



“NO RESETTLEMENT AVAILABLE”

**An assessment of the expropriation principle
and its impact on land reform in Namibia**

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**Land, Environment and Development (LEAD) Project
LEGAL ASSISTANCE CENTRE**

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I. Introduction: Three Farms – the Beginnings of Land Expropriation in Namibia

The “land question” is among the most difficult issues facing independent Namibia.¹ About half of the agricultural land in Namibia is in the hands of about 3 500 whites, while nearly a million blacks live on subsistence farms in the communal lands. Expropriation of agricultural land is both a popular and controversial route to achieving the land reform needed. The Agricultural (Commercial) Land Reform Act 6 of 1995 (ACLRA) is the primary legal mechanism for securing land reform.² Although expropriation has been legal under this Act since 1995, the Government of Namibia held to a “willing buyer / willing seller” process for political reasons, until announcing in 2004, after much public criticism over “the slow pace of land reform”, that it would proceed with land expropriation.³

The first three farms were expropriated in 2005, when rumours of massive expropriations were rampant, but as at late 2007, the expropriation process has proceeded slowly. At the time of writing this report in August 2007, two more farms were earmarked for expropriation. In July 2007, three High Court cases were filed by German farmers who are challenging the entire land expropriation process on several grounds, including constitutional.⁴ The study on which we report here was an in-depth investigation of the first three expropriations. Our goal in undertaking this research is threefold: (1) to describe the operation of the legal process under the ACLRA; (2) to offer a critical analysis of what has been accomplished since the ACLRA was ratified in 1995; and (3) to make recommendations for an effective land reform and resettlement programme.

We recognise the difficulties involved in writing about an ongoing process, but by its very nature, this process must be analysed while it is underway.

Before proceeding, it is important to give a brief description of the agricultural framework of Namibia that necessitates land reform. Namibia has always been, and to a lesser extent still is, an agrarian society. Farms occupy most of the country’s land area, and farming employs most of the population (when the communal areas are included), hence the work of farming has

¹ While this report is concerned entirely with the situation in Namibia, the related land reform situations in South Africa and Zimbabwe are well known in Namibia and clearly have some impact on the Namibian situation. See Lungisile Ntsebeza, “Address the Land Question”, *Globe and Mail*, 19 August 2007; Thembele Kepe and Ben Cousins, “Radical Land Reform is Key to Sustainable Rural Development in South Africa”, Programme for Land and Agrarian Studies, University of the Western Cape, *Policy Brief 3*, August 2002, and “Land Reform in South Africa: Is It Meeting the Challenge?”, *Policy Brief 1*, September 2001; Martin Adams and John Howell, “Redistributive Land Reform in Southern Africa”, Overseas Development Institute, *Natural Resource Perspectives*, No. 64, January 2001; Willem Odendaal, “The SADC and Agrarian Reform Initiative: The Case of Namibia”, Namibian Economic Policy Research Unit (NEPRU), *Working Paper 11*, December 2006; and Justine Hunter (ed.), *Who Should Own the Land?*, Namibia Institute for Democracy, Windhoek, 2004.

² Agricultural (Commercial) Land Reform Act 6 of 1995.

³ The entire history of the land reform process since independence has been difficult. There is an extensive body of literature on land reform. See Sidney L. Haring, “‘Stolen Lands’ Under the Constitution of Namibia: Land Reform under the Rule of Law”, in Manfred Hinz et al (eds), *Ten Years of Namibian Nationhood*, New Namibia Books, Windhoek, 2002; Jan Kees van Donge, “Land Reform in Namibia: Issues of Equity and Poverty”, Institute of Social Studies, *Land, Poverty, and Public Action Policy Paper 8*, December 2005; Wolfgang Werner, “Land Reform and Poverty Alleviation: Experiences from Namibia”, Namibian Economic Policy Research Unit (NEPRU), *Research Report 24*, 2001; Phillipus Geingob, “Land Reform Process in Namibia: A Study of the Impact of Land Reform on Beneficiaries in the Otjozondjupa Region, Namibia”, MPA thesis, School of Government, University of the Western Cape, September 2005; and Land, Environment and Development Project, Legal Assistance Centre, “Consultative Workshop: Perceptions of Land Reform” (report on the workshop proceedings), Windhoek, November 2006.

⁴ Brigitte Weidlich, “Germans to go head to head with Government over farm grab”, *The Namibian*, 24 July 2007, p.1; and “Expropriations target German Land Owners High Court Hears”, *The Namibian*, 25 July 2007, p. 1.

deep cultural and social meaning in Namibia. Two distinct farming regimes, i.e. commercial and communal, have divided the country since colonial times.⁵ About 3 800 commercial farmers,⁶ mainly white, occupy 6 000 commercial farms, comprising just under half of the country's land area. These farms are large, averaging at about 5 000 hectares in the north and 10 000 in the south. The commercial farmers are viewed as prosperous citizens and their farms as highly desirable. About one million blacks share communal land in the communal areas where they typically farm cattle and goats, which forage on heavily overgrazed lands. Most of these farmers are very poor, living at subsistence level with little money to meet their basic needs.⁷

Another several hundred thousand blacks have left (or have been crowded off) communal lands and moved to sprawling squatter camps surrounding every town in Namibia. While these people are now urbanised, they are both poor and products of a collapsing agrarian social order in the communal areas. About 40% of Namibia's population live at or near subsistence level, without real employment, hungry and lacking opportunity.⁸

This current social order is a product of a history of colonialism, racism and apartheid. Both German and later South African colonial governments subsidised white commercial farming and denied blacks both land and access to equal education and employment opportunities. After independence in 1990, the new SWAPO-led Government of Namibia promised "land reform" as a core element of their promise for the new nation.⁹ Land reform is necessary to redress the great inequalities that developed in all spheres of Namibian life, which are still particularly obvious in both the occupation of land and the activity of farming.

⁵ Eirin Hongslo and Tor A. Benjaminsen, "Turning Landscapes into 'Nothing': A Narrative on Land Reform in Namibia", Norwegian Institute of International Affairs (NUPI), Forum for Development Studies No. 2, 2002. Brigitte Lau and Peter Reiner, *100 Years of Agricultural Development in Colonial Namibia*, National Archives of Namibia, Windhoek, 1993, is the classic history of Namibian agriculture. The evolution of the current situation under apartheid is analysed at pp. 52-63.

⁶ The exact data, which is highly political, is subject to interpretation. According to the Namibia Agricultural Union (NAU) in "A Framework for Sustainable Land Use and Land Reform in Namibia", Windhoek, 2003: 64.75% of the high-potential agricultural land belongs to the government and affirmative action buyers, and is utilised by the latter and resettled persons; 24% of the high-potential agricultural land belongs to white commercial farmers; 32.45% of marginal agricultural land belongs to the government and affirmative action buyers, and is utilised by the latter and resettled persons; and 66.35% of marginal land belongs to white commercial farmers. According to March 2007 figures from Agribank, 361 full-time farmers and 285 part-time farmers have Affirmative Action Loan Scheme (AALS) loans from this bank, totalling 646 AALS farmers.

These figures, however, include communal land as government land and conflate the small farms in the communal lands with the large farms purchased under the AALS. Also, AALS lands, in this NAU analysis, are placed under black ownership when in fact they are held under Agribank mortgages. There are also apparently secret contractual agreements that conceal actual ownership of some commercial farms. Still, a few hundred formerly white-owned commercial farms are now under black ownership and the number is growing.

⁷ Sidney L. Harring, "Communal Lands, Land Reform, and 'Indigenous' Peoples' Right to Land in Namibia", in *Land in Southern Africa*, International Working Group for Indigenous Rights, Copenhagen, 2002.

⁸ The Government officially reports that in the year 2000, 24.7% of Namibians lived in poverty, or 450 000 in a population of about 1.8 million (National Planning Commission, *Regional Poverty Profile: Ohangwena*, 2003, pp. 15-16). This estimate is too low, given both low income levels and the number of people who must spend nearly all of their income on basic food needs. The Government's own data is inconsistent. A parallel study (National Planning Commission, *Regional Poverty Profile: Omaheke*, 2004) noted the same 24.7% statistic under the Human Poverty Index, but also that 29.1% of Namibian households were "poor". The same report states, at least partly inconsistently, that 54.1% "participate in the labour force", while 39.3% of the population are "outside of the labour force". Of those "participating in the labour force", 23.8% were unemployed at the time of the study. Thus, underemployment is rampant, affecting a majority of the population. While not all of these people are "poor", they live close to the poverty line.

⁹ Wolfgang Werner, "The Land Question in Namibia", in Ingolf Diener and Olivier Graefe (eds), *Contemporary Namibia: The First Landmarks of a Post-Apartheid Society*, Gamsberg Macmillan Publishers and IFRA, Windhoek, 2001.

A. Ongombo West

The expropriation of farms announced in 2004 was quickly followed by the first expropriation – a political action involving former President Sam Nujoma himself. Ongombo West was a farm owned by a Namibian German-speaking family that got into a petty and mean dispute with its workers. The farm was a well-developed and profitable one located near Windhoek, which cultivated flowers and some crops, and exported some 400 arum lilies daily to the European market.

One story is that the owners asked their seven farm workers to leave after a dispute over a goose that a worker had accidentally killed. Another story involves the owner shooting a worker's goat. The dispute turned nasty and workers reportedly threatened the owner's son with a knife. The workers dismissed turned to the Ministry of Labour for help, and the Labour Court ordered their reinstatement. The owners refused this, and in the midst of the dispute, President Sam Nujoma stated at a May Day rally that “[S]ome of the whites are behaving as if they came from Holland or Germany. Steps will be taken and we can drive them out of this land. We have the capacity to do so.”¹⁰ Expropriation proceedings were soon initiated against the farm.

The owners, already publicly derided as epitomising the worst type of racist, colonial-era farmers, reacted by overstocking the land, which resulted in overgrazing and land degradation, and by shooting 60 game animals.¹¹ The farm was expropriated in 2005 at a price of N\$3.7 million – far less than the N\$9 million asked by the owners.

A recent visit found seven workers and their families still living there in small houses in two camps.¹² Two newly resettled people, one living in the former owner's large house, are government employees who commute to work in Windhoek. A few cattle and small stock are present, but no crops or flowers were evident. A substantial facility for flower farming is unused, and apparently no one has been resettled on that part of the farm. The farm is obviously under-utilised and the workers are poor. Discussion with the workers revealed that the Government has not provided any support at all for either subsistence or operating the farm. They were living on pension income.¹³

Because the owners were Namibian citizens of German descent, this expropriation was widely reported in the European press. The aggressive response of the Government to a dispute between farm workers and farm owners sparked a great deal of fear in the white farming community that expropriation would be used as a weapon in such social disputes in the future. The owners did not appeal the expropriation to either the Lands Tribunal or the High Court, and accepted the \$3.7 million compensation offered.

B. Okorusu and Marburg

Given both the speed of the first expropriation and the failure of the owners to use legal recourse to challenge the Government's action, many thought that other expropriations would soon follow, but this turned out not to be the case. Later in the year, the second and third

¹⁰ Christof Maletsky, “Ongombo West: Out for a Duck!”, *The Namibian*, 16 November 2005. One of the constant rumours in Namibia is that many of the farmers are notorious racists, treating their farm workers in racist ways reminiscent of the apartheid era. With this announcement, therefore, the President was addressing an issue that is deeply felt. This view is countered by many stories of farmers being paternalistic by looking after their workers and providing good working conditions. These images are part of the culture, and the truth is difficult to determine.

¹¹ Christian Schmidt, “Ein Bauernopfer?”, *Neue Zürcher Zeitung*, 4/5 February 2006.

¹² We use the word “apparently” because we took these people at their word that they had been workers on the farm, but local ministry officials have disputed that some of them were actual farm workers, claiming they are squatters.

¹³ The Legal Assistance Centre visited Ongombo West on 18 July 2007 and held interviews with some of the ex-farm workers.

farms were expropriated. Okorusu (3 410 ha) and Marburg (5 000 ha), neighbouring farms located 60 km north of Otjiwarongo, were expropriated together in 2006. The situation here was more complex than that of Ongombo West, but the common element was legal problems.

The farms operated as a unit – Marburg was originally a cattle post on Okorusu – adjacent to a large fluorite (or fluorspar) mine run by Solvay Group, a Belgian mining company. The large open-pit mining operation, employing 130 workers, was environmentally disruptive and dusty, and it reduced the water table, which motivated the owners of the farms to sue for damages. The parties' lawyers agreed to a monthly payment of N\$25 000 pending resolution of the lawsuit. In the meantime, they negotiated the sale of both farms to the mine to resolve the dispute, recognising the incompatibility of a substantial farming operation and mining operation in such close proximity.¹⁴ As required by the ACLRA, the farms were first offered for sale to the Government in the belief that the Government would recognise the utility of this transaction and issue a certificate of waiver to permit the sale. But, for reasons unknown, the Ministry neither purchased the farm nor issued the waiver.¹⁵ The owners sued the Ministry for the waiver, and a court ordered the Government to issue the certificate of waiver.

But then, inexplicably under the circumstances,¹⁶ the Ministry launched expropriation proceedings, offering N\$750 155 for Okorusu and N\$2.5 million for Marburg. The owners believed that the compensation offered was too low, and their independent appraisal found N\$4.8 million to be an appropriate amount for both farms. The Ministry served a notice of expropriation, setting the price at N\$3.3 million plus N\$375 000 for a usufruct over Marburg. The latter's owner vacated the farm, and in December 2005 the deeds were delivered to the Ministry's office together with a letter refusing the offer of compensation. The letter claimed that the value was N\$4.64 million plus financial losses of N\$4.89 million (due primarily to the N\$25 000 monthly payments), and invoked legal procedures to dispute the compensation. Under the ACLRA, if the owner refuses the original offer, the Ministry has 60 days to respond, and it did not do so.¹⁷ Accordingly, an urgent application was made in the High Court and the Ministry paid N\$2 965 000 or 80% of its original offer. The matter was scheduled for the High Court and postponed several times, and in September 2006 the Ministry settled for N\$8 million, which concluded the legal matter. The owners had not contested the expropriation process itself, but only the matter of compensation. In settling, the Ministry kept the question of "just compensation" from being decided by the courts.

But the matter was not quite over, because the owners had a good relationship with their farm workers and their families (about 40 people in all) and raised the obvious issue of their welfare and legal status following expropriation. This became a serious issue when the Ministry announced its dispossession of the farms: they were to be used to resettle five farmers from Cleveland, a resettlement farm about 50 km from Okorusu and Marburg, including Mr Fritz Nghiishililwa, Vice-Dean of the Faculty of Law of the University of Namibia, a former police Deputy Inspector-General, and a former fighter in the People's Liberation Army of Namibia (PLAN), the Namibian resistance army in the pre-independence period.¹⁸

¹⁴ These details were gathered in interviews with the previous owners, their lawyer, many of the farm workers and other occupants during an LAC visit to both farms on 13 June 2007.

¹⁵ The ACLRA requires the government either to purchase the land or to issue a certificate of waiver within 60 days, thus by not taking any action, the Ministry breached its legal duty.

¹⁶ If the Ministry wanted to purchase the farm, already offered for sale, it was legally entitled to do so under the certificate of waiver process, and there is no possible reason for the Ministry preferring an expropriation to such a purchase. The best explanation is that the Ministry simply missed the deadline, then wound up in court, and in the meantime decided to purchase these farms for resettlement purposes because they were well located and available, so began expropriation proceedings because it missed its chance to purchase.

¹⁷ ACLRA at section 17(5).

¹⁸ It should be clearly stated here that Mr Nghiishililwa has apparently acted according to law in this matter. When we asked a local Ministry of Lands and Resettlement official about his resettlement, we were told that "He was entitled to apply under the law." Our response was that this is not the issue; the issue is whether the law is appropriate under the circumstances.

Cleveland was among the first farms purchased in the early 1990s under the “willing buyer / willing seller” scheme for resettlement purposes, and was then divided into five smaller farms. The resettled farmers raised cattle and small stock there until Cleveland was selected as the site for a cement plant and the Ministry decided to relocate these five farms. Promises that the cement plant would be up and running in 2007 have still not materialised as at August 2007, apparently because the investors in the cement plant lack sufficient capital to get the project off the ground. Marburg and Okorusu are nearby, but the decision to move the Cleveland farmers to these farms meant displacing seven families with five, thus a net loss in resettlement terms.

It also raised other questions. For example, what sense does it make to first “resettle” farmers on Cleveland, and then again on Marburg? What type of legal right to their land could they have had at Cleveland if the Ministry was selling that land to a cement plant?¹⁹ Was the Ministry taking “resettlement” seriously as a social process or just using the “settlers” to occupy farms until “better” uses came along? Are all resettlement farms in Namibia subject to any industrial use of the Government’s choosing? If Okorusu and Marburg were unsuited to white-owned farming operations because of their proximity to a large open-pit mine, what sense does it make to resettle poor black farmers there? And finally, if the Ministry needed the farm for resettlement purposes, why didn’t it simply buy the farm when it was offered for sale rather than gratuitously opting first to use the expropriation process and then to settle so as to avoid letting the expropriation valuation method proceed to court? It appears that the Ministry was either acting capriciously or reacting in the context of poor planning and poor decision-making.

A visit to Okorusu/Marburg followed an apparently false rumour that the Ministry intended to send trucks to remove the farm workers at the request of Mr Nghiishililwa.²⁰ The staggering injustice and illogic of removing 40 poor farm workers so that a law school Vice-Dean could enjoy his weekend farm made a public mockery of the process of expropriation for land reform purposes. A year after the expropriation, the farm’s physical appearance is just as it was. A large and well-maintained house compound is apparently occupied by Mr Nghiishililwa, who, according to workers there, comes about once a month from Windhoek – roughly a four-hour drive. The house is reportedly rented to employees of the mine located a few kilometres from the farm.²¹ A sign identifying the farm as Mr Nghiishililwa’s is posted at the main entrance on the road.

A few hundred metres to the east lies a substantial housing compound for the workers. Thirteen houses accommodate about 40 people. Some of the older houses are made of stone in the German colonial style, and represent the best-quality housing typically constructed for farm workers. The newer houses are also substantial but made of cement. The houses are surrounded by small fenced yards holding chickens and goats. Most of the farm workers are elderly people living on pensions. Some have family histories on the farm going back 40 years to the grandparents of the owner. A small graveyard near the housing compound contains at least 20 graves of the ancestors of current workers there. The workers also have a few cattle, and longstanding relationships with farm workers on neighbouring farms. In other words, this is a well-established rural community. A large hall near the farmhouse formerly housed a sewing cooperative that provided extra income for as many as 400 women on this and neighbouring farms.²²

These workers have no legal status on the current government-owned farm. Ironically, the issue of severance pay was raised by the former owners at the time of the expropriation, but the labour law provides for severance pay only for farm workers dismissed. The workers here are not eligible for severance pay because the ACLRA does not provide for farm workers who lose work due to expropriation. Moreover, the Act does not provide for resettlement for

¹⁹ At the time of writing, not a single resettlement beneficiary has been issued with a right of leasehold certificate.

²⁰ Brigitte Weidlich, “Farmworkers at odds with former Police General”, *The Namibian*, 7 June 2007.

²¹ Section 46 of the Agricultural (Commercial) Land Reform Act prohibits a resettlement beneficiary to assign, sublet or mortgage his/her farming unit unless the Minister (of Lands and Resettlement) gives consent to it.

²² This information was gathered in a visit to Marburg/Okorusu by LAC staff on 11 June 2007.

farm workers displaced by expropriation. Any “formerly disadvantaged” person in Namibia may apply for resettlement, so displaced farm workers may apply on the same basis as any other person, but they are not given a special status, and considering “the slow pace of land reform”, they can expect to wait years unless some special provision is made. Of course, farm workers satisfied with their current position have no reason to apply for resettlement, so these workers gave no thought to resettlement – until the Government itself made them homeless. They would like to be resettled nearby so they can continue life as part of their community and visit the graves of their ancestors.

Petrus Johannes, one of the workers, describes coming to Marburg in 1994 with 8 head of cattle, 35 goats, 3 horses and 1 donkey. Other farm workers also own cattle and small stock: Frans Oabeb has 30 cattle and 100 goats, Matheus Toivo 11 cattle, and others own cattle. This arrangement was traditional on many Namibian farms, giving farm workers grazing rights for their own stock as a means to both promote employment stability and encourage the development of good farming skills. In addition, this provided extra income to poorly paid farm workers. The Ministry of Lands and Resettlement sent letters to some of the farm workers in 2006 and 2007 notifying them of the expropriation, and various local government officials and newly resettled beneficiaries²³ told them that they would have to leave the land or face eviction.

The farm workers advocated for themselves, and contacted the Legal Assistance Centre for legal assistance. The Ministry also took applications from each of them for resettlement, but no action has been taken and they, like all other applicants for resettlement, have no idea when or if they might be resettled. The immediate legal issue is that the ACLRA, designed to promote and expedite resettlement, makes no provision for farm workers on expropriated farms. Since resettlement of disadvantaged persons is the goal of the Act, this omission has an oxymoronic effect: more farm workers are being displaced under the resettlement programme than “beneficiaries” are being resettled. In other words, the Act may be running at a net loss, displacing and impoverishing more persons than it resettles, a result which not only makes no sense at all, but also violates some human rights norms. For example, while compulsory “resettlement” in the name of national progress might be necessary, customary international law requires that the resettled person be re-established in a position equal to that which was lost. To hold otherwise creates a situation where national “development” enriches some and impoverishes others.

These farm workers have been effective in getting their story out. It was published, for example, on the front page of *The Namibian* newspaper, apparently embarrassing the Ministry of Lands and Resettlement.²⁴ The farm workers have been verbally assured that they will not be removed until some decision about their relocation is made. A low-ranking regional official told us that there was some thought being given to purchasing or expropriating another farm nearby for these workers.²⁵

While Mr Nghiishililwa – who has a highly paid government job and could qualify for an Affirmative Action Loan Scheme (AALS) loan to purchase his own farm – occupies the main house, a survey of the rest of the property reveals that four other resettlement farmers are in fact disadvantaged farmers living on their new farm plots, averaging at just over 1 000 hectares each. One of the farmers, living in a corrugated tin shack, stated that he had 80 head of cattle, too many for the capacity of his portion of the farm. Another family on a plot nearby had a large herd of goats. A third moved into the hall that formerly housed the sewing cooperative.

²³ “Beneficiaries” is the term used by the Ministry of Lands and Resettlement. This term clearly connotes the recipient of a welfare benefit, not the independent status of a small-scale commercial farmer. We prefer not to use this term, but since the Ministry uses it, and its use is widespread in Namibia, we cannot avoid it.

²⁴ Brigitte Weidlich, “Forgotten Farmworkers Still Waiting”, *The Namibian*, 24 August 2007.

²⁵ In response to this information we asked the obvious question: if one farm, Cleveland, was already purchased for these workers who were then removed to Marburg, which was expropriated for them when Cleveland was sold, what is going to happen to the farm workers who have to be removed from the next farm expropriated? Will yet another farm be expropriated for them? The official saw the point and shook his head.

Many of the resettlement farms are not adequate to support a family. Complex formulas are used to determine farming capacity, but one commonly used formula indicates that a minimum of 150 head of cattle are needed. With an off-take of 28% per annum, this could provide a reasonable income for a family. If the land has a carrying capacity of one cow per 20 hectares,²⁶ it would take a farm of 3 000 hectares to support a herd of 150 cattle. This means that all of the resettlement farming units are inadequate, since they average at only about 1 200 hectares, and none of the farmers at Marburg have as many as 150 cattle. Since each farm is different, it would take a careful evaluation of local conditions to determine how many stock a farm will support and how it might be effectively farmed by resettled farmers. It is apparent at both Cleveland and Marburg that this evaluation is not occurring.

C. Conclusion

Direct observations are possible here on a number of levels. While three farms expropriated in two processes is a small number, it is still representative of the entire expropriation process in Namibia. It is inescapable that one farm was specifically expropriated for the benefit of its workers, with the Ministry making an example of one particularly troublesome farmer and his family. While one could argue as to whether this was an appropriate use of expropriation, it was effective in transferring land ownership to a group of disadvantaged persons with some connection to that land. The tactic of threatening to seize the farms of “bad” farmers might offer some support to farm workers in Namibia, and encourage farmers to build honest relationships with their workers, but on the other hand, the land reform process should be carefully planned and transparent, and should not hinge on idiosyncratic personal factors.

In the case of Okorusu and Marburg, not only were the workers left out of the expropriation and land reform process, but they were objectively disadvantaged and their position worsened. The overall objective of this expropriation was the legitimate objective of the ACLRA, i.e. to obtain land for resettlement, but these farms were first offered for sale to the Government, also under the ACLRA, and it seems that the expropriation was unnecessary in that it occurred only because the Ministry bungled the original offer – if indeed this is what happened.

It must be remembered that the original owners desired to sell the farm to a neighbouring mine *because it was unsuited to their cattle farming operation*. The mine had both polluted the environment and degraded the water table. Thus the farm was unsuitable for resettlement and the Ministry should have issued the certificate of waiver to enable its sale to the mine. (The mine, ironically, had announced that it would resettle its own workers on this farm when the mine is exhausted in about 20 years.) Assuming that the international mining company would have engaged in appropriate environmental rehabilitation at the time, and that a mining operation employing 130 persons was an appropriate use of that land, this was probably the best solution to a difficult land use problem. As it stands now, five families are resettled on an environmentally degraded farm, with the mining company having no obligation to rehabilitate it after it has finished mining. And there is the matter of the N\$25 000 per month that the mining company was paying the farm owner as damages for their environmental destruction of the farm. This money is not going to the five families resettled on the land; presumably it is going into the coffers of the Ministry of Lands and Resettlement. Either way, the environmental damage is unabated.

To the extent that farms are being both purchased and expropriated for the resettlement of disadvantaged persons as successful small-scale farmers, it is obvious that the resettlement process is not going well, and that these farms are neither viable nor do they have any apparent potential ever to succeed. These three farms cost the Government nearly N\$12 million, and it is

²⁶ This is a typical estimate for northern Namibia, but it would vary from farm to farm depending on water and bush encroachment. In the south and west, where the climate is drier, it would take a much larger farm to support the same herd.

impossible to imagine that the 12 resettled families will ever see benefits justifying this cost. In addition, seven families were displaced, further diminishing the net value of this expensive enterprise to resettlement of five families, in poverty, without the means to succeed as farmers. This is dealt with in more detail in section IV of this report.

Finally, as noted above, an effective land reform process must be both carefully planned and transparent, yet there is no evidence that these particular farms were taken under any comprehensive plan for the purpose of land reform. It seems that they were convenient targets for expropriation for opportunistic and political reasons that have nothing to do with the success of any land reform programme.

II. The Agricultural (Commercial) Land Reform Act 6 of 1995

If the end of apartheid-era segregation and disenfranchisement of Namibia's black citizens was the first goal of the new SWAPO Government at independence in 1990, the promise of land reform was a central element in the rebuilding of a new Namibia.²⁷ A National Land Conference was called in 1991 to gather the broadest possible input on the land reform process. These recommendations emerging related primarily to policy, but among them, and still central to the land reform programme, was that the restoration of ancestral lands should not be a part of the process, and that poor and disadvantaged people, variously defined, should be given land.²⁸ In addition, it was understood by all that any land reform programme must be consistent with the law embodied in Article 16 of the Constitution, and implicitly recognise the compromise struck between SWAPO and South Africa at the time of independence.²⁹ Article 16 recognises property rights, and while explicitly permitting expropriation to redress inequality, provides that "just compensation" must be paid.

It then took four years for Parliament to pass the Agricultural (Commercial) Land Reform Act 6 of 1995.³⁰ The legislative history is of disagreement and some turmoil within the SWAPO Government over the terms of the Act. Elements within SWAPO favour a radical and broad-based land reform programme, but this view lost out in the final Act. More conservative and accommodationist views prevailed. This result can be explained in several ways. First of all, minority parties in the National Assembly were well organised and clear about their demand for a moderate and legal land reform process. But secondly, the SWAPO Government had little interest in destabilising the commercial agricultural sector because it employed a large number of blacks, and also was seen as critical to a stable economy.

The result is a lengthy³¹ and complicated³² Act designed to provide layer after legalistic layer of protection for commercial farmers. It is overly complex, and many key provisions are inadequately defined. The Act is legally deficient in two ways that operate against each other: firstly, the legal requirements for accomplishing anything are detailed and cumbersome; and secondly, many of the key legal categories are so vague as to be inoperable.³³ At the same time, while these legal issues are key to the operation of the Act, a lack of legal capacity within the Government, particularly in the Ministry of Lands and Resettlement, has had an immobilising

²⁷ Sidney L. Harring, "Stolen Lands' Under the Constitution of Namibia: Land Reform Under the Rule of Law", in Manfred Hinz et al (eds), *Ten Years of Namibian Nationhood*, New Namibia Books, Windhoek, 2002; and Wolfgang Werner, "The Land Question in Namibia", in Ingolf Diener and Olivier Graefe (eds), *Contemporary Namibia: The First Landmarks of a Post-Apartheid Society*, Gamsberg Macmillan Publishers and IFRA, Windhoek, 2001.

²⁸ National Conference on Land Reform and the Land Question, conference brief, 1991.

²⁹ Joseph Diescho, *The Namibian Constitution in Perspective*, Gamsberg Macmillan Publishers, Windhoek, 1994. The story, in brief, is that the South Africans came to the table with a detailed document providing for legal protection of white interests, and SWAPO, ready to assume state power, completely surprised them by accepting their terms and agreeing to the draft Constitution. This was a brilliant tactic that doubtlessly accelerated the independence process, but it did enshrine existing property relations into the new Constitution.

³⁰ Assented to on 15 February 1995.

³¹ The Act consists of 81 sections arranged in seven parts spanning well over 100 pages. It has already been amended five times.

³² The Act creates two new bodies to implement it: a Land Reform Advisory Commission and a Lands Tribunal, the latter being a special court with the power of a High Court to interpret the Act's many provisions.

³³ Patrick McAuslan, R.H. Behnke and James Howard, "Assistance in Implementation of Agricultural (Commercial) Land Reform Act (Final Report)", United Nations Development Programme (UNDP) and Food and Agricultural Organisation (FAO), 1995, Appendix A, 1-5.

effect which is stalling the implementation of the Act and thereby blocking an effective land reform programme from materialising. This is politically very dangerous as the popular will demands an effective land reform programme and the country's overall stability probably depends on it.

A. Who are the beneficiaries of the land reform programme?

While virtually the whole ACLRA sets out the legal procedures that will achieve land reform, the first failure of the Act is its failure to define either the purpose of land reform or the selection of beneficiaries. This is critical because the Act necessarily defines the lands to be acquired for land reform purposes. Section 14 provides that land is to be made available to the following persons:

“Namibian citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land and foremost to those Namibian citizens who have been socially, economically, or educationally disadvantaged by past discriminatory laws and practices.”

These two overlapping categories include every black citizen of Namibia, but with no legal mechanism for ranking the potential beneficiaries or for any selection process. Given that a grant of land amounts to a grant of money, there is enormous potential here for conflict, corruption and litigation by beneficiaries. Regarding the first category, “citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land”, a whole range of questions arise surrounding the allocation of land to existing farmers, beginning with the definition of “adequate” agricultural land. But the second category, by the use of the word “foremost”, takes precedence over the first category, and includes all Namibian citizens who have been “socially, economically, or educationally disadvantaged”, i.e. virtually the entire black population of Namibia, and doubtlessly a number of whites. Since this law purports to offer to all of these persons a government benefit in the form of access to land acquired by the Government under this Act, the legal inadequacy of this language is both obvious and dangerous, and is undermining the whole operation of the land reform process. This problem is compounded under the resettlement statute, which, as we will see in section IV, also lists eligible “beneficiaries” in a legally inadequate manner.

B. The legal infrastructure of land reform: Land Reform Advisory Commission and Land Acquisition and Development Fund

Critical to an effective agricultural land reform process is reliable data and experience with the land itself. The Government of Namibia is not an experienced farmer. Moreover, the agricultural sector in general, and farmers in particular, were distrustful of both the Government and the land reform process. It was therefore important to take measures to both expose the process and incorporate a broad set of views. The first provision of the Act was to create a Land Reform Advisory Commission to take these measures. The 12-person Commission consisted of three from the Ministry of Lands and Resettlement, including the Permanent Secretary acting as Chairperson, one from the Ministry of Agriculture, Water and Rural Development, one from the Ministry of Justice, three from “Associations or bodies involved in agricultural affairs”, including the Agricultural Bank of Namibia, and four other persons – “at least two females”, “not employed in the public service” or generally representative of the public. In theory, the

Ministry of Lands and Resettlement was outvoted in this body by 9 to 3; and the Government as a whole was outvoted by other Commission members by 7 to 5 – both measures indicating a suspicion of the Government’s intent and a lack of public representation in the process. However, the role of the Advisory Commission is entirely advisory, and in this respect, the body has not been effective.³⁴ The idea that the Ministry needed outside information and input in order to carry out an effective land reform programme is embodied in this provision for the creation of an advisory body, but there has not been adequate consultation or research in the land reform process.

Similarly, the creation of a Land Acquisition and Development Fund was, on the one hand, a simple means to establish both a fund for land acquisition and a body to administer it, but on the other hand it was unnecessary, since the Government has the capacity to buy land with public funds from any source, and setting up this Fund effectively limited the capacity of the Ministry to carry out land reform because it linked land reform directly to the availability of money in this Fund.

C. The acquisition of land for land reform purposes

The core of the ACLRA begins at Part II, “Acquisition of Agricultural Land by State for Purpose of Land Reform”, and indeed this is the purpose of the Act. Section 14, discussed above, provides that the Minister may –

“out of moneys available in the Fund, acquire in the public interest ... agricultural land in order to make such land available for agricultural purposes of Namibian citizens who do not own or otherwise have the use of agricultural land ...”.

This continues into the language describing the beneficiaries discussed above, defining an overbroad and unspecified population. The paragraph just quoted requires that the Minister follow the extensive procedural requirements set down in the rest of the Act, their complexity giving rise to a substantial likelihood of litigation.

In the original Act, the Minister was limited to certain categories of agricultural land, including under-utilised land and land held by foreigners, but the controversial amendment Act 14 of 2003 introduced the phrase “(3) any agricultural land which the Minister considers to be appropriate for the purposes contemplated ...”, hence the Minister has the power to appropriate *any* agricultural land in order to make it available to any “qualified” Namibian citizens for agricultural purposes and in the public interest.

This provision is straightforward enough in the context of Article 16 of the Constitution, but it is not without problems. The Namibia Agricultural Union (NAU), representing the commercial farming sector, has developed a careful and technical legal challenge to the land reform process based on this language.³⁵ A summary of its argument is that the phrase “for agricultural purposes” legally requires the beneficiaries of any land reform scheme following expropriation to operate viable farms that contribute to the agricultural development of the country. There is considerable data on Namibian farms suggesting that farm sizes of 2 000 hectares or more are necessary for a farm to be viable, along with stocking rates of at least 150 large stock units.³⁶ The NAU argues that smaller units are not viable, therefore the Minister has not seized land for an “agricultural purpose”. Similarly, the term “public interest” has been construed very

³⁴ The first lawsuit filed against the Government’s land expropriation process in fact argued that the LRAC is a “rubber stamp” and was not, as required by the statute, actually consulted on the land expropriation decisions (“Expropriations Target German Land Owners, High Court Hears”, *The Namibian*, 25 July 2007, p. 1).

³⁵ Namibia Agricultural Union, “Proposals Towards Establishing Principles and Procedures for Agricultural Land Expropriation for Resettlement Purposes in Namibia”, Windhoek, 2004, at s. 6.2 (pp. 29-32).

³⁶ Namibia Agricultural Union, “A Framework for Sustainable Land Use and Land Reform in Namibia”, Windhoek, 2003.

broadly by the courts of various countries – though not directly by the courts of Namibia – but the NAU argues that it is not “in the public interest” to expropriate or otherwise acquire under this Act operating farms and turn them into failing farms, and also that the “public interest” language requires acquiring land as rationally and inexpensively as possible, subject to careful scientific research and following a transparent land reform plan.³⁷

While there is a great deal of complexity here and none of these matters have been litigated in Namibia, it is clear that there are legal problems with the range and scope of the Minister’s power to acquire land for land reform purposes under section 14 of the Act. In general, courts hold that the term “public interest” is a political choice for the Legislature, and the courts will not substitute their own judgement with that of the Legislature as long as *any* valid public interest is served.³⁸ For example, there is no reason for a particular choice to not be “in the public interest” just because another choice might be cheaper, nor because one farming operation is less economically successful than another, as long as other public interests are served. It is also beyond challenge that very general social programmes such as affirmative action and land reform are in the “public interest” even if the expropriated property is allocated to private individuals and does not remain in public ownership.³⁹

Perhaps the more serious underlying issue with legal challenges on these grounds is that they expose both the inefficiency and the lack of transparency of the Ministry’s land reform process. Requiring the Ministry to defend its land reform process in open court requires full access to a wide range of data as well as to internal ministerial processes. How are the beneficiaries selected? How are farms selected for purchase or expropriation? What support will be provided to new farmers? Is the goal of land reform increased agricultural productivity, redress for past injustice, or poverty alleviation?

D. Willing buyer / willing seller

Part III of the Act, beginning at section 16, sets out a preferential right of the State to purchase agricultural land. This right has been in operation since 1995 and requires the willing seller of any farm to first offer the land to the State. If the State decides not to purchase the farm, it issues a “certificate of waiver” enabling the owner to sell the land on the open market. Under this provision the Government has acquired 209 farms for land reform purposes at a cost of N\$215 million, and has issued 785 “certificates of waiver”.⁴⁰ This process has involved, in only 12 years, about one-seventh of all the farms in Namibia, so over time, many more farms could be acquired through this process, without expropriation. The NAU, which supports a moderate and legal land reform process, endorses this method of land acquisition.

³⁷ Ibid.

³⁸ This principle is settled in international law in the Upper Silesia case (1926 PCIJ 7, 22). There is a detailed discussion of the concept of ‘public interest’ in international and Namibian law in Christina Treeger, *Legal Analysis of Farmland Expropriation in Namibia*, Namibia Institute for Democracy, Windhoek, 2004, pp. 2-6.

³⁹ A.J. van der Walt, *The Constitutional Property Clause*, Juta & Co., Kenwyn (Cape Town), 1997, pp. 135-139. There is a vast body of international comparative literature on this issue. The issue is receiving much attention in the USA especially, where “property rights” groups have spent millions of dollars on litigating the “public use” issue in contexts involving governmental acquisition of private land for other private landowners, but in the “public interest”, particularly in urban renewal schemes. These are not legally different from a public land reform scheme, involving the public acquisition of private property to be turned over to other private persons. See for example Dwight Merriam and Mary Massaron Ross, *Eminent Domain: Use and Abuse: Kelo in Context*, American Bar Association, Chicago, 2006. It is useful to note here that because the Namibian Government itself holds title to all land acquired for land reform purposes, the Government is in an even stronger legal position than the “public interest” in that it grants either no legal land right to “beneficiaries” or a right of leasehold..

⁴⁰ Christof Maletsky, “Sluggish Pace of Land Reform Means Target Won’t be Met”, *The Namibian*, 14 May 2007, p. 3. Apparently this is the latest data available. Namibia Agricultural Union, “A Framework for Sustainable Land Use and Land Reform in Namibia”, Windhoek, 2003, p. 82, reports that 166 farms cost the Government N\$105 127 469.

Given the lack of transparency, it is difficult to evaluate the success or failure of the “willing buyer / willing seller” model in Namibia. A number of problems are suggested. In terms of a planned land reform process, it is difficult to base planned change on the chance opportunity that particular farms might be available. The fact that the Government rejected 785 farms has been argued to prove that the Government is not serious about land reform. But much of Namibia has always been marginal agricultural land, and the Government has stated that most of the farms offered were unsuitable for resettlement purposes in that they were farms so marginal that they were never profitable even to white farmers subsidised by the State. This is especially true of as many as 3 000 farms in the southern and western parts of the country.⁴¹ The opposite may also be true: that the best farms in the country were not being offered to the Government under the scheme because they were in the hands of stable families passing profitable land down from generation to generation. There were also rumours of schemes to evade the Act, most specifically of creating close corporations to own the farms, then selling shares rather than selling the land.

Finally, although the economics of land acquisition is a difficult issue, the Government may not have enough money to buy as many farms as it would have liked. In 2003, the annual budget for land acquisition was increased from N\$20 million to N\$50 million.⁴² A land tax introduced in 2005 has yielded N\$60 million for land acquisition. Farms were being acquired at an average price of just over N\$1 million, so with the budget available, the Government should be able to buy a large number of farms. But farm prices have increased (Okorusu/Marburg cost N\$8 million), the land acquisition infrastructure is expensive, and little money has been made available for technical support for new farmers, so it is not obvious how far this money will go in support of an effective land reform programme.

The “slow” pace of land reform was attributed to the “willing buyer / willing seller” process, but in retrospect it seems that the pace was due primarily to the Government’s limited capacity to utilise the farms offered for sale for resettlement purposes. The section 14 issue of who should be the beneficiaries has created a backlog in the resettlement process. This, combined with a lack of capacity in the creation and support of resettlement projects, has left the Ministry over-extended. Indeed, the change of the name of the Ministry, dropping “and Rehabilitation” from the title, was meant to refocus the Ministry’s effort on land reform and to remove the focus on rehabilitation, at which the Ministry had failed.

E. Expropriation: “compulsory acquisition of agricultural land”

The preference of the Ministry to avoid expropriation was political rather than legal. Given the socialist history of SWAPO and the desire of the Government to portray itself as democratic and committed to the rule of law, the spectre of “expropriation” was one that it preferred to operate without. Events in Zimbabwe also cast a shadow over the concept of expropriation in both Namibia and South Africa.⁴³ Both governments have been determined to emphasise that land expropriation will proceed under the rule of law.

⁴¹ The concept of ‘land reform’ in Namibia has been limited to the redistribution of formerly white-owned commercial farms to black farmers. Equally important, and completely missing from current political discourse in Namibia, is the acquisition of degraded commercial farmlands for the purpose of environmental rehabilitation. The two processes might be linked as follows: redistributing degraded farmland from white farmers to black farmers will simply continue the colonial process of land degradation. The Government needs a plan to rehabilitate environmentally degraded farmlands – at least several thousand commercial farms. Ultimately these rehabilitated farms might also be suitable for some types of farming and allocated to black farmers, but this type of long-term planning is not currently undertaken as part of the land reform process.

⁴² Robin Sherbourne, “Rethinking Land Reform in Namibia: Any Room for Economics?”, Institute for Public Policy Research, Windhoek, April 2004, p. 2.

⁴³ William H. Shaw, “They Stole Our Land”: Debating the Expropriation of White Farms in Zimbabwe”, in *Journal of Modern African Studies*, Vol. 41, 2003, 75-89.

Nevertheless, in 2004, just in time for the critical election of President Sam Nujoma's successor, the Government announced that it would begin to expropriate farms.⁴⁴ This was expected to be popular with the SWAPO support base and to preempt the election year criticism that land reform had progressed slowly. As a political matter, there is of course nothing wrong with the Government using expropriation as a card in an election; if the people want it, a democratic government can both promise and deliver it.

There is no fundamental legal problem in Namibia with the basic concept of expropriation. The ACLRA was nothing less than the statutory embodiment of the Namibian Constitution's specific provision for expropriating land. Article 16(1) of the Constitution guarantees the right to acquire, own and dispose of property, while Article 16(2) specifically provides for expropriation "in the public interest subject to the payment of just compensation". Furthermore, Article 23(2) permits the Government to legislate for the advancement of persons "who have been socially, economically, or educationally disadvantaged by past discriminatory laws and practices", and for "the implementation of policies and programmes aimed at redressing social, economic, or educational imbalances in the Namibian society ...".

The ACLRA not only set out the legal process for expropriation, but also used the language of the Constitution in doing so, which is part of the problem with the Act: while a Constitution is a broad statement of legal policy, a statute must have much narrower and more precise legal definitions.

The reason that land expropriation was given constitutional status is that the racist and colonial character of Namibian land law had created a grossly unequal society based on land. At independence in 1990, white farmers controlled almost half of the land, in the heart of the country, while almost one million black farmers lived in overcrowded conditions on less than half of the land. The very legitimacy of the new State required redressing that highly visible imbalance, and doing so quickly. Expropriation was enshrined in the Constitution to ensure that this happened. The ACLRA was a popular measure designed to implement this constitutional provision.

There is a considerable body of international law on the subject of land expropriation, but none of it is particularly relevant to the present situation in Namibia.⁴⁵ It is undisputed under international law that expropriation is legal, provided that it is compensated and meets fundamental due process norms.⁴⁶ In fact, such power must be inherent in national sovereignty, otherwise existing property relations could obstruct development and change in any country. The existing Namibian constitutional provisions meet this standard. And, in view of treaty agreements and bilateral agreements with Germany regarding the equal treatment of German citizens under Namibian law, international treaty obligations would also structure the law of expropriation. There is no special problem with the expropriation of agricultural lands held by foreigners as long as (1) they are treated equally under Namibian law, and (2) they are paid just compensation as required by both Namibian and international law.⁴⁷

A complicated set of procedures governing expropriation is set out in sections 19-35 of the ACLRA. These have not been legally tested: there have been only three farms expropriated, and none of them have challenged the action in court. Given that expropriation in itself is clearly legal, what can be litigated is (1) the process and (2) the compensation.

There is an elaborate legal process created in the Act. This was so complex and technical that the Act also created its own court, a Lands Tribunal, which has the legal authority of a

⁴⁴ See also "Statement by the Right Honourable Theo-Ben Gurirab, MP, Prime Minister of the Republic of Namibia, on the Acceleration of Land Reform in the Republic of Namibia", 25 February 2004, at http://www.sarpn.org.za/documents/d0000745/P826-Namibia_land_reform_Gurirab.pdf (accessed 3 August 2007).

⁴⁵ See for example East Timor Law Program, "Land Expropriation Policy Suitable for Timor-Leste", July 2005.

⁴⁶ A.J. van der Walt, *The Constitutional Property Clause*, Kenwyn, Juta, 1997, pp. 115-140.

⁴⁷ Most of the land in Namibia owned by foreigners is owned by South Africans. A bilateral agreement requires that German citizens be treated no differently to Namibian citizens under the law, which would mean that the property of German citizens could not be subject to expropriation under a different standard than that applied for Namibian citizens. Most Namibians of German descent holding farms are Namibian citizens.

High Court, making detailed determinations of fact and law.⁴⁸ There is no question that this procedural detail opens the Government up to procedural challenges to its land reform process. In fact, this was evident in the first cases heard in the High Court.⁴⁹ But, while procedural challenges can delay the land reform process and increase its cost, such legal actions cannot stop land reform. All the Government has to do is either (1) keep trying until it meets the procedural requirements, or (2) get Parliament to amend and simplify the procedural requirements of the ACLRA.

As complicated as the valuation of agricultural land may be, compensation is probably the simplest matter and is not likely to cause serious constitutional problems. It is fundamental that it is a part of the inherent sovereignty of any state that it has the power to expropriate land in the public interest. Land is always valuable, and always contested. But courts world-wide have always been able to set a monetary figure that qualifies as “just compensation”. Everything has a value, and as contested as that value might be, courts everywhere hear evidence, listen to expert testimony, read valuations of “similar” property, and then decide what compensation is “just”.

As a base line, courts have consistently held that “just compensation” is presumptively “fair market value”.⁵⁰ Then, according to conditions, parties can argue that some other figure represents “just compensation.”⁵¹ In Namibia, for example, some would argue that the lands were originally “stolen”, and that this should be accounted for in calculating the fair market value. Similarly, one could argue that the accumulated value of government subsidies is a public investment in private lands that should also be deducted from the fair market value. Farmers may argue that the threat of expropriation has reduced the “fair market value” of farms and that “just compensation” should be based on market value independent of the threat. A counter argument is that the AALS scheme has artificially raised the fair market value and this factor should be taken into account. There is no Namibian law on these matters, and the appropriate courts will have to hear and evaluate these and any other arguments on the value of Namibian farmlands in determining “just compensation”. This adjudicatory process could be both lengthy and expensive, but there is no reason for Namibian courts not being able to set these figures. Thus, again, farmers can litigate the issue of “just compensation” and make the land reform process more lengthy and expensive, but they cannot block it. Such actions could also provoke a popular reaction both against white farmers and in favour of accelerated land expropriation processes.

Any legal process of land expropriation must follow the letter of the ACLRA. These procedures are complicated, and run from sections 19 through 35. Because the legal challenges to the expropriation process are just beginning, it is too early to determine what legal problems might arise here. It may be that the real legal issue is challenging whether an expropriation is in the public interest and for an agricultural purpose, and whether “just compensation” has been paid. There are numerous legal challenges possible to any particular expropriation, and this will both run up the cost of land expropriation and deter the Ministry, with limited legal capacity, from rigorously pursuing expropriation. The Namibia Agricultural Union has retained very good lawyers to develop arguments on behalf of farmers facing expropriation.

⁴⁸ The Lands Tribunal is created under Part VII of the Act, sections 63 through 75. For all the complexity of these regulations and the underlying land issues, the Act (section 63) specifies only that one member should be a “person with legal qualifications and who has been practicing law for a period of not less than five years, and who shall be the chairperson”. Another must be experienced in economic or financial matters and a third in agricultural matters. The qualifications of the remaining two members are not specified. So, for all the complexity of the Act, a judicial body at the level of a High Court is created, composed primarily of non-lawyers. It should not be unexpected that the decisions of this body will run into considerable legal difficulty in the appellate process.

⁴⁹ “Expropriations Target German Land Owners, High Court Hears”, *The Namibian*, 25 July 2007, p. 1. When asked, “Is the proposal by the Namibia Agricultural Union to establish principles and procedures for land expropriation helpful?” Prime Minister Nahas Angula replied that “They are just defending their interests.” (“The Basis of Land Reform is Social Justice”, *Insight*, August 2007, pp. 27-29, at 28.)

⁵⁰ Christina Treeger, *Legal Analysis of Farmland Expropriation in Namibia*, Namibia Institute for Democracy, Windhoek, 2004, includes a lengthy discussion of the just compensation issue under international and Namibian law, pp. 6-9.

⁵¹ A.J. van der Walt, *The Constitutional Property Clause*, Juta & Co., Kenwyn (Cape Town), 1997, pp. 141-148.

III. The Process of Land Reform in Namibia

Twelve years after the passage of the Agricultural (Commercial) Land Reform Act 6 of 1995, it is probably safe to say that nobody in Namibia thinks that the land reform process is going well. There are different levels of critique.

A. The failure of the agricultural land reform process in the commercial farming areas

The most common criticism, and one that the SWAPO Government has heard, is that the land reform process is proceeding far too slowly.⁵² At present it appears that no more than 209 commercial farms have been acquired for resettlement purposes, and that no more than 9 138 people were resettled on these farms. Given that there are about 6 000 farms, and perhaps up to one million Namibians living in rural areas and trying to make a living farming a few acres, at this level this is not a programme that will impact significantly on poverty alleviation.

A second criticism, related to the first, is that land is being acquired without any perceivable plan, in all parts of the country, in such a way that any planned land reform programme is undermined. And, since the basic unit of agricultural planning is still the commercial farm, the large commercial farm of the apartheid era, an old and inefficient structure of agriculture, is being reproduced, but in diluted form. Black farmers get smaller units than white farmers held, but remain stuck with the same plan to be livestock farmers. Since even the larger white farms were not very profitable, this apportionment is both setting black farmers up to fail and failing to reconceptualise a new Namibian agricultural order that could both feed the growing population and provide reasonable incomes to the new black commercial farmers.

A third criticism, to be taken up in the next section, is that the Government is not granting any legal status to the recipients of land. Rather, the Government is keeping title to itself as “state land”. Leaving poor people in some kind of tenant relationship with the Government is not empowering them. Further, the impoverished status of these “landless” recipients of “land reform” undermines both the success and legitimacy of the programme. Land in any agrarian society confers wealth and status, and the self-esteem that goes with farm ownership.

A fourth criticism is that the poor and disadvantaged people who are most in need of resettlement are also those who may most lack the skills to succeed at operating a small farm, especially in an impoverished environment. This is even true in an agrarian society where the majority have some farming experience. Such farming experience is likely to have been limited to narrow types of subsistence farming in a certain area, or farm work done at the direction of a white farmer. The range of skills needed to succeed as an independent commercial farmer is much broader. The Prime Minister recently stated that “emerging farmers need comprehensive assistance so that they can do proper farming ...”,⁵³ so the Government recognises the problem, but no significant technical support is being provided at present. This support must be extensive and ongoing for a number of years.

A fifth issue is the failure of the Ministry to link the problem of land reform with the problem of the degradation of agricultural lands and the process of desertification, enhanced in Namibia by overgrazing and poor farming methods. There was a recognition that taking degraded and overgrazed lands from white commercial farmers and redistributing them to larger numbers of

⁵² Land, Environment and Development Project, Legal Assistance Centre, “Consultative Workshop: Perceptions of Land Reform” (report on the workshop proceedings), Windhoek, November 2006.

⁵³ “The Basis for Land Reform is Social Justice”, *Insight*, August 2007, p. 28.

blacks would only exacerbate the process of land degradation and desertification.⁵⁴ Now it seems that resettlement policies of the Ministry, such as giving black farmers farm plots that are too small to support their families, serve to encourage overgrazing and further abuse of the land.⁵⁵

A sixth criticism is directed at the Ministry of Lands and Resettlement – and the Government generally. The Ministry has a huge staff, with offices throughout the country, charged with the task of running a viable land reform programme. Yet, given the small numbers of people involved, what the Ministry and its staff actually do is not apparent. For example, resettling 9 000 people in 12 years amounts to fewer than 800 a year, hardly more than 125-150 families. Yet it takes a staff of perhaps a 1 000 government employees to do this work. Almost all of the 209 or so resettlement projects or farms have staff of the Ministry on their premises or in a nearby town, yet it is not obvious that these people are well trained and performing their duties.⁵⁶ Indeed, following an LAC visit to Okorusu/Marburg on 1 August 2007, a visit was paid to the offices of the Ministry of Lands and Resettlement in Otjiwarongo, at approximately 11h45. The front door was wide open but there was no one on the premises. There was also no notice to indicate where the staff members were or when they expected to return. Faced with such circumstances, it is difficult to commend the Ministry for efficiency.

A seventh and final criticism, related to the sixth, is that a good land reform programme requires both planning and transparency. but it is not clear how the “plan” for land reform will be implemented over the next 10-20 years,⁵⁷ nor which farms might be expropriated or purchased, nor what the criteria for such actions are, nor how beneficiaries are selected. As this report is being written, we are told that there are no resettlement farms available, and that they will be advertised in local newspapers when they become available, which is not a rational process nor one that will reach poor and illiterate people. Indeed, there is a measure of hopelessness in the land reform process. Poor people may be asked to apply over and over again for resettlement farms that arise and are then resettled by others, with no other farms becoming available for years. With no criteria for accepting applicants, those rejected do not know why they were rejected, nor when, if ever, they will be resettled.

All in all, this is a pretty grim process, with little possibility of improvement in the near future. On average it costs the Government over N\$1 000 000 for each farm purchased on the “willing buyer / willing seller” basis, and far more for expropriated farms – Okorusu/Marburg cost \$8 000 000 and was used to resettle five families. If each farm resettles around that number of families, the land cost will be very high. But more significantly, little money is invested in supporting these struggling farmers and their families. Just as the white commercial farmers who farmed this land received many thousands of dollars in government subsidies before independence to help them succeed, so these new farmers should have the same support. This support would also make the resettlement process more attractive and draw more applicants. But it would also make the process much more expensive. Adequate resources

⁵⁴ Wolfgang Werner, “The Land Question in Namibia”, pp. 269-270. Julian Quan, David Barton and Czech Conroy, “A Preliminary Assessment of the Economic Impact of Desertification in Namibia”, Directorate of Environmental Affairs, Namibia, *Research and Discussion Paper 3*, September 1994; and A.S. Kruger, *Coping in a Fragile Environment*, Ministry of Agriculture, Windhoek, February 2001.

⁵⁵ Sidney L. Haring, “‘Stolen Lands’ Under the Constitution of Namibia: Land Reform under the Rule of Law”, in Manfred Hinz et al (eds), *Ten Years of Namibian Nationhood*, New Namibia Books, Windhoek, 2002.

⁵⁶ In our research on land issues, we have routinely stopped in at local Ministry of Lands and Resettlement offices to enquire about local projects. One local official in a listed government resettlement project denied that it was a resettlement project. Often no officials are at work. Resettlement beneficiaries report that Ministry staff are unhelpful and difficult to locate.

⁵⁷ The Permanent Technical Team (PTT) on Land Reform identified that directorates within the Ministry of Lands and Resettlement experience a variety of obstacles such as limited qualified staff and inadequate resources to carry out their tasks effectively. Without proper qualified staff, the PTT’s recommendations for an “Action Plan” for land reform for the next 15 years certainly cannot materialise (Government of Namibia, Ministry of Lands and Resettlement, “Strategic Options and Action Plan for Land Reform in Namibia”, November 2005, p. 41).

have not been budgeted for, and indeed, such additional expenditure could double or triple the cost of land reform.

B. Land reform programmes not under the ACLRA

The failure of the ACLRA programme for acquiring commercial farms for the resettlement of disadvantaged blacks becomes even more pronounced when compared to two other land reform programmes that do not involve the Government's purchase of commercial farms for resettlement purposes.

1. Resettlement on communal lands

During the period 1990-2002 when just over 9 000 people were resettled on commercial farms purchased by the Government, 27 942 (three times as many) were resettled on the communal lands, at a much lower cost because it was not necessary for the Government to purchase these lands.⁵⁸ Communal lands account for just under half of Namibia's land area, slightly less than the commercial farms. With a few exceptions, this land has always been occupied by blacks and was organised into black "homelands" in the apartheid era. More than half of Namibia's population still live in these communal areas. The Government takes the position that it holds title to these communal lands, in trust, for the people of Namibia.

From this, the Government takes the position that it can use "under-utilised" communal areas for resettlement purposes without paying compensation. Moreover, since the communal areas are disproportionately in the north and north-east, where there is more rain than in any other part of Namibia, there is the argument that these lands are more suited to resettlement than the white commercial farms. Thus, as resettlement here is far cheaper, it is an attractive alternative for the Ministry, but one that does not come without problems.

Firstly, the communal areas were divided into homelands belonging to the eight major tribal groups and administered by the traditional chiefs as tribal lands. To assign members of other tribal groups raises issues of tribal land ownership and of the authority of traditional chiefs in the communal areas. While the Government maintains that there is now "one Namibia" and these homelands are vestiges of apartheid, there are still strong tribal interests in these lands.⁵⁹ In addition, distinct tribal groups used the land differently, so, for example, resettling herding peoples among the San, traditionally a hunter-gatherer people, sets up a land conflict that didn't previously exist.⁶⁰ Perhaps more importantly, creating individually fenced grazing lands in the communal areas cuts local people off from land that they traditionally used for crop farming, communal grazing or hunting and gathering. Traditional governmental bodies in these areas are both fragile and undermined by the introduction of outsiders who are not subject to local government. In turn, this places more pressure on Namibian institutions that may not be readily available. For example, if traditional government breaks down, it is necessary to travel many miles to locate a police officer to enforce a grazing law, and neither the victims nor the police may have transport.

Secondly, while approximately 3 000 white farmers own around 5 000 commercial farms, the communal lands, occupied by over one million people, are seriously overcrowded in some areas. One might wonder why there is so much "under-utilised" land for the Government to

⁵⁸ Namibia Agricultural Union, "A Framework for Sustainable Land Use and Land Reform in Namibia", Windhoek, 2003, p. 83.

⁵⁹ Sidney L. Haring, "Indigenous Land Rights and Land Reform in Namibia", in Robert Hitchcock and Diana Vinding, *Indigenous Peoples' Rights in Southern Africa*, International Work Group for Indigenous Affairs (IWGIA), Copenhagen, 2004, pp. 63-81.

⁶⁰ Sidney L. Haring and Willem Odendaal, *"Our Land They Took": San Land Issues in Namibia*, Legal Assistance Centre, Windhoek, 2006.

claim in overcrowded communal areas. The reason is usually that the land is not very good and is used only seasonally for grazing or hunting and gathering. Were the Government to divide these lands up into farms of, say, 1 000 hectares, it would destroy the traditional lifestyle of those who have used the “under-utilised” land, and create a marginal farming operation that would further degrade land that is already dry and marginal for farming. In other words, the Government would be making the same mistake that the German and South African authorities made in allocating marginal land to white commercial farmers.⁶¹

Thirdly, the communal areas are both impoverished and remote from cities and markets, making both resettlement and farming there undesirable and difficult. One major obstacle to rural development in Namibia is transportation. Small farmers cannot afford vehicles, hence they cannot get to town for supplies or parts. Limited water resources constrain farming in most of Namibia.⁶² Water points, always expensive and difficult to maintain, break down and repairs are difficult or impossible under local conditions, requiring, for example, a repair technician or a farmer to travel hundreds of kilometres for parts.⁶³ Cash must be available to pay for either.

2. The Affirmative Action Loan Scheme

While the Government has acquired 209 farms for resettlement, individual black farmers have purchased 646 farms under the Affirmative Action Loan Scheme (AALS) since the scheme was started in 1992. This amounts to about 12% of all the previously white-owned commercial farms in the country – a significant redistribution of white-owned farms to black owners. Put another way, the AALS has accounted for transferring about four times the number of farms that the Ministry transferred into black ownership.

The Government-backed Affirmative Action Loan Scheme is defined in the Agricultural Bank Amendment Act 27 of 1991, while the Agricultural Bank Matters Amendment Act 15 of 1992 introduced the AALS, among other schemes. The main objective of the AALS is to resettle well-established and strong communal farmers on commercial farmland to minimise the pressure on grazing in communal areas.⁶⁴ The scheme is straightforward in its conception: blacks purchase farms on the open market, as would any other purchaser, but with the backing of Government-guaranteed loans at a subsidised rate. Applicants must have at least 150 head of cattle or small stock, and an operating capital of about N\$150 000. If these requirements are met, Agribank loans the farmer 85% of the farm’s purchase price.

Full-time farmers (349) are subsidised in their repayment schedule, paying 0% on the loan for the first 3 years, 2% for years 4-6, 4% for years 7-8 and 8% for year 9, until finally owing the full interest rate of 13.5% from year 10 onwards. Part-time farmers (274) pay a higher but still subsidised interest rate of 1% for years 1 to 3, 3% for years 4-6, 5% for years 7-8 and 9% for year 9, with the same full interest rate beginning in year 10. At the same time, the Government guarantees 35% of the loan, and will pay the downpayment if the applicant does not have the necessary funds. The purpose of this arrangement is to give the new farmer 10 years of low-interest payments to enable stocking of and reinvestment in the farm. The subsidy makes the option of buying and operating a farm an attractive one for blacks who have a good income.

⁶¹ Brigitte Lau and Peter Reiner, *100 Years of Agricultural Development in Namibia*, National Archives of Namibia, Windhoek, 1993. While initially there was a wide range of agricultural activity in Namibia, the period of South African administration was characterised by a policy of supporting cattle farming to the exclusion of all other forms of agriculture, which led to overgrazing.

⁶² Wolfgang Werner, “The Land Question in Namibia”, pp. 269-270.

⁶³ An advantage of the large white-owned commercial farms is that they are able to bore and maintain multiple water points, and hence to move cattle from one point to another in the event of drought. The divided farms redistributed to black commercial farmers typically have only one water point, thus these farmers are less able to survive drought. The classic history of water resource management in Namibia is Christel Stern and Brigitte Lau, *Namibian Water Resources and their Management*, National Archives of Namibia, Windhoek, 1990.

⁶⁴ Agricultural Bank Amendment Act 27 of 1991.

In Namibia's agrarian society, owning a farm is an attractive investment and a symbol of wealth and status.

Given that the AALS began in 1992, and the 10-year period of low-interest payments is still in effect on most farms, it is too early to determine whether the programme has succeeded in establishing efficient and profitable farms under black ownership. There is mounting evidence that the opposite is true, i.e. that the programme is failing because none of the farmers will be able to repay their loans once the subsidised period ends.⁶⁵ If this proves true, Agribank will repossess most of these farms soon after the 10-year grace period ends, unless the loans are refinanced or the subsidised period is extended,⁶⁶ which would be a major setback for the process of giving blacks ownership of commercial farms.

There are also rumours of rampant corruption in the AALS programme involving a collusion of white commercial farmers and Agribank. In a series of articles in *New Era*, the government-funded newspaper, a scheme is described wherein a prospective farm buyer inflates the value of the farm by at least 50% to raise the total amount of his loan, which is set at 85% of the inflated value.⁶⁷ Thus the loan amount is 50% higher. In addition, the Government's "guarantee" of 35% of the loan is in effect converted into an additional subsidy because the Government pays the downpayment at the inflated price. This inflated price is paid to a white farmer, who sells the land to a black farmer under the AALS. The black farmer, who will pay no interest on the loan for 3 years, and then a reduced interest, then leases the farm back to the white farmer for enough money to yield a profit, but at the subsidised loan rate. The white farmer thus continues to farm his former farm at a low lease payment, while the AALS subsidises both the white farmer's operation and the black owner's loan payments.

Obviously, the scheme collapses at the end of the subsidised period of 10 years, but since this period has not yet expired on most farms, what the outcome will be is unknown. In the scenario of collusion described above, it is possible that the black farmers will take over the operations now partly paid for by both the Government and the white farmers, but, given that the black farmers have not been operating the farms and thereby gaining farming experience, it is also possible that these operations will end up in default.

As the median age of white farmers is nearly 60 years, and with the threat of expropriation looming, the 10-year lease is an attractive option for most white farmers, especially after selling a farm at a 50% premium and investing the money in more lucrative ventures. The applicable farms are also likely to be free from the threat of expropriation, although in theory the Minister may expropriate *any* farm, including black-owned affirmative action scheme farms.

Finally, this leasing process has inflated the market value of farms at the same time that the Government is beginning to expropriate farms, paying "just compensation", therefore the AALS has a direct impact on expropriation, making it more expensive as well as accelerating the expenditure of state funds that could be used for land acquisition.

But this is not the only relationship prevailing between the AALS and the Ministry's land resettlement programme. To the extent that "land reform" means transferring land from white to black ownership, both of these schemes are "land reform" schemes. But to the extent that "land reform" involves poverty amelioration, the AALS is limited to middle-class or wealthy

⁶⁵ *New Era*, the official newspaper of SWAPO, published a detailed report on abuse in the AALS scheme in June 2007. This can only mean that high-level government officials are aware of the abuse, are determined to act, and are using the press to motivate public opinion – see Mbatjiua Ngavirue, "Affirmative Action Loan Scheme Chaotic: White Farmers Benefiting More Than Blacks", *New Era*, 1 June 2007, p. 1; "AA Farming Maths Don't Add Up", *New Era*, 4 June 2007, p. 3; "Financial Flimflam in Affirmative Action Loans", *New Era*, 6 June 2007, p. 4; and "Proposals for AA Loan Scheme but Few Solutions", *New Era*, 12 June 2007, p. 6.

⁶⁶ This scenario of mass foreclosure assumes that the Government will not intervene with various refinancing schemes, a political likelihood given the relationship of AALS farmers to the State, as well as the political liability of returning black farmlands to the bank.

⁶⁷ Mbatjiua Ngavirue, "Affirmative Action Loan Scheme Chaotic: White Farmers Benefiting More Than Blacks", *New Era*, 1 June 2007, p. 1.; "AA Farming Maths Don't Add Up", *New Era*, 4 June 2007, p. 3; "Financial Flimflam in Affirmative Action Loans", *New Era*, 6 June 2007, p. 4; "Proposals for AA Loan Scheme but Few Solutions", *New Era*, 12 June 2007, p. 6.

blacks with access to capital in a country where up to 40% of all blacks live at subsistence level. The AALS has cost the Government at least N\$100 million, and these contractual subsidies will continue for many years. This is not as much as the Government has spent on purchasing commercial farms for resettlement, so the AALS puts white farms in black hands at a lower cost than the resettlement programme, but accomplishes nothing for poverty amelioration. Prime Minister Nahas Angula has gone so far as to directly challenge the idea that the AALS amounts to a land redistribution programme:

“Are you sure those farms belong to black farmers or do they rather belong to Agribank or other banks? Are you sure that they paid the bank so that the land belongs to them? You see, this issue is debatable because you may be residing on a farm, but as long as you have not paid it off, it does not really belong to you but to the bank.”⁶⁸

A meaningful land reform programme in Namibia requires paying full attention to the dynamics of race and class. At the same time, if the critical variable in an agricultural scheme is the success of the farmer, then middle-class blacks with capital are more likely to succeed than poor blacks without capital. This is especially true of Namibia’s experienced large-scale black farmers, of whom there are hundreds. The only way to redress this imbalance is to design a programme to directly support poor people starting farming operations.

3. Farms purchased privately

About 180 blacks have purchased commercial farms on the open market without participating in the AALS, i.e. they paid with their own funds or with private, unguaranteed bank loans.⁶⁹ These private transactions are of no concern to the Government, but it has to be noted that a number of black businessmen and government officials have used their own resources to buy farms.⁷⁰ Ironically, it seems that even under apartheid, about 40 commercial farms in Namibia were owned by blacks. These private purchases are relevant to the land reform process only in that they increase the number of farms owned by blacks and reduce the number owned by whites. The number owned by blacks will increase as blacks become more prosperous in Namibian society, but, as with the AALS, as desirable as black farm ownership is, it will not help immediately to alleviate poverty.⁷¹

B. Who benefits from land reform?

The data above leaves no doubt that most of the Government’s land reform efforts have been designed to help middle-class or wealthy black Namibians to obtain subsidised loans to buy functioning farms. Not only has much of the money been directed to achieving this aim, but four times as many farms have been acquired under the AALS than by the Ministry of Lands and Resettlement. And, while resettlement farmers receive little or no support on their small farms,

⁶⁸ “The Basis of Land Reform is Social Justice”, *Insight*, August 2007, p. 28.

⁶⁹ Namibia Agricultural Union, “A Framework for Sustainable Land Use and Land Reform in Namibia”, Windhoek, 2003.

⁷⁰ With respect to the resettlement of the Vice-Dean of the Law Faculty at Marburg, we asked the Ministry if there were income ceilings on resettlement programmes and were assured that “top-ranking government officials earn too much to qualify for resettlement or AALS even if they were disadvantaged”, but then we asked what the upper income limit was, and no answer was forthcoming. It is clear, however, that Cabinet ministers generally have purchased farms without benefiting from either scheme.

⁷¹ These black-owned commercial farms are an indirect intervention for alleviating black poverty, as they still need farm workers. While some employ the previous workers, others move members of their extended families onto their farms and use them as farm workers. But, as these farms all had farm workers when they were purchased, the continued employment of farm workers, whoever they are, maintains the status quo in the calculus of overall poverty reduction.

the AALS farmers, with farms averaging at over 5 000 hectares, receive subsidised loans for 10 years to enable them to use their capital for equipment and stocking. This is a huge subsidy, and one without transparency in terms of who applies, who is awarded loans and what criteria are applied. Moreover, it is probably a continuing subsidy as the Government is likely to have to bail out many of the AALS farmers in the future.

One AALS applicant is well known, and it has been reported that the Minister of Lands and Resettlement, Jerry Ekandjo, is the biggest defaulter in the AALS, owing over N\$2 million.⁷² So, again, the question of transparency: to what extent have the AALS funds been used to enrich government ministers or party leaders? What is the purpose of the AALS with respect to government officials? What are the goals of the land reform programme?

While it is significant that existing commercial farms are being transferred from white to black ownership and continuing to operate successfully, this overlooks the entire range of poverty alleviation issues discussed at the 1991 Land Conference. Namibia has nearly a million black people living at or near subsistence level in rural areas, who do not have land, or “adequate land”, and farming is one viable way to give them a stake in the new Namibia. The existing land reform programme is presently inaccessible to them, and offers them little more than a corrugated-iron hut in a rural slum. A carefully planned and transparent land reform programme that actually provides workable land, some kind of legal title, housing, and financial and technical support, would give them both hope and delivery on 17 years of government promises of land reform.

⁷² “Ministers’ Awesome Agribank Arrears”, *The Windhoek Observer*, 10 June 2006.

IV. The Resettlement Programme Revisited

One way to conceptualise the relationship between expropriation and resettlement in the land reform process is to see it as a two-staged activity, always in motion and with the two stages overlapping. The first stage involves land acquisition: the Government must acquire land from the target group, i.e. the commercial farmers, mostly white, who hold almost 50% of the country's land. But acquiring land, by itself, only makes the Government a landowner. Land acquisition is the easy part of land reform – as difficult as expropriation may be.

The difficult part is the second stage: the resettlement of large numbers of disadvantaged blacks on new farms, often far from their former homes, and with a new occupation – often very different to their former occupations – as small-scale commercial farmers. These new farmers will build homes and sheds, fence their lands, start gardens, buy seed, tools, fertiliser and stock, breed their stock for improved productivity, sell stock for cash income, send their children to school, and repeat the process again and again. A farm is a small business, and a special type of business that takes in money only a few times each year, which requires good money management skills, savings and careful planning. This second stage of land reform may sound utopian, but it is absolutely realistic – most people in the world still make a living as small farmers. The difficulty is making it happen in Namibia.

The existing resettlement programme is aimed at five principal beneficiary categories, namely the San population, ex-combatants, displaced people, destitute and landless people, people with disabilities and people in overcrowded communal areas.⁷³ These target groups are further prioritised according to the following criteria:

- 1 = persons with no land, no income and no cattle
- 2 = persons with no land and no income, but with cattle
- 3 = persons with no land, but with income and cattle

These categories are based on those of the land reform programme, and overlap with them, but are more specific. Applicants apply to local branches of the Ministry where they are vetted, and then their names are forwarded to the Ministry in Windhoek. There is no transparency in the process and applicants do not know the status of their application until it is finally approved or rejected.

While there is no question that the Government can expropriate or purchase more land given the existing legal structure of the ACLRA, it is not obvious that the Government will be able to operationalise an effective resettlement programme. Currently, over 209 resettlement farms can be observed. Most are not doing very well; in fact it is not apparent that *any* are.⁷⁴

The first criticism is that the process of resettling people on these farms is inadequate. People are moved hundreds of miles and left to themselves, in tin shacks, without adequate training or support, in farming environments that are difficult at best. It must be remembered that white commercial farmers were heavily subsidised and supported by both the German and South African colonial governments. It takes both capital and sizeable numbers of livestock to weather Namibia's drought-prone climate, but resettled farmers have neither, and are left to an impoverished lifestyle which is often as bad as or worse than the one they had prior to

⁷³ Ministry of Lands, Resettlement and Rehabilitation, *Annual Report 2001*.

⁷⁴ There is a substantial body of literature on the resettlement process in Namibia because so much investment has gone into the process. See for example Sidney L. Haring and Willem Odendaal, *"One Day We Will All Be Equal": A Socio-Legal Perspective on the Namibian Land Reform and Resettlement Process*, Legal Assistance Centre, Windhoek, 2002.

joining the resettlement programme. Moreover, the general public in Namibia now knows this, and fewer people are applying for resettlement. Observers have consistently described the resettlement projects as rural slums.⁷⁵ Given that a major objective of the land reform programme is poverty alleviation, to continue leaving people in abject poverty has the effect of defeating that programme. There is evidence that most of the poor farmers in the communal areas as well as squatters in urban slums know this, and don't want to participate in the land reform programme.

A second criticism of the resettlement programme is that besides the squalid living conditions, the programme has not in fact dealt with the main objective of land reform: providing to poor people some form of legal title to land. Moving poor people from one state-owned farm to another, as in the Cleveland to Marburg move, does not accomplish land reform. The Ministry has not dealt with the difficult legal issues of vesting some form of land title in the "beneficiaries" of resettlement programmes. Since they have no definite legal status, they are unable to borrow money using their farms as collateral, and cannot pass their farms down to their children. This has led to an instability in the resettlement projects whereby beneficiaries abandon their small farms and others move in, creating the same kind of informal settlements (squatter camps) that exist all over the country.

Legal settlers and squatters live side by side, with no legal distinction between them, which effectively reduces the beneficiaries of the land reform process to living like squatters on what should be their own land. If the beneficiaries are to receive land – which is inherent in the definition of "land reform" – there must be a well-defined legal regime to transfer some right to the land from the original commercial farmer, through the Government, which takes legal title through expropriation or sale, to the resettled farmer. It is this legal title that confers on the new farmer some measure of property and status, and a chance to earn a living as a farmer. This legal title is an asset that, at the time title passes, immediately transforms the beneficiary's status from that of an impoverished person with nothing to that of a landowner and farmer who owns and operates a small farm.

The whole question of the legal title of the beneficiaries is still not fully resolved within the Ministry. The stated intent is that they be given some legal title, but the Ministry has been unwilling to discuss title deeds. Some sort of leasehold, perhaps for 99 years, has apparently been decided on, but none of the thousands of resettled beneficiaries have any legal title at this time. The short-term meaning of this is that the Government itself is the title holder of these lands, and the process of land reform as it stands means transferring land titles from individual commercial farmers to the Government.

While the long-term leasehold is an improvement over no legal interest at all, it does not answer the question of the long-term underlying title. What happens, for example, to the grandchildren of successful beneficiaries who manage to build their farming operations into substantial family farms? The long-term leasehold also creates an obvious inequity between the two land reform schemes: AALS farmers get title deeds and land that they can pass on to their children for generations, whereas beneficiaries of resettlement schemes do not. Inherited land represents one of the basic forms of inequality between classes, which is now being incorporated into a modern land reform process. One group is middle-class, while poor people predominate in the other, so class distinctions are being entrenched in land reform, and these will be exaggerated by inherited wealth for generations to come.

The same thing is true of differences in property size. If land equals wealth, then more land means more wealth. There is a reason for the basic farm unit in northern Namibia being 5 000 to 8 000 ha while in the south it is 15 000 ha. Following many years of farming experience, these are the unit sizes that have proven necessary for operational farms. Under the AALS scheme, a new black commercial farmer takes a farm of this size. Because it is under a 25-year mortgage,

⁷⁵ Ibid. See also James Suzman, *An Assessment of the Status of the San in Namibia*, report 4 of 5 in the series of reports on *A Regional Assessment of the Status of the San in Southern Africa*, Legal Assistance Centre, Windhoek, 2001, pp. 89-103.

he must maintain this size until the farm is profitable enough to pay the mortgage, and thus stabilises the basic commercial farm unit at the present size for another generation. But resettlement farms always consist of commercial farms that are broken up into smaller units – typically five to eight or a few more. Thus, a farm of 5 000 ha in the north is broken up into farms of about 1 000 ha, and a farm of 15 000 ha in the south is broken up into farms of about 3 000 ha. There are no hard-and-fast rules on this and the Ministry divides each farm on the farm's merits. Obviously, the beneficiary who gets the unit with the former owner's house and buildings gains a substantial benefit: a good house. The placement of water points governs the rest of the farm division: each unit must have water, and it is possible to divide the farm in such a way that one water point borders two or three units. The disadvantage of this practice is that the unit farms will be entirely dependent on this one water source, and if it dries up, the farms will be worthless. White commercial farms ordinarily have several water points, making them viable beyond the failure of a single point – a critical factor in a desert country. Bush encroachment also regulates the size of farm units by reducing the number of stock units that each hectare can carry.⁷⁶ Access to markets and services also limits farm size. There is disagreement over the minimum size possible for a small farm, but the suggestion that the minimum size requires 150 cattle would seem to require a minimum of close to 2 000 hectares – almost twice the current average size of resettlement farms. In other words, it seems that almost all of the resettlement farms are too small to be economically viable, and that resettlement farmers are being set up to fail.

The Cleveland experience may be all too typical. This was among the first farms purchased by the Government for resettlement purposes. In 2005, after more than 10 years of operation, this 5 000 ha farm was occupied by five small farmers, none of whom had succeeded beyond subsistence level. There are some 209 resettlement farms in Namibia. A few are little more than squatter camps, while others, like Cleveland, are small farms. It is evident that virtually none of the resettled people, or “beneficiaries” as they are called, are successful farmers. Some are doubtlessly living a comfortable subsistence life, but most are living on a pension, or have relatives as a source of money, while others work in towns and visit their resettlement farm only on weekends or once a month.⁷⁷ It is essential that the Ministry put sufficient resources into these small farms to make them viable farms that produce food for Namibia or cash in export dollars, and an income for their owners. If the resettlement schemes do not accomplish these things, they will not be sustained; the youth will leave them for slums and squatter camps near cities – precisely the problem that gave rise to these schemes in the first place.

A final set of issues relates to the social services that are needed following resettlement. Resettlement projects cause complete upheaval in the beneficiaries' social lives. Families are removed from their homes and moved to places far away, which causes social stress, family breakdown, drug and alcohol abuse and other forms of social disorganisation. The Ministry has lacked the resources or capacity to provide meaningful social services, so disorganisation and violence characterise many resettlement projects.

⁷⁶ J.N. de Klerk, *Bush Encroachment in Namibia*, Ministry of Environment and Tourism, Windhoek, 2004, pp. 58-67.

⁷⁷ These are observations of the research team after having visited many resettlement farms and projects over the years.

V. Farm Workers and Resettlement

Currently about 37 000 farm workers are employed on Namibia's commercial farms.⁷⁸ They have an average of over five dependants each, thus potentially they could displace 222 000 people in the course of the land reform process. This far exceeds the number of potential "beneficiaries". Obviously, the fact that the fate of farm workers was left out of the ACLRA requires remedial legislation. It is a difficult problem and one that can render land expropriation difficult or even impossible: the problem of unemployed and displaced farm workers roughly equals the scope of the problem of land reform. It is also closely related to the problem of poverty: farm workers are among the lowest-paid workers in Namibia and farm work is often the work of last resort.

Farm workers almost always live on the farm employing them, necessitated by the large size of the commercial farms and the long distances between them. The commercial farmers provide housing for their workers and a basic wage. Typically, farm workers live on the same farm for a long time, and many hail from families of farm workers, which usually means that they have no other home and no roots in other parts of Namibia, so if displaced, they have no 'place of refuge' to return to. Also, they don't have money, and the commercial farming sector is in decline, so there are few job opportunities on other farms. On average there are six farm workers on each farm, most living permanently with their families.⁷⁹

Simple arithmetic throws up the same problem as in the Marburg case: most commercial farms employ about the same number of people as can be resettled there, thus any 'average' resettlement process will move five "disadvantaged" families to a farm at the same time that it removes six farm workers and their families to homelessness and poverty. This is a zero sum game that renders this kind of resettlement process completely dysfunctional as a remedy for poverty, although it does serve an important political function in taking white-owned lands and giving them to black farmers. The process is also dysfunctional as a method of supporting black commercial farming operations because it is the farm workers on commercial farms rather than the newly resettled and often inexperienced farmers who have the farming expertise, so they are more likely to be able to operate the farms – provided that they have adequate support from the Government. If provision is made for resettling the farm workers as a legal condition for expropriating or purchasing a farm for resettlement, the latter issue will be irrelevant. There is no reason for farms to be expropriated without consideration for the farm workers present, who could be resettled on the expropriated farm, neighbouring farms or other appropriate farms.

But this simple model has two problems. Firstly, because the number of displaced farm workers roughly equals the number of resettled people, there is no net gain in the resettlement process. Each resettlement process displaces as many as it resettles. Secondly, farm workers do not want to be resettled. Most like the farms they are on, and also they have first-hand knowledge of the experience of resettled farmers. They have experienced the resettlement process negatively, and regard the resettlement farms as rural slums. Even as poorly paid farm workers, they have their basic needs met: they receive a regular salary, are allowed to have chickens, small stock and perhaps even cattle, and live in reasonably good housing. All of this disappears on a Namibian resettlement farm.

⁷⁸ Namibia Agricultural Union, "A Framework for Sustainable Land Use and Land Reform in Namibia", Windhoek, 2003, p. 23.

⁷⁹ Cons Karamata, *Farm Workers in Namibia: Living and Working Conditions*, Labour Resource and Research Institute, Windhoek, 2006.

When the agricultural economy was expanding, there was a constant demand for skilled farm workers, and therefore no significant unemployment problem among farm workers, but in the present declining agricultural market, farm workers are not in demand. As farmers scale back due to old age or fear of expropriation, they are already dismissing farm workers and sending them off to squatter camps and unemployment. The farm workers fear this, as they don't want to move to squatter camps near cities and they don't have the skills to compete in the urban job market.

There is another model of land reform, currently used in South Africa, that incorporates farm workers increasingly into management roles. They work with the commercial farmer,⁸⁰ while at the same time efforts are made to train them up to higher skill levels, with the intention that title to the farm could gradually be handed over to them. This process is funded by the Government under a land titling scheme. The end result is the same as that of the AALS, but this scheme has the advantages of: (1) putting the farm in the hands of its workers, who are trained to operate it; (2) reducing the level of failure by increasing skill levels; and (3) putting the farm in the hands of poor people, not in those of blacks with the necessary capital.⁸¹

There is a legal consideration here in addition to a social justice consideration. Forced resettlement raises human rights norms.⁸² While such resettlement is sometimes necessary in any large-scale development project, it must be conducted with careful regard for the lives of the people involved. This means, for example, that no one should be resettled in worse conditions than they faced prior to resettlement. As resettlement disrupts social relations and causes poverty, family disorganisation, drug and alcohol abuse, and unemployment, social measures must be taken to ameliorate such expected results. A visit to any resettlement project in Namibia reveals that this is not occurring even though high levels of social disorganisation are present.

⁸⁰ David Mayson, "Joint Ventures", Programme for Land and Agrarian Studies, University of the Western Cape, *Policy Brief 8*, February 2004.

⁸¹ Christiaan Keulder, Willem Odendaal and Johann Hamman, "The Impact of Land Reform on Farm Workers: A Report to the Permanent Technical Team on Land Reform", 2004.

⁸² Michael Cernea, "Re-examining 'Displacement': A Redefinition of Concepts in Development and Conservation Policies, in *Social Change*, Vol. 36, p. 1. The World Bank, a number of other international organisations and customary international law now recognise that forced resettlement violates basic human rights norms and requires careful measures to ameliorate resettlement to advance social development schemes, including, for example, dam building and land reform. See also World Bank, *Displacement and Resettlement Sourcebook*, Washington D.C., 2005.

VI. Conclusion and Recommendations

As this report goes to press, the Government is in the High Court defending its sixth, seventh and eighth land expropriations. There can be no question that there will not be more land expropriations, and accordingly more legal challenges. Undeniably there are legal problems with the existing provisions on expropriation in the Agricultural (Commercial) Land Reform Act of 1995, but they are well within the capacity of Namibia's legal system to resolve. Ultimately, land expropriation is legal under the Constitution.

Expropriation is also politically necessary for this multi-racial country's continued stability. Colonialism and apartheid have rendered this one of the most unequal societies in the world. The poor and black farmers of Namibia are entitled to some return of their lands as a fact of fundamental social justice. There is no quick or easy way to accomplish this; replacing one social order with another is a radical process.

At the current land reform pace of 1% of farms per year, the process will take 100 years to complete. The political reality of Namibian democracy is that the Government must meet a popular demand for land reform in a timely way: it cannot wait 100 years without losing its own legitimacy. While the AALS may solve a small part of the problem of black land ownership, it cannot be a substitute for land reform because it does nothing to ameliorate poverty or to meet the legitimate political demands of nearly one million poor blacks.

Only 209 out of a possible 6 000 have been acquired for land reform and resettlement purposes, at a cost of well over N\$200 million. It may be that a little over 9 000 persons are actually resettled on these farms, but the record-keeping is so poor that we cannot determine the actual number. Many have already left the rural poverty of the resettlement farms, and more leave every day. We do not doubt the honest intentions of the Ministry of Lands and Resettlement, nor does any responsible party oppose land reform in Namibia as a necessity to counter the legacy of colonialism and apartheid. Even the Namibia Agricultural Union, the organised voice of the commercial farmers, officially supports land reform. To oppose it would be both reactionary and politically suicidal. Sorting out all these matters is the role of law – a challenge that would strain the legal order of any country.

Recommendations

1. Expropriation is an appropriate, necessary and legal part of the land reform process.

At the same time, it is a difficult legal process that requires great care and transparency. Even the first expropriations have demonstrated the need for an evaluation and amendment of the Agricultural (Commercial) Land Reform Act of 1995. Changes are needed in the Act to provide at least for the following:

- (a) A transparent process of selection of farms for expropriation
- (b) A transparent process of allocating land to beneficiaries
- (c) A well-defined legal role for the Advisory Board
- (d) A simplified acquisition process
- (e) A comprehensive land reform plan against which the above can be measured.

2. To the extent that the land reform and expropriation processes are grounded in eradicating the vestiges of apartheid and racism, they have to be clearly connected to a programme of poverty eradication for Namibia's poorest people – a substantial proportion of the population. This is a difficult task, but it has to be accomplished if land

expropriation for such purpose is to succeed. The plan for the recommended poverty eradication programme would have to provide for, at least, empowerment and training, and substantial social and economic support. This effort would cost as much as or more than land acquisition itself, and would have to be covered by the land reform programme budget.

It follows from this that current eligibility standards are too vague and general, including, for example, most of Namibia's population. To the extent that resettlement is available to tens of thousands of middle-class government and private sector workers, the standards should be actively reviewed to answer the question of what purpose such resettlement serves. It is not poverty alleviation.

- 3. Land expropriation will have an adverse impact on the lives of farm workers and their families, who will be both displaced and impoverished if the programme proceeds as presently planned.** Specific legal provisions are needed to ensure that farm workers such as those on Marburg and Okorusu are not displaced by expropriation. The simplest legal requirement would be to include farm worker resettlement and support for their own farming initiatives as a component of each expropriation plan. Arguably, this is required by an emerging international common law concerning the rights of displaced and forcefully resettled persons, who are entitled to be resettled with dignity under conditions that are no worse than their previous living conditions.

As things stand, farm workers are not even assured of resettlement, but can apply and be listed at the bottom of the long and slow-moving list. But even prioritising displaced farm workers for resettlement is inadequate because they will still be displaced and forced into squatter camps as soon as expropriation occurs, and be left there for months while a secondary resettlement effort is made, so their lives will still be disrupted.

If the average commercial farm in Namibia has about six employees, together with their families, their numbers are daunting. It may be that the major beneficiaries of expropriation will have to be farm workers. This would change the function of land reform to an extent, but would have benefits. Most of the existing farm workers are impoverished Namibians who have the necessary farming expertise. In addition, since their labour added value to their respective farms and employers, granting them some priority right to expropriated farms would make the expropriation process more equitable.

- 4. While the Affirmative Action Loan Scheme is undeniably a good policy, especially to the extent that it encourages successful black commercial farmers to expand their operations and successful communal farmers to move to commercial lands, and frees communal lands for other black farmers, thereby taking resettlement pressure off the overcrowded communal areas, care must be taken to prevent abuse and corruption.** This not only threatens the entire AALS by destabilising it economically, but also it competes with the resettlement programme by drawing off the governmental support needed.

The evidence is mounting that the AALS is already subject to massive abuse, which suggests that an audit of the scheme must be undertaken immediately and appropriate changes must be made to the law. For example, if the AALS is being abused by white commercial farmers collusively selling their lands to black partners with the intent of leasing them back, such action could be outlawed by a legal requirement that the emergent black farmer must actually operate a farm of a defined standard.

In addition, as the AALS is being used to inflate land values, which adversely impacts on the resettlement programme by raising land prices, Agribank should be required both to adequately value the farms for which it grants loans, and to return to its role as guarantor of only a portion of the value set, no longer granting loans to make up the difference between the farm's inflated value and purchase price.

5. **There has to be complete transparency throughout the land reform, expropriation and resettlement processes.** Huge sums of money are involved in land reform in a new democracy and relatively poor country. Land reform creates new wealth: giving land to poor people means giving them money. Buying land at a fair market price from commercial farmers is also giving them money. Any process of redistributing wealth is subject to both conflict and corruption. One remedy is complete transparency, so that there can be open discussion of who is benefiting and why. Another remedy is vigorous prosecution of those who attempt to enrich themselves by taking advantage of their official positions or of government benefits. One final suggestion is that the Office of the Ombudsman should directly and publicly open a full-time land reform bureau that would develop expertise and monitor the transparency of the land reform process.

6. **As part of the land reform and expropriation processes, Namibia has to reconceptualise its agrarian model.** The average size of 8 000 hectares for a cattle farm is as much a product of the apartheid era as racism and poverty, and does not benefit the needs of African farmers, nor of the modern Namibian nation, nor does it serve as an effective basis for a programme of poverty alleviation. Moreover, dividing large farms into units of one-fifth to one-seventh the size, being the typical resettlement farm size, not only applies the failed colonial model but further weakens it, in that farms of such small sizes cannot succeed. Namibia's land reform programme, in other words, is setting impoverished black farmers up to fail.

Namibia needs its own 'green revolution' in terms of rethinking the role of diversified small-scale black commercial farmers. Land reform has to be restructured to accord with the new models of farming. The country's agricultural colleges are colonial-era institutions still teaching curricula that overemphasise large farms for raising cattle. This should be rectified by introducing new farming models such as those for crop cultivation and tropical agriculture.

The new agrarian model must also restore the degraded Namibian environment and combat desertification. The apartheid-era agricultural regime encouraged overgrazing that led to increased brush growth and erosion, and reduced the quality of much agricultural land. In addition, water resources have been overused and strained. The expropriation and redistribution of degraded land is not a sound basis for a land reform programme. Large numbers of rural blacks could be employed to restore the applicable lands and improve access to water, and new black farmers could be given subsidies and technical support for restoring their land.

7. **Related to all the recommendations above is the recognition that land reform and land expropriation are not ends in themselves, but are just the first step in the process of creating a new class of black commercial farmers and transforming impoverished rural blacks into productive citizens, able to raise and send their children to school, and to operate successful farms that can feed the growing Namibian population. All of this will take substantial governmental support.** Improved and appropriate agricultural training must be provided. Loans must be available to new farmers for stock, seed, fertiliser and living expenses while they improve their farms. Government services must be extended into rural areas. Transportation must be improved. Health clinics must be available.

This would cost as much or even more than land acquisition will initially cost, and the structure and budget of the Ministry of Lands and Resettlement should begin to reflect this reality. The Ministry has to put more time and money into the 209 resettlement farms that it presently operates, and be more transparent about the development occurring on these farms.

While some thought has been given to the legal title to be granted to "beneficiaries" of resettlement, and the Government apparently intends to grant 99-year leaseholds, to date no title has been granted. Since nothing has yet occurred on this front, it seems appropriate

to re-evaluate the entire process. As illustrated by the removal of the resettled farmers from Cleveland to Marburg for the creation of a cement factory that has not been built, resettled farmers need a legal form of land tenure to help ensure their success as small farmers. While the 99-year leasehold is such a tenure, whether it is the most appropriate one for encouraging successful farming activity is uncertain.

The 99-year leasehold form of tenure would ultimately place virtually every farm in the country under state ownership, with the Government able to reallocate any farm on any political basis of its choosing every 99 years. While black farmers would initially be able to borrow against this leasehold to improve their farms and leave them to their children, this opportunity would be eroded with successive tenancies as the 99-year period grows shorter. As farming is a long-term undertaking, children within just one or two generations would have to plan their farming operations with the lease expiry in mind, and incentives to make improvements would be reduced as their ability to borrow against a successively shorter lease terms declines. Furthermore, the power of the Government over the farmers would increase over the lease term.

More thought must be given to the issue of legal title for emergent black farmers. One obvious option is to grant them full ownership title – the same title that white commercial farmers have always held, though perhaps after a substantial period of successful farming under a leasehold, for example 20 years.

8. **Finally, there can be no question that land expropriation, as a key element of a land reform programme, is ultimately a political question.** And, as a political question, land expropriation is also a critical element of the Government's policy on poverty alleviation. The problem of urban slums is linked to land reform in that poor people displaced from rural areas flock to squatter camps on the outskirts of cities, but slums are also a separate issue requiring its own policies and resources.

The speed of land reform has been an issue in Namibia since independence. If the combination of the AALS and the Government's resettlement scheme has placed 800 farms in black hands in the 17 years since independence, this is about 12% of all farms, or less than 1% per year, so the process will take over 100 years to complete, depending on what proportion of white commercial farms the Government plans to place in black hands before deeming the process complete. In the same 17 years, only about 209 farms, or hardly 3% of all commercial farms, have been resettled by poor people. The infrastructure on these 209 farms is inadequate and the land reform process there can only be said to have been started but not completed. As the Prime Minister himself has pointed out, the remaining hundreds of farms in the AALS now really belong to the banks and not yet to black farmers, so we cannot say how effective this scheme will ultimately be, nor how many farms are actually in black hands. If anything, the failure of the AALS will put more pressure on expropriation as the market economy fails to resolve the "land question".

In the context of colonialism, racism and apartheid, the pace of land reform has been slow. Land expropriation has only just begun, and is progressing at a slow pace. If both the "willing buyer / willing seller" scheme and the AALS have faltered, the pace of expropriation can be expected to increase. The Government has repeatedly declared its commitment to land reform, even in the face of its slow pace of achieving it.

In the long term, it is unclear how substantial the land reform issue really is in the context of poverty alleviation in an increasingly urbanised Namibia. It has been suggested that one reason for the slow progress in land reform is that the Government, increasingly responsive to an urban base, is not fully committed to it, but since land reform has always been central to the SWAPO platform and is still popular with the ruling party's rural support base, the Government cannot abandon this reform. Related to this, it is not known to what extent Namibia's poor really want small farms as opposed to urban jobs. Farming is a hard way to make a living in most countries, especially in Africa and the Third World. At the same

time, the popular demand for the expropriation of white-owned commercial farms is ever present; it has deep roots in Namibia's political culture, and is a powerful symbolic issue too as the expansive white commercial farms in the heart of the country remain a highly visible symbol of white rule and white wealth, especially to black people still living in poverty.

Namibia has some difficult political choices to make. Land expropriation looms large as one choice. Given the fundamental place of agriculture at the centre of Namibia's economic and social order, it is not feasible to continue with the present system of white commercial farms dominating the Namibian heartland.

The speed of land reform now depends largely on an increased pace of expropriation. In turn, an increased pace of expropriation probably depends on public confidence that land reform is being successfully implemented at grassroots level, i.e. that small black-owned farms are being created successfully. All of these factors are complex and interconnected, hence a successful land reform programme is a great legal and political achievement. But, to return to our starting point, the land expropriation process needs to be more carefully planned and implemented.

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