker in the SADC region as a legitimate subject of concern to be addressed by the SLRSF. The chapter will focus on the peculiar situation of farm workers as a class that historically possesses insecure and non-registrable rights and interests characterised as personal and non-proprietary. The farm workers are placed in a position that is risk prone and precarious and which has damaging social, economic and developmental effects. These effects are illustrated through a discussion of Malawi's tenant worker. It is an established fact that farm workers lack secure tenure and live under constant threat of summary evictions. At the root of the farm workers' problem is the near universal characterization of their 'rights' and 'interests' as lacking definitive legal recognition and status. An attempt will therefore be made to locate the farm worker's situation within the international human rights framework. Under the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR) normative standards of good practice relevant to security of tenure have evolved and provide authoritative benchmarks against which state practice is assessed. The SLRSF seeks to provide a forum for the promotion of research on Farm workers and land rights as well as on the prospects for SADC land policy norms. It is argued in this article that the SLRSF initiative presents a unique opportunity as a conduit through which international human rights norms may be funneled to national land reform programmes to positively impact on the farm workers' question.

conceptual legal expression of art is recognized in both the Roman Dutch (otherwise also referred to as civil law systems) and English common law based legal systems of the SADC region.

1.1 Overview of Conflicting Claims on Private Land Holdings and Divergent Responses to Historical Inequality

1.1.1 A Regional Problem

The past two decades have witnessed in the SADC region the growth of a combination of social policy research initiatives¹⁰ and grass roots social movements¹¹ aimed at researching, highlighting and addressing pressing problems faced by farm workers on private estates. On occasion researchers, activists and grass roots movements have come together in fora aimed at highlighting attention to the abhorrent social conditions of farm workers and influencing change in policy. For instance, in 2001 a communiqué issued by the Southern African Regional Conference on Farm Workers, Human Rights and Security noted that

Farm workers constituted a significant proportion (10-20%) of the population of individual SADC countries, but they continue to [sic] marginalized and excluded from mainstream development throughout the region.¹²

The communiqué then recommended that 'National governments should ensure that the living and working conditions and security of farm workers is [sic] acted upon and improved.'¹³ The driver of these initiatives is a consensus that farm workers live lives of extreme risk as they lack security of tenure and live under threat of eviction.¹⁴

In the past 50 years, and with varying levels of commitment and success, the governments of the SADC region have made attempts to institute policy and legal reform aimed at correcting the skewed distribution of land inherited from past colonial regimes. However, the

10 A good example is a programme run in the University of Western Cape's Institute for Poverty, Land and Agrarian Studies (PLAAS) on farm workers entitled Farm workers and farm dwellers in South Africa: tenure, livelihoods and social justice <<http://www.plaas.org.za/research/land/farmworkers>.> (accessed 16 March 2010). The programme aims to, among other things, "document and analyse the impact of land reform on farm workers and farm dwellers, as beneficiaries and as non-beneficiaries.

11 The Southern African Charter on Land, Labour and Food Security, *African Journal of Political Science*, 1997, vol. 2 (2), 118-31

12 Southern African Charter on Land, op cit

13 ibid.

14 Southern African Charter on Land, op cit , Andrew Hartnack, My life got Lost: Farm workers and displacement in Zimbabwe, *Journal of Contemporary African Studies*, vol. 23 (2) 2005, 173-92

issues pertaining to the problems of farm workers do not appear to feature as a priority in the agendas of most of the national governments.¹⁵ An exception and a positive exemplar in this area is the land policy of the Government of South Africa which has specifically targeted farm workers as beneficiaries of targeted land reform and land law reform initiatives.¹⁶ Despite the lack of uniformity in the attitudes of national governments the SLRSF provides a unique opportunity for advancing a transnational agenda.¹⁷ The SLRSF can facilitate the galvanizing of efforts towards the development of a concerted approach to what is obviously a clear and present problem of private estate relations and which is a common regional problem of inequitable access to, and distribution of, natural resources.

The SLRSF appears to provide an appropriate vehicle through which a common regional problem can be addressed. In order to attain this it is necessary to recall that the plight of the farm worker is a problem rooted in history and cannot be addressed effectively without a proper appreciation of its social-historical contexts. Therefore the article will describe comparatively the broad historical impellents and the contemporary responses to the question as it relates to legal relations on the private estates of South Africa and Malawi.

1.1.2 South Africa

The history of the labour tenant's contract in South Africa exemplifies the legal insecurities farm workers' in the SADC region face in contemporary times. Under the South African labour tenancy contract a labour tenant occupied and used for his own purpose a parcel of privately owned farm land in exchange for an undertaking by the labour tenant to work for or supply labour to the owner of the land for a specified period of time.¹⁸ The Labour Tenancy Contract therefore provided a mechanism that enabled both land-expropriated blacks and the white landowning class to get

¹⁵ For example, economically Malawi significantly depends on tobacco growing and exporting industry and farm workers', who make a very important contribution to the industry, are not mentioned at all in the Malawi Land Policy.

¹⁶ D.L. Carey Miller and A. Pope, *South African Land Reform*, vol. 44, *Journal of African Law*, 2000, 167 and A. Dittlake, *Labor Tenancy and the Politics of Land Reform in South Africa*, op cit

¹⁷ <http://www.sadc.int/fanr/environment/landreform/index.php> (accessed 16 March 2010)

¹⁸ M. Hathorn and D. Hutchison, *Labour Tenants and the Law*, op cit

around the restrictions on land access by black people – it served a utilitarian purpose.¹⁹ The rights or interests held by the labour tenant were legally insecure. Labour tenancy was a phenomenon that occurred in rural and isolated places and consequently the struggles of the labour tenant enjoyed very poor visibility and very limited legal protection.²⁰

1.1.2.1 South Africa's Response to Historical Inequity

Under the post-apartheid democratic dispensation the acquisition and ownership of land was identified as an area that required urgent redress. Measures underpinned by provisions in the South African Constitution were undertaken to address labour tenancy through land tenure reform and land restitution.²¹ Land law reform, a component of land reform seeks to make secure forms of tenure which in the past were insecure. The attainment of security of tenure is intended to be achieved through a rights-based approach—as opposed to a permits-based approach.²² Prior to reform specific to the situation of the labour tenant, the rights of tenure enjoyed by the labour tenant were very limited and depended on the goodwill of the farm owner and the state. South Africa's land law reform, through the adoption of a rights-based approach spells out in detail the relative rights and obligations of the farm owner and the labour tenant. This approach is intended to create certainty by both removing doubts and the possibility for unreasonable and unlawful conduct.²³

19 Furthermore, the labour tenancy contract did not fall within the ambit of the Natives Land Act 1913 (which restricted ownership of land by blacks) on the basis that it did not constitute an agreement or transaction for the 'purchase, hire or acquisition' of land.

20 N. Haysom, Rural Land Struggles: Practising Law Democratically in Murray and O'Regan in No Place to Rest op cit 107. See also A. Dithake, Labor Tenancy and the Politics of Land Reform in South Africa, 228–30, op cit and M. Hathorn and D. Hutchison, Labour Tenants and the Law, op cit

21 Ibid; D.L. Carey Miller and A. Pope, South African Land Reform, op cit and D.L. Carey Miller, The Reform of South African Land Law in its Roman-Dutch Context: New Wine? in P Jackson and DC Wilde (eds), Contemporary Property Law, Ashgate: Aldershot, 1999 and for a critique of the measures taken see A. Dithake, Labor Tenancy and the Politics of Land Reform in South Africa, op cit

22 P. McAuslan, Making Law Work: Restructuring Land Relations in Africa, 29 *Development and Change*, 1998, 525, 528 where it is stated: 'Land reform in South Africa, then, must include land *law* reform because it seeks to change the nature of the legal regime and the legal culture that applies to African-held land. It is to replace, at best, licences or permits held at the mercy of law, with *rights* guaranteed by law' (italics in the original).

23 Although the process has been largely welcomed it nonetheless has had some of its aspects criticised. A. Dithake, Labor Tenancy and the Politics of Land Reform in South Africa, op cit

Land tenure and land law reform in South Africa has two aspects potentially relevant to the common regional issue that the farm workers' question is. The first aspect of land tenure reform in South Africa is the 'adjustment of the correlative position between landowner and the holder of lesser rights' in land through the enhancement of security of tenure of the labour tenant.²⁴ The legislative instrument used for the adjustment of the relative positions of the farm owner and the labour tenant is the Land Reform (Labour Tenants) Act²⁵. It provides a framework for the detailed regulation and enhancement of tenure security under the labour tenancy contract. The second relevant aspect of land tenure and land law reform in South Africa is the conversion of the previously personal rights of the labour tenant to proprietary rights. This conversion has been achieved through the Extension of Security of Tenure Act²⁶ and, arguably through the Labour Tenants Act.

1.1.3 Malawi

Under a tenant worker's contract the private estate owner grants the tenant worker access to a parcel of land on the private estate and also provides material agricultural inputs and services in consideration for an undertaking by the tenant worker to produce and sell the resulting commodities to the private estate owner. In colonial Malawi, the private estate owner could not sustain commodity production on the basis of a wage-earning workforce and therefore, resorted to engaging tenant workers.²⁷ The post-colonial state has overseen the further intensification of private estate production and the use of tenant workers.²⁸

1.1.3.1 Malawi's Response to Historical Inequity

Following the re-introduction of competitive politics in Malawi, the rural population made clear demands for a review of land ownership and

24 D.L. Carey Miller and A. Pope, *South African Land Reform*, op cit; J Pienaar, 'Extending Security of Tenure in South Africa: Labour Tenants and Farm Workers' in Jackson and Wilde, op cit, 317; B Cousins, *How do Rights Become Real? Formal and Informal Institutions in South Africa's Reform Programme* (International Conference on Land Tenure in the Developing World with a Focus on Southern Africa 1998)

<<http://www.geomatics.ucalgary.ca/~barry/Research/Publications/Publications%20Page/PublicationsOnWeb/capetown.PDF>> (accessed 27 December 2006.)

25 Act 3 of 1996

26 Act 62 of 1997.

27 Sibona Banda, *Land Law Reform*, op cit

28 Ibid,

access to land. Malawi formulated and adopted what is dubbed a 'comprehensive land policy'.²⁹ This reform aims to create a long term framework for the development of land administration, maintenance of various forms of tenure, the regulation of land use and planning as well as the management of the environment.³⁰ A notable but unfortunate aspect of land policy in this regard is the absence of any mention of the presence of the tenant worker on the private estate.³¹ In particular, the land policy document does not recognize the simple and clear fact that tenant workers on the private estates are workers of the land who live on the land and depend on the land for their livelihoods. Nevertheless, the tenant workers do not enjoy any secure tenure and their tenure is dependent on the whims of the private estate owners.

Malawi's land policy does not necessarily and definitively reject private estate commodity production by tenant workers. However the land policy simply does not make any reference to the tenant worker, to the tenant worker's contract or to the obvious need to undertake corrective action in this regard. This is an indication that land policy will not address the social, economic and legal problems that the tenant worker's have, at least not within the context of any land law reform initiative.³²

1.1.4 Divergent Attitudes to a Common Law Problem

This brief review of the responses by the state in South Africa and Malawi to the farm workers' question highlights and suggests the existence of extremely divergent attitudes. In both instances historical events produced a class of farm workers that possessed insecure and non-registrable rights and interests characterized as personal and non-proprietary. Similarly, in both cases the farm worker was effectively treated as a tolerated squatter whose ability to continue to live on the private estate land was dependent on the 'good nature' of the land owning class. In other words, the occupancy of land by the farm worker was

29 Republic of Malawi, Ministry of Lands, Housing, Physical Planning and Surveys, Malawi National Land Policy (Lilongwe 2002) <<http://www.malawi.gov.mw/publications/landpol.htm>> (accessed 27 December 2006)

30 *ibid.*

31 *ibid.*

32 It is noteworthy that corrective legislative action has been envisaged outside the land law reform process, although all efforts in this regard have not yielded positive results to date.

never grounded on a firm legal basis. In the following section the problem of farm workers will be defined as a regional issue which is largely about the characterization of farm workers' rights and interests as lacking definitive legal recognition and status. On the basis of relevant international human rights instruments an alternative perspective will be discussed. The international human rights instruments, it will be argued, are normative benchmarks for good practice which all SADC region countries ought to comply with.

1.2 Defining the Farm Workers' Question

1.2.1 The Farm Workers' Question as a Common Law Problem

Farm workers across the SADC region invariably can only lay claim legally to insecure and personal non-registrable rights and interests in land. The reason for this is historical and largely shaped by the entrenched ideas society holds about the meaning of property on the one hand and by the brutal factual reality of social and economic privilege that exclusive possession of property delivers on the other hand. It is also an undisputed fact that effective mechanisms for change aimed at making secure forms of tenure which are presently insecure, largely, are located at the national constitutional and political levels. However, it is submitted and argued that international human rights instruments equally have an important role to play as normative drivers that provide the impetus for change and as a touchstone that guides reform through good practice standard setting.

As noted a common aspect of the socio-political history of the SADC countries is their encounter with western colonial capitalism which left in its wake legal artifacts which are an integral part of the contemporary social and economic governance apparatus. In the context of land relations received law may easily constitute the single most influential artifact and this is a feature that cuts across the expanse of the SADC region. A close inspection of land law in any SADC region country irrespective of its description as a Roman Dutch or English common law

based jurisdiction reveals a common theme; these jurisdictions are legally pluralistic and the dominant law is received law.³³

Intrinsically the received law has carried a set of apparently self evident principles of similar temporal and intellectual origin which create and recognize a complex system of land rights and interests. These range from rights and interests characterized as absolute, superior and proprietary perched at the apex of a hierarchy through to rights and interests described as dependent, inferior and non-proprietary clustered at the base of the hierarchy. For example in a commentary on the Roman-Dutch common law based land law of South Africa Hanri Mostert makes the following observation:

Rights to immovable property are usually divided into registrable real rights, on the one hand and non-registrable forms of land tenure such as personal rights or statutory grants on the other hand. Real rights in land comprise two broad categories in traditional private law theory in South Africa, namely ownership and limited real rights... Traditionally, ownership is described as the most complete right and the only real right that a person can hold with regard to her own property...The South African system of registration endorses this categorization... Limited real rights are defined as rights to specified uses of property belonging to another which restrict the exercise of the ownership entitlements by the owner thereof. These rights are, in terms of the existing system, the only other kinds of rights capable of being registered... Rights other than ownership are not registrable if they merely place an obligation on a specific person, without burdening the landowner in her capacity as landowner³⁴

Similarly, in a comparative essay on the law of real property in the English common law world Kevin Grey elucidates the historical and central organizing features of the common law in the following terms

Central to the genesis of property ideas in the common law were the twin notions of *tenure* and *estate*. The theory of *tenure* bore a distinctively

33 See J.P. McAuslan, *Bringing the Law Back In: Essays in Land, Law and Development*, Ashgate: Aldershot, 2003 and Ben Chigara, *Land Policy Reform: The Challenge of Human Rights Law*, Ashgate: Aldershot, 2003. For a conceptual discussion of legal pluralism see Gordon Woodman, Ideological Combat and Social Observation: Recent Debate about Legal Pluralism, *Legal Pluralism and Unofficial Law*, Vol. 42, 1998, 21

34 Hanri Mostert, The Diversification of Land Rights and its Implications for a New Land Law in South Africa: An Appraisal Concentrating on the Transformation of the South African System of Title Registration, in E Cooke (ed.), *Modern Studies in Property Law*, Hart, Oxford 2003, vol II, 4.

political aspect and served to identify the ultimate or *radical* title at the back of all relationships in respect of land. By contrast the emerging doctrine of the estate was more closely concerned with the technical quantification of the grades of ownership which might be enjoyed by any particular tenant within a tenurial framework³⁵

The classification of land rights on a sliding scale from ownership to mere personal rights evident in the Roman Dutch common law based civil legal systems as well as the quantification of enjoyment of rights of ownership on a temporal continuum in English common law based legal systems have had a real influence on private estates. In both instances, the idea of marginal claims to enjoyment of insecure and personal rights is a reality that is essentially acknowledged as an incidental, normal and natural feature of the system 'as everybody knows it'. Invariably, this normalisation and naturalisation, condemns the farm workers across the expanse of the SADC region to precarious livelihoods that are dependent on insecure and personal non-registrable rights.

Historically, and in a formal legal sense, the possession of insecure and non-registrable and non-proprietary rights often has two possible implications for the claimants of these limited personal rights and interests. On the one hand they are cast completely outside any official legal rights-based framework of tenure protection. On the other hand the claimants are incorporated in a framework of tenure protection that is dependent on official administrative discretion or on contract. As studies of the Malawi tenant worker have shown, for example, the tenant worker hardly ever benefits from the exercise of favourable administrative discretion.³⁶ Equally the tenant worker does not have the capacity, on account of a variety of reasons, to negotiate favourable contracts and to enforce breaches of contracts.³⁷

35 Kevin Grey, Property in Common Law Systems, in GE Van Maanen and AJ Van der Walt (eds), *Property Law on the Threshold of the 21st Century, Proceedings of the International Colloquium*, Maastricht: Maklu, 28 -30 August 1996 and Graham Battersby, Informally Created Interests in Land, in S. Bright and J. Dewar (eds) *Land Law: Themes and Perspectives*; Oxford: OUP, p. 487

36 Sibio Banda, Land Law Reform, op cit and Sibio Banda, Constitutional Mimicry and Common Law Reform in a Rights-Based Post-Colonial Setting: The Case of South Africa and Malawi, 53 (1) *Journal of African Law*, 2009, 142 -70.

37 Ibid

A limited number of studies and anecdotal evidence suggest that the farm worker class is the last to benefit from any contemporary initiatives that seek to adjust the correlative common law position of limited personal rights holders and classes with insecure tenure.³⁸ This may be a consequence of several factors including a non-empathetic attitude that society has of the farm workers as a class perceived to hold a lowly position in society³⁹, the effect of official choice of a particular development model,⁴⁰ the entrenched ideas that society holds about the meaning of property and the competition for land fuelled by the reality of social and economic privilege that the exclusive possession of property confers.

1.2.2 Locating the Farm Workers' Question in the International Human Rights Law Framework

The question of farm workers' possession of insecure, non-proprietary and non-registrable rights and interests is an issue that falls squarely in the realm of land law reform. Inevitably then this becomes a political question to be determined largely through national frameworks of political and constitutional governance. Nonetheless, international human rights instruments and their associated obligation producing norms have a particular and important role of setting basic minimum standards which states must conform to in any land law reform process. The following discussion draws from the provisions of the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR).⁴¹ The countries of the SADC region are signatories to these treaties. International state practice suggests that states which are signatories of these treaties view them as law making treaties and that they possess exceptional compelling force.

38 Sibó Banda, Land Law Reform, op cit

39 Ibid

40 Ibid

41 <http://www2.ohchr.org/english/law/ccpr.htm> and <http://www2.ohchr.org/english/law/cescr.htm> (accessed 20 February 2010)

One of the cardinal issues that farm workers raise is that they lack secure tenure and that they live under a constant threat of eviction.⁴² This is an issue that has been addressed by international human rights law through the ICCPR and the ICESCR. The provision relevant to the security of tenure under the ICESCR is Article 11 which stipulates in part as follows:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The relevant provision in the ICCPR is Article 17 which partly states

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home...

The Committee on Economic, Social and Cultural Rights (CESCR) through its General Comment No 4⁴³ and General Comment No 7⁴⁴ and the Human Rights Committee (HRC) through its General Comment No 16⁴⁵ have given interpretative accounts which explain the obligations that State parties to the ICESCR and the ICCPR are expected to discharge.⁴⁶

The CESCR through its General Comment No 4 has interpreted the term 'housing' widely to mean 'the right to live somewhere in security, peace and dignity'. The CESCR, in relation to the concept of 'adequacy' in Article 11 as it applies to legal security of tenure, has interpreted it as

42 Jean du Plessis, The Growing Problem of Forced Evictions and the Crucial Importance of Community-based, Locally Appropriate Alternatives, *Environment and Urbanisation*, Vol. 17 (1), 2005, 123 -34

43 The right to adequate housing (Art. 11.1): .13/12/91. CESCR General comment 4.

<[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument)> (accessed 20 February 2010)

44 The right to adequate housing (Art. 11.1): . forced evictions: .20/05/97. CESCR General comment 7.

<[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/959f71e476284596802564c3005d8d50?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/959f71e476284596802564c3005d8d50?Opendocument)> (accessed 20 February 2010)

45 The right to respect privacy, family, home and correspondence, and protection of honour and reputation (Art. 17): . 08/04/88. CCPR General Comment No 16.

<[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/23378a8724595410c12563ed004aeecd?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/23378a8724595410c12563ed004aeecd?Opendocument)> (accessed 20 February 2010)

46 The 'role of the General Comment [has] come to take on an almost exclusively 'law-making' function... They are widely considered as authoritative interpretative statements, and a device through which treaty bodies articulate their understanding of human rights norms. Far from being merely hortatory, they can in some ways be likened to the advisory opinions of the International Court of justice'. Conway Blake, Normative Instruments in International Human Rights Law: Locating the General Comment, Center for Human Rights and Global Justice, Working Paper No. 17, 2008

<<http://www.chrgj.org/publications/docs/wp/blake.pdf>> (accessed 20 February 2010)

applicable to a variety of forms of tenure including 'informal settlements' and that

Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;

The CESCR also urges state parties to prioritise the cases of 'social groups living in unfavourable conditions by giving them particular consideration'. The CESCR in its General Comment No 7 has noted in relation to 'forced evictions' that

This expression seeks to convey a sense of arbitrariness and of illegality...The term "forced evictions" as used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.

The CESCR also urges state parties to 'refrain from forced evictions' and to enforce the law against agencies of the state and private parties 'who carry out forced evictions'.

Moreover, the CESCR General Comment No. 7 urges state parties to develop a system of effective protection built on legislation which among other things includes measures which 'provide the greatest possible security of tenure' and 'are designed to control strictly the circumstances under which evictions may be carried out' and give recourse to mechanism for 'effective legal remedies and procedures' as well as 'legal assistance'. The legislation must be applicable to both agencies of the state and private entities. In circumstances where legislation and policies are in place state parties must review them to in order to ensure their compatibility with international human rights law obligations.

The HRC through its General Comment No 16 has observed that state parties to the ICCPR have an obligation to guarantee against 'unlawful interference' emanating from both the agencies of the state as

well as from non-state agencies whether natural or otherwise. The HRC has also interpreted article 17 of the ICCPR as requiring them

‘to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right.’

Furthermore the expression ‘unlawful interference’ has been interpreted as encompassing removal which is founded on law and yet is procedurally arbitrary, unreasonable and at variance with the ‘aims’ and ‘objectives’ of the ICCPR.

1.2.3 The Regional SADC Architecture: Plotting a Course for Action

The issuance of the SADC summit directive in 2001 directing SADC ministers responsible for land affairs to develop a strategy for land reform for the SADC region was in principle a progressive act that recognized that land reform encapsulates questions that are regional in character and which require a common approach for them to be addressed effectively. A consequence of the summit directive is the creation of the SADC Land Reform Support Facility (SLRSF) and the SADC secretariat describes the objectives of the SLRSF as intended to

Develop or implement a regional land strategy. National Policies remain paramount and the facility will simply provide a resource for Members States to call upon when developing or implementing their land and agrarian reforms policies or programmes to address national development priorities⁴⁷

The activities of the SLRSF will coalesce around areas which SADC member states have identified as requiring priority. The priority areas fall within four programmes of the SLRSF and they are ‘policy formulation and implementation; land information and management; capacity building and research’.⁴⁸ Particularly interesting in this instance is the identification of ‘farm workers and land rights’ and the ‘prospects for SADC land policy norms’ as priority thematic areas on the research programme.

⁴⁷ <http://www.sadc.int/fanr/environment/landreform/about.php>

⁴⁸ <http://www.sadc.int/fanr/environment/landreform/about.php>

The statement of objectives essentially recognizes that the settlement of land reform and land law reform is ultimately an activity that will be settled through national action through local political and constitutional governance structures. It has been observed that international human rights norms have an important role to play in the land law reform process through the setting of basic minimum standards. The SLRSF provides a potential conduit through which international human rights norms may be channeled to ultimately influence structures, procedures and products of national land law reform programmes. The envisaged SLRSF programmes therefore have the capacity to convey international human rights norms on to the national political and constitutional governance frameworks which are the final arbiters on the land reform question. In the following section, it will be shown how the principles of law and the administration of legislation have been employed to reinforce the weak position that the tenant worker has had in relation to private estate land.

1.3 The Private Estate in Malawi: The Legal Framework

1.3.1 The Tenant Worker: A Distinct Legal Class

Malawi law, the Africans on Private Estates Act, 1962,⁴⁹ (the Private Estates Act) recognises a category of persons who reside on the private estate pursuant to land access agreements – referred to under the Act as persons under a ‘special agreement’.⁵⁰ The tenant worker on the private estates, on complying with required formalities under the Act, falls under the category of a special agreement private estate worker.

1.3.2 The Legal Regulation of the Tenant Worker’s Contract

Functionally, the Malawian special agreement provides a legal framework for the creation of contractual relationships on the private estate whose primary purpose is the production of commodities referred to under the Africans on Private Estates Act as economic crops. The contract must be written and it must provide for access to land.

Furthermore, the minister concerned must be satisfied that the terms of

⁴⁹ Sibon Banda, Land Law Reform, op cit. The provisions of the Africans on Private Estates Act, 1962 have their origins in the colonial Natives on Private Estates Ordinance, 1962 and the Natives on Private Estates Ordinance, 1928.

⁵⁰ Ibid

the contract guarantee adequate security of tenure and that the contract is fair and equitable.⁵¹ The tenant worker's contract is therefore an example of a contract which potentially may be constituted as a special agreement.

The use of the special agreement as a framework for the constitution of the tenant worker's contract in both the colonial and the post-colonial period has been disappointing. The private estate owning class has always created the impression that on the basis of the principles of law the tenant worker's contract does not confer proprietary rights on the tenant worker – although as an absolute view this position is incorrect both in law and in equity.⁵² Inadvertently or otherwise, State practice, the conduct of the private estate owners and the social position of the tenant worker have combined to create a strong and enduring impression that proprietary rights—rights other than personal rights if any — do not extend to the tenant worker by virtue of his contract with the private estate owner. This view of State practice suggests official complicity in the questionable absolutist view that a proprietary jural relationship does not exist between the private estate owner and the tenant worker.

Similarly, the tenant worker has not fared well with regard to the specific question of security of tenure. Although Section 25 of the Private Estates Act does attempt to address this question, it may be argued that the question of security of tenure ought to be dealt with independently from the question of whether the tenant worker acquires proprietary rights under a tenant worker's contract. This is mainly because, as the situation of the labour tenant in South Africa shows, these are distinct issues.⁵³ Moreover, the responsible minister has not adhered to the requirement set by the Private Estates Act that he or she must be satisfied

51 Sec 25 of the Private Estates Act provides: '(1) Any owner may enter into a written special agreement with any African [who] ... is entitled to reside on the estate of such owner; (2)... an African who enters into such agreement shall be required to work for the owner of the estate for such period during the year as may be agreed upon; Provided that:...(b) no agreement shall be approved by the minister as a special agreement unless he is satisfied that it provides for adequate security of tenure ... and is fair and equitable in all circumstances.' (Emphasis added)

52 Sibon Banda, *Land Law Reform*, op cit. Blair Rutherford, *Working on the Margins: Black Workers, White Farmers in Zimbabwe*, New York: Zed Books, 2001

53 For an informative discussion on this in the context of English law see Graham Battersby, *Informally Created Interests in Land*, in Susan Bright and John Dewar, eds., *Land Law: Themes and Perspectives*, Oxford: OUP, 1998. See also Sibon Banda, *Land Law Reform*, op cit.

the terms of the contract do guarantee adequate security of tenure.⁵⁴ Section 25 is intended to provide a mechanism to prevent or control such practices and to improve the tenant worker's bargaining capacity. However, section 25 is permit-based, as opposed to rights-based;⁵⁵ it depends on the initiative of the minister to bring it into operation and the minister has taken not been successful in that respect.

A consequence of the minister's failure is to place the tenant worker's contract outside the framework of the Private Estates Act and in turn this effect undermines efforts to prevent unjust and exploitative tendencies. Section 25 of the Private Estates Act, which is intended to protect a contracted person from economic, social and legal vulnerabilities, potentially enables the tenant worker to attain a dignified existence. Often the contract sets up a patron=client relationship and is susceptible to unjust and exploitative tendencies which include unlawful summary eviction and disregard of contractual provisions that secure the tenant worker's tenure. Tenant workers are often landless intra-territorial migrants compelled by circumstances to work on private estates. They are unable to negotiate for themselves favourable terms or to have them enforced through legal process.⁵⁶

Studies of the tenant worker's contract have shown that the tenant worker's contract retains particular uncertainties over the nature of land access.⁵⁷ The framework of the special agreement ideally is intended to provide a mechanism for the resolution of such uncertainties. The placement of the contractual arrangement outside the framework undermines any attempt to minimise the uncertainties. This may manifest itself in the lack of clarity on the terms of access to land or employment protection. Consequently such terms are assumed to be unreservedly at the discretion of the private estate owner. Inherent in the discretion is an inclination towards understanding the nature of land access as a short-term affair. In other words, the tenant worker has no guarantees of

54 The task that the minister has is much more complicated than it first appears on its face on account of the requirements of the law (common law and statute law) and equity.

55 Sibò Banda, *Land Law Reform*, op cit.

56 Ibid and Sibò Banda, *Constitutional Mimicry*, op cit

57 Ibid.

secure tenure whatsoever. Short-term land access or employment are associated with, and have as a symptom, the high turnover rates among tenant workers on the private estates.

From a developmental or a public interest perspective on the one hand and an economic efficiency point of view on the other hand short-term land access has debilitating economic and social costs.⁵⁸ Efficient production and investment are basic and crucial conditions if an individual in the tenant worker's circumstances is to raise her living standards. A tenant worker's contract is an economic undertaking. A tenant worker requires as a minimum a contractual relationship that allows him effectively and fairly to negotiate those terms of the contract that impact on financial viability. However, empirical evidence suggests that the tenant worker does not have effective bargaining power in such matters.⁵⁹ A case may be made that the lack of long-term access is detrimental to the tenant worker's social development. Consequently failure to conform to requirements under Section 25 frustrates the aim of policy to institute a regime of commodity production on the private estates that is based on social justice and which underlies the Private Estates Act.

1.4 Breach of International Human Rights Obligations

It is an established fact that an important issue farm workers raise is the lack secure tenure and that they live under a constant threat of eviction. This state of affairs is largely influenced by the nature of claims to the enjoyment of rights and interests in land that tenant workers can make. The claims of farm workers are marginal and are characterized as non-registrable and non-proprietary. In effect farm workers are cast either completely outside any official rights-based framework of tenure protection or are dependent on administrative discretion or contract. In either case the tenant worker operates under tenure which is very insecure.

Under the auspices of international human rights law normative standards of good practice relevant to security of tenure have evolved and

⁵⁸ Cardwell Michael, Land and Agricultural Production in S. Bright and J. Dewar (eds.) Land Law op cit 406. See also Sibó Banda, Land Law Reform op cit and Sibó Banda, Constitutional Mimicry, op cit

⁵⁹ Sibó Banda, Land Law Reform op cit and Sibó Banda, Constitutional Mimicry, op cit

are considered 'authoritative' benchmarks against which national practice is measured. The discussion of the Malawi tenant worker illustrates clearly that, in many respects, the regulatory situation of the tenant worker falls short of the standards stipulated by the ICCPR, and the ICESCR and elaborated by the HCR and the CESCR respectively through the relevant general comments.

Immediately relevant to the situation of the tenant worker is the obligation to 'prioritise cases of social groups living in unfavourable conditions' and ensure that, through effective legislative measures, they are provided with 'the greatest possible security of tenure'. The legislative measures must be designed with the aim of controlling 'strictly the circumstances under which evictions' take place. The discussion of the tenant worker further shows that ignorance about the existence of 'effective legal remedies' and 'procedures' as well as lack of access to legal assistance are challenges that require to be addressed. The legislative and common law framework the tenant worker's contract operates in evidently falls short of giving the tenant worker effective legal protection and therefore it requires review. The framework does not satisfy the basic normative standards envisaged by Articles 11 and 17 of the ICESCR and the ICCPR respectively.

1.5 Towards a Common Settlement: The SADC SLRSF Framework as a Driver for Change

The evident social policy research activity on farm workers, action by grassroots movements of farm workers, and concrete, all be it marginal, social policy initiatives are strong indicators of a common acknowledgment of the existence of the farm workers question and a cue that urgent action is needed to settle the situation of the farm worker. The establishment of the SLRSF as a regional institutional mechanism dedicated to the SADC region land question is a welcome development as land is a scarce and highly prized resource in the SADC region. An important feature of the SLRSF is its incorporation of the farm workers question into the SLRSF agenda. This perhaps heralds the dawn of an era in which the question of farm workers will be featured as a priority in the agendas of the national Governments of the SADC region.

The SLRSF lists as part of its envisaged programme research on 'farm workers and land rights' and on 'prospects for SADC land policy norms' among priority themes that require policy oriented research. Research activity on 'farm workers and land rights', alongside activity in the other SLRSF programmes, presents an opportunity for informed engagement on a question which until now appears not to have been the focus of robust debate from a concerted state sponsored transnational framework. Similarly, research activity on 'prospects for SADC land policy norms' also provides an opportunity to anchor the land question in general, and the question of farm workers in particular, in the terrain of well established international human rights norms through a regional SADC norm formation and inculcation process.⁶⁰

1.5.1 Research on Farm Workers and Land Rights

Research practices are an effective tool for promoting progressive policy initiatives on the farm workers' question. Since policy action on the farm workers' question in the SADC region countries is not uniform, the identification of research on "farm workers and land rights" as a priority research area presents a rare chance for 'positioning' the farm workers' question at both the national and regional levels. The expression 'positioning' is very significant in two respects. The farm workers must first seek visibility for their cause and secondly, they must engage in successful marketing of the farm worker's question as a legitimate research question.⁶¹ To begin with Harry Bernstein observes that

There is little experience in modern Africa history of popular rural political organization on a broader scale centered on agrarian and land issues, again by contrast with Latin America and Asia with their histories... of rural social movements, and peasant leagues, unions and other forms of organisation, and agricultural worker's associations...⁶²

The observation by Bernstein suggests that there is very little experience of organized activism among farm workers. Activism entails

⁶⁰ This observation is not a suggestion that there is no research available aimed at influencing policy. Rather research appears to have been done outside any official regional framework such as the SLRSF presents.

⁶¹ Positioning relates to the capacity of the farm workers to advance a persuasive and sustained argument for research of a particular issue.

⁶² Harry Bernstein, *Rural Land and Land Conflicts in Sub-Saharan Africa*, op cit, 88

visibility but effective visibility is not uniformly evident across the SADC region.

Positioning also relates to the capacity of the farm workers to advance a persuasive and sustained argument for research of a particular issue. The term 'positioning' denotes that the SLRSF will effectively create a market for research questions which interest groups will seek to exploit to their advantage. The research theme 'farm workers and land rights' does not necessarily preclude private land owners from using it as a platform in order to advance their own perspective and ultimately to influence policy and law making.⁶³ A typical example in this respect is given by Deborah James in her review of competition among interest groups in their attempt to influence state land reform policy in South Africa in the mid 1990s to the early years of the millennium. The visions advanced were on the one hand a 'populist and egalitarian' approach which favoured land restitution and land redistribution and on the other hand an approach a 'developmentalist focus associated with the influence of the World Bank' which promoted the 'primacy of the market' through the 'development of small- through medium to large scale agriculture'.⁶⁴

The market for research then potentially creates space for the advancement of contradictory and competing perspectives and the jockeying for influence through the strategic positioning of ideas. The act of including farm workers' issues as a theme does not necessarily lead to the assumption that research will be sympathetic to the farm worker. It is submitted that there is an important link between visibility and the ability to successfully make a persuasive argument that the farm worker's question is an issue worthy of policy action informed by research. The promotion of the visibility of the farm workers' situation is a basic and a minimum requirement if, from the perspective of the farm worker, the goal is to influence policy makers to be more responsive to the rights and livelihood needs of farm workers.

63 Allison Goebel, *Is Zimbabwe the Future of South Africa? The Implications for Land Reform in Southern Africa*, 23 (3) *Journal of Contemporary African Studies*, 2005, 345-70

64 Deborah James, *Land for the Landless: Conflicting Images or Rural and Urban South Africa's Land Reform Programme*, *Journal of Contemporary African Studies*, 19 (1), 2001, 93,103

The intensity (breadth and depth) of research activity on farm workers in the SADC region is not clear. The research that has been generated appears to be from a select number of countries and particularly South Africa and Zimbabwe.⁶⁵ For example Edge Kanyongolo writing on the phenomenon of 'illegal' land occupations or 'squatting' in Malawi observes that

Land occupations in Malawi have attracted very little academic attention. In the vast literature on the land and agrarian questions in Malawi, land occupations are generally mentioned in a cursory manner and largely conceptualised as a social pathological phenomenon.⁶⁶

This suggests that there may be countries within the region in which the question of the farm worker needs attention and yet these countries are not normally associated with the question. An implication here is that these countries may also not be addressing the question at the policy, legislative and research levels.⁶⁷ The SLRSF programme presents a platform for engaging in comparative research practices which in turn have the potential to draw out common aspects as well as differences from a range of perspectives. The observation made by Moyo and Yeros on the state of the academy's attitude to the agrarian question suggests that the identification of what constitutes relevant and useful 'research' might itself constitute contested terrain.⁶⁸

Moyo and Yeros decry the turn that the discourse on the agrarian question has taken towards 'rarefied debates over 'identity politics' which they denounce as focusing on irrelevant and non-causative questions. For Moyo and Yeros the reason for this state of affairs lies in the emasculation

65 Farm workers and farm dwellers in South Africa op cit. It is also possible that research may be available but is not published.

66 Fidelis Edge Kanyongolo, Land Occupations in Malawi: Challenging the Neoliberal Order, in Sam Moyo and Paris Yeros (eds.) op cit, 118. Farm workers are often labeled illegal land occupiers in order to justify the summary termination of their land tenure. See also Sibo Banda, Constitutional Mimicry, op cit, Mfaniseni Fana Sihlongonyane, Land Occupations in South Africa, in Sam Moyo and Paris Yeros (eds) op cit, 142-143. See also Banda, Land Law Reform op cit as regards the combined attitude of farm workers and state in Malawi towards farm workers

67 Although some research work has been done on the farm worker in Malawi it may be dated. From a policy perspective Malawi has articulated its desire to see the exploitation of children in tenant worker contracts eradicated in an effort to comply with relevant International Labour Organisation standards and particularly the Declaration on Fundamental Principles and Rights at Work in 1998. However, Malawi is an example of a country that has invested very little in comprehensive action at the policy and legislative levels.

68 Sam Moyo and Paris Yeros, Land Occupations and Land Reform in Zimbabwe: Towards the National Democratic Revolution, in Sam Moyo and Paris Yeros (eds.), op cit, p.165.

and 'co-optation of both academia and 'oppositional' politics' leading to the abandonment of 'the agrarian question'.⁶⁹ The issue which is highlighted by this observation requires to be taken seriously. As a cautionary tale it can equally be applied to the operationalisation of the SLRSF research agenda. For example the farm workers question may, depending on preferences as to the appropriate development model, be considered insignificant. Research activity informed by public choice theory is for example likely to argue that regulating the relationship between the farm worker and a land owner imposes costs, results in unintended consequences and ultimately will impede the development goals sought by the SADC region countries.⁷⁰

In some SADC region countries the farm workers' question has suffered not so much from its abandonment as from lack of any meaningful engagement at all. Elsewhere I have suggested, in relation to Malawi, that this lack of engagement is consistent with the development model preferred by the state. Allied to this observation is the nature of the legal paradigm that the farm workers question labours under. This question is held hostage to hegemonic, entrenched and apparently ineradicable paradigmatic ideas about the legal meaning of property and the incidental exclusivity that this meaning carries with it. The farm workers situation is one which can only be resolved by transcending these ideas. Consequently, from a legal and policy perspective there will be a need to engage in research activity that seeks to transcend the prevailing orthodoxy. For example comparative research might look into the possibility of replicating the constitutionally inspired statutory and common law changes in South Africa with a view to adjusting the relative positions of the farm worker and the private land owner from the point of view of traditional received Roman Dutch and English common laws.⁷¹

69 *ibid* p. 166

70 Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation*, Cambridge: Cambridge University Press, 2007

71 For examples of discussion on statutory and judicial limitation or expansion of principles of Roman Dutch and English common laws see Sibon Banda, Constitutional Mimicry *op cit*; A J Van der Walt, Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law, *SAJHR*, Vol. 18, 2002, 372 and A J Van der Walt, Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence, *SAJHR*, Vol. 17 (3), 2002, 341.

1.5.2 Research on Prospects for SADC Land Policy Norms

The SLRSF is, as part of its research agenda, also charged with the responsibility for commissioning research aimed at the examination of the 'prospects for SADC land policy norms'. This mandate presents an invaluable window of opportunity in the light of a background of conflict and threats of conflict over land in some of the SADC region countries.⁷² In so far as the question of security of tenure on the private estate is concerned, the norms that have evolved at the level of international human rights law provide a starting point in the process of norm formulation and inculcation. In this regard the SLRSF can be viewed as an excellent opportunity for the production of regional transnational norms in an area of immense economic, social and political importance and which until now has been devoid of any common standards.

Farm workers on account of historical reasons across the SADC region have rights and interests in land which are conventionally described as insecure, personal and non-registrable rights. These in effect provide them, formally, with very limited protection. It is also the case that authority for changes in the law aimed at alleviating the precarious situation of the farm workers will emanate from the national constitutional and political frameworks. However, established norms within the international human rights law framework equally have an important role in guiding national reform process through the provision of good standards of practice. The SLRSF land policy norm formation process provides a point of entry through which such international human rights law norms can filter down to national land reform processes.

Scholars of international law and international relations have thrown some light on the norm formation process between states although there is considerable theoretical divergence in their explanations.⁷³ Exposition by these scholars covers a range of international state interaction contexts. For example Oona Hathaway draws attention to the

72 Sam Moyo and Paris Yeros, Land Occupations, in Sam Moyo and Paris Yeros (eds.), op cit, p.165. Allison Goebel, Is Zimbabwe the Future of South Africa? Op cit

73 Oona Hathaway, Do Human Rights Treaties Make a Difference? Yale Law Journal, Vol. 111, 2001-2002, 1935, 1957. Hathaway in her review of literature on this subject identifies two main theoretical trends and these are approaches influenced by rational choice theory on the one hand and normativist approaches on the other hand.

distinction between international human rights law and commercially oriented international law from a compliance perspective and opines that the impellents for compliance existing in commercial international law are absent in international human rights law. Thus international human rights law neither has 'competitive market forces' nor is it an area where states will engage in retaliatory action on account of perceived compliance related breaches.⁷⁴ This article limits its focus to international human rights law norm formation and compliance.⁷⁵ Consequently, the argument maintained here is that the norm forming process is especially relevant to farm workers. The ICCPR and the ICESCR are therefore important sources of norms in this regard.

The envisaged land policy norm formation process, it is submitted, is one that a variety of groups with either a direct or indirect stake in the land reform process will naturally feel they are entitled to engage in.⁷⁶ Normativists also recognize the important role that non-governmental activism plays in norm formation and compliance.⁷⁷ Although Governments are conventionally viewed as the natural protagonists in norm formation at the international interstate level the picture is much more complicated. The possible participants in this process will certainly not be limited to the SADC governments. This aspect of norm formation is explained from a normativist perspective as follows

This process of norm proliferation and socialization is aided by the human rights activism of nongovernmental organizations, which motivate international discourse on human rights, establish international networks of people and institutions to monitor human rights violations, and rally public opinion in support of efforts to convince governments to create human rights regimes and press other states to join them.⁷⁸

This portrait of norm formation indicates that beyond the issue of visibility farm workers groups will, if they are to exert any influence in

74 Ibid

75 Ibid. What motivates states to comply with International Human Rights Law is an area that appears to lack clarity.

76 For example powerful multilateral development oriented organizations and foreign aid and development departments of developed states have been closely associated with the land reform processes happening in the SADC region and their views are often very persuasive.

77 Harold Honhju Koh, Transnational Legal Process, *Nebraska Law Review*, 1996, 181, 207

78 Oona Hathaway, Do Human Rights Treaties Make a Difference? op cit

policy and law making, have to engage with the norm formation process. Ultimately this process of norm formation is expected to culminate into an overarching and directory structure of standards of good practice against which practices within states and by states are measured.

The issue of participation in turn raises the following question; what are the legitimate sources from which principles of norm formation are to be drawn? In other words, is the assumption that the norms set by the ICCPR and the ICESCR are capable of being viewed as legitimate instruments from which the SADC norm formation process can draw from a correct one? This question immediately raises a scenario of a complicated and contradictory norm forming process whose outcome cannot be predicted with certainty. A strand of scholarship on international norm formation emphasises the importance of 'legitimacy'. This approach is referred to as the 'fairness model'. Legitimacy in this instance is understood as the fairness of the process of norm production as well as the fairness of the practical application of the international normative system or regimes.⁷⁹ For example there is indication that the ideals and assumptions underlying the land settlement in Zimbabwe and which apparently inspired the Zimbabwean independence constitutional framework did not enjoy universal legitimacy.⁸⁰

The fairness approach resonates with the peculiar agrarian question in the SADC region. Land reform processes in the region are impelled by a legitimacy deficit in the prevailing land regimes. For example, received law has a peculiar view of 'fairness' which may not be compatible with 'fairness' as understood by those that are on the receiving end of the rough edges of received law. This dissonance permeates the range of the agrarian based legal, social and economic relations implicated in the land question. An assumption is made here that the 'fairness' view advanced by received law is different from the 'fairness' reflected in the ICCPR and the ICESCR. Consequently, a possible path towards the transcendence of

79 Thomas Franck is a major proponent of the 'fairness model'. See Thomas M. Franck, *Fairness in International Law and Institutions*, Oxford: OUP, 1995 and Thomas M. Franck, *Legitimacy in the International System*, *American Journal of International Law*, Vol. 82, 705.

80 Ben Chigara, *Land Reform Policy: The Challenge of International Human Rights Law*, Aldershot: Ashgate, 2004 and Allison Goebel, *Is Zimbabwe the Future of South Africa?* Op cit and Sam Moyo and Paris Yeros, *Land Occupations op cit* and

the divide is provided by the international human rights system which has in other contexts managed to attain a measure of respectability and fairness.⁸¹ For example Galit Sarfaty explains that

The language of human rights has become a platform for organizing the international indigenous movement. Its rhetoric has entitled indigenous peoples to claim legitimacy for their campaigns for political, economic and cultural autonomy.⁸²

Allied to the legitimacy question is a concern about possible compliance with the dictates of the principles that the SADC states will eventually endorse as the fundamental governing framework for the resolution of the land question. In other words what are the impellents that induce compliance with international norms? Here again scholars of international law and international relations shed some light though they offer different explanations for state compliance.

Rational actor theorists suggest that states or individuals within decision-making positions in states behave in the same way as '*homo economicus*'; they act as a rational individual would in a market place in order to maximize their self interest.⁸³ Consequently states carry out cost-benefits analyses to determine whether compliance with a particular norm will further the interest of the state.⁸⁴ Motivation in this respect can therefore range from a genuine commitment to a particular set of international norms, sheer coincidence between norms and the 'path dictated by self-interest' through to fear of offending a more powerful hegemon who sets great store in a particular set of international norms.⁸⁵ For example the controversial land redistribution programme in Zimbabwe is perhaps a consequence of a regime undertaking particular action in order to further its own interest. In other words, the survival of the regime was dependent on demonstrating solidarity with an important

81 For example indigenous groups have appropriated human rights language in order to advance their agenda

82 Galit A. Sarfaty, International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation, *Harvard International Law Journal*, Vol. 48, (2), 2007, 441

83 Morgan and Yeung, An Introduction to Law and Regulation op cit

84 Oona Hathaway, Do Human Rights Treaties Make a Difference? Op cit

85 Ibid; Honhju Koh (1996) Transnational Legal Process, op cit and Galit A. Sarfaty, International Norm Diffusion in the Pimicikamak Cree Nation, op cit

constituency in the countryside as opposed to doing the 'optically' right thing as seen from the perspective of the 'international community.

For normativists state compliance is brought about purely by 'the persuasive power of legitimate legal obligations'.⁸⁶ Normativists argue that compliance comes about either because a treaty articulates legal norms which have an intrinsic authority; whether there is sufficient information and capacity; whether the state is liberal democratic in character; whether the norms are fair and legitimate or whether the state has undergone an iterative interactive process which leads to norm socialisation and inculcation. Consequently, the question of compliance is thus dependent on whether there is sufficient information and capacity on the part of the state parties to fulfill the demands of a normative regime; whether the norms are compatible with the states' liberal democratic character; whether the norms are fair and legitimate or whether the state has undergone norm socialisation.⁸⁷

Ultimately, it is not clear how the process of land policy norm generation is intended to operate and any comment to that extent will be merely speculative. However, it appears that irrespective of the anticipated overarching normative structure the requirements of the ICCPR and ICESCR are not fundamentally inimical to the existing constitutional and Roman Dutch and English common law systems of the SADC region countries. In the words of McAuslan what is required is that

the law has to be much more specific, detailed and clear. Such aspects as the nature and limits of private rights; how they may be acquired, disposed of, burdened, lost; the whole issue of third party rights; and, where the state is to remain involved, a more exact demarcation of state power and its limits... these all have to be spelt out in detail so that all those who have private rights, or intend to try to obtain private rights in land can predict with reasonable certainty the scope and operation of the law applicable to those rights.⁸⁸

86 Oona Hathaway, *Do Human Rights Treaties Make a Difference?* op cit

87 Oona Hathaway, *Do Human Rights Treaties Make a Difference?* Op cit; Harold Honhju Koh, *Transnational Legal Process*, op cit and Galit A. Sarfaty, *International Norm Diffusion in the Pimicikamak Cree Nation*, op cit

88 P. McAuslan, *Making Law Work*, op cit, 525, 528.

1.7 Conclusion

In 2000, commenting on the situation in Zimbabwe, Ben Chigara observed that the 'issue of inequitable land distribution appears to be the single biggest economic, political and social concern confronting the people'.⁸⁹ The uncomfortable truth about this observation is that 10 years on it remains a legitimate observation of the current situation in Zimbabwe. This observation is equally applicable to the rest of the SADC region.

A question that looms large in this situation is the identification of groups that ought to be considered as legitimately deserving of equal attention in the land question resolution process. Farm workers in the SADC region have, for over a century, been an important feature of the private estate economy and yet they often tend to be viewed as least deserving. Furthermore, the farm workers' cause has in some countries attained notoriety because the farm workers have been caught between choosing a nuanced approach to resolving the land question and the absolutist view that is implacably hostile to the existence of a private estate economy.⁹⁰

The setting up of the SLRSF by the SADC region countries is a very welcome development as it appears to provide an entry point for the initiation of a region wide discussion respecting the specific features of the land reform process and the principles which ought to underpin it. In the specific context of the farm workers' question the SLRF has the capacity to mediate in what is clearly a contemporary problem of regional proportions. For example, it is widely accepted that among the farm workers are nationals of the SADC region countries some of whom have lived in the host countries for decades.⁹¹ Research is therefore a very important aspect to this question.

89 Ben Chigara, *From Oral to Recorded Governance*, op cit

90 Blair Rutherford, *Working on the Margins: Black Workers, White Farmers in Zimbabwe*, New York: Zed Books, 2001

91 Joyce M. Chadya and Peter Mayavo, 'The Curse of Old Age': Elderly Workers on Zimbabwe's Large Scale Commercial Farms, with Particular Reference to 'Foreign' Farm Labourers up to 2000, *Zambezia*, 2002, XXIX (i).

<<http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/Journal%20of%20the%20University%20of%20Zimbabwe/vol29n1/juz029001003.pdf>> (accessed 21 March 2010), Blair Rutherford, *Commercial Farm Workers and the Politics of (Dis)placement in Zimbabwe: Colonialism, Liberation and Democracy*, *Journal of Agrarian Change*, 2002, Vol. 1, 4, 626-51

Obviously, the capacity of farm worker groups to successfully bring about the adjustment of their tenure and proprietary position on the private estate relative to the private estate owner will ultimately be a function of national political and constitutional frameworks. The question is whether the regional states will feel sufficiently persuaded by either self-interest or the inherent legitimacy of the land policy norms in order to accept the ICCPR and the ICESCR inspired normative structure as a useful standard. A possible outcome of the norm formation process may in fact be a bilateral and therefore flexible case by case approach as opposed to a multilateral all encompassing inflexible framework. Irrespective of the approach chosen, there is reason to expect that a normative structure based on the ICCPR and the ICESCR can be successfully introduced at the national level.