

Remarks at Namibian Land Conference

Tembeka Ngcukaitobi – 5 October 2018

In the streets of Johannesburg, Harare, Windhoek, there is only one cry. Land. Land. Land. The land that was lost, together with citizenship, under colonial conquest. Our ancestors fought for this land. But in the pitiful, brutal and genocidal wars of colonial occupation, the land was lost. Here, the story of Lothar Von Trotha, a general of the Second Reich, who announced the ethnic cleansing of the Herero and Nama by stating 'I destroy the African tribes with streams of blood ... Only following this cleansing can something new emerge, which will remain' is known and remembered. In my own country, we recall the words of Harry Smith who regarded the 'extermination' of the Xhosa of the Eastern Cape as 'the only principle to guide us'. Boundaries between and within African states were constructed to suit the imperial wishes of Europe. Foreign languages were imposed throughout the continent. Families, clans and communities were split down the middle by the random selection of borders.

When the Union Government inherited this land in 1915, it exacerbated the suffering. When it created native reserves it entrenched the dispossession and converted native people into wage labourers to provide labour for the emerging settler agriculture. Arbitrary taxes were imposed on the native population to discourage farming of any scale. The reserves were deliberately designed to disrupt native life in social and economic terms. Families were broken down, as the Union administrators attempted to replicate the native labour system applicable in the Transvaal. By 1902, it will be remembered, South Africa had passed its own Native Reserves Act, which compelled every native person to reside in the native areas, and to visit the cities as wage labourers. Enforcement was through the pass laws. The contract labour system produced conditions comparable to indentured labour system. Punishment forms, such as whipping were common place. The Transvaal mining economy drew labourers from the whole of the region presently known as South Africa. Hence the definition of "native" in the Native Reserves Act included Damaras, Hottentots, Bushman, and any aboriginal people of South and Central Africa.

Since the crushing of the Nama and Herero in 1905, it had become illegal for native people to own their own land, in their own name. After South Africa obtained *de jure* and *de facto* control over the territory of South West Africa, it simply transposed the terms of the Native Land Act of 1913 herein, confining native people into native reserves and carving up the country into areas of European Settlement and Native Settlement. 17 native reserves were created. The policy of apartheid began formally in 1948. Its sponsors called it 'separate development'. It perpetrated racial segregation and the balkanization of the country into separate homelands, a process which was completed by 1963, with the grant of self-government to the Transkei, the first Bantustan. In South West Africa, the same goals were achieved when the so-called Odendaal Commission completed its work in the same year, 1963. This Commission reduced the 17 reserves into seven ethnic homelands. In my country we had 10 ethnic homelands. The lie of course was that these homelands would allow separate development, along ethnic lines, when considering the nature of the land allocated for these purposes. The land allocated in Transkei and Ciskei was the most arid and plainly unsuitable for agriculture and therefore,

development. The same occurred here. Arid and semi-arid land was allocated to the native people.

The struggle for freedom was therefore the struggle for land. The freedom of the native people of Namibia was the freedom of the native people of South Africa. In the 1980s apartheid experienced internal raptures and could not withstand external pressures from Swapo, the ANC and PAC, and crashed. A new promise for the return of the land emerged. Now, with new conditions, no longer the same as those that underpinned the struggle for freedom, a new struggle began. It would be underpinned by the principle of constitutional supremacy. Zimbabwe, in 1979, negotiated its independence at Lancaster House. A contentious clause in those negotiations was the property clause. Should the land taken from the native people during colonialism be returned? And if so, on what conditions. Lancaster produced a constitution, which contained four elements.

- Every person will be protected from having his property compulsorily acquired.
- The exception was that that the state could take property by compulsion in the interests of defence, public safety, public order, public morality, public

health, town and country planning, the development or **utilisation of that or other property in such a manner as to promote the public benefit or, in the case of under- utilised land, settlement of land for agricultural purposes.**

- When property is wanted for one of these purposes, its acquisition will be lawful only on condition that the law provides for **the prompt payment of adequate compensation** and, where the acquisition is contested, that a court order is obtained.
- A person whose property is so acquired will be guaranteed the right of access to the High Court to determine the amount of compensation.

Thus, from the onset, the constitutional property clause would allow the retention of land acquired – included in the definition of property – under colonialism. However, the democratic state would be granted the power to force the taking of land it requires it for the public benefit, which included the resettlement of persons without land. By the year 2000, after 20 years of trial and error, the model had failed, with the failure of central government to use the

legal tools at its disposal. Yet the draft property clause proposals of the 2000 version of the Zanu-PF constitution contained the exact same wording as the failed Lancaster agreement. For political reasons, land reform could no longer be guaranteed by the rule of law. Judges were instructed to resign, others fled the country and those who remained were openly intimidated. The rule of the strong had displaced the rule of law. Those with access to state power, institutions of the army shared the spoils. We all whistled in amazement at the implosion in the name of the revolution. Today, announcements are being made about the return to the status *quo ante*. But everyone knows it is impossible to put the genie back into the bottle. Zimbabwe's land reform collapsed under the weight of market fundamentalism, disrespect of the rule of law, corruption and bureaucratic inefficiency. Today, we should help Zimbabwe must forge a way forward, recalibrate its commitment to the rule of law, restore the hope of its citizens and rebuild its economy from the ruins.

Zimbabwe's model to constitutional property was followed by Namibia, some 19 years after Lancaster. Article 16 of the Namibian constitution guaranteed existing property relations. The land relations created under

colonialism and consolidated by apartheid were left intact. Every person will be protected from having his property compulsorily acquired, the constitution provided. The exception was when the acquisition is in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development or utilisation of that or other property in such a manner as to promote the public benefit or, in the case of under-utilised land, settlement of land for agricultural purposes. When property is wanted for one of these purposes, its acquisition will be lawful only on condition that the law provides for the prompt payment of adequate compensation and, where the acquisition is contested, that a court order is obtained. A person whose property is so acquired will be guaranteed the right of access to the High Court to determine the amount of compensation. Land acquired during colonialism and apartheid was constitutionally guaranteed. It did not matter what type of land it was. Ancestral or not. Existing ownership was considered lawful. Like the Zimbabwe state, the Namibian state was granted the power of compulsory taking of the land. This time, the concept was called 'expropriation'. Unlike the Zimbabwean constitution, in Namibia, the state was not required to pay

the price of the land or adequate compensation in the case of expropriation – instead it was required to compensate the owner, based on what is ‘just’.

The four elements related to property, which first appeared in the Zimbabwe, now found their way into the Namibian constitution. Within four years after Namibia’s independence, South Africa entered the family of free African states. Property, like in Zimbabwe and Namibia, was a major sticking point. A formula, borrowed from Zimbabwe and Namibia, was applied. Property acquired in colonialism and apartheid would not be uprooted at once. Instead, the state would have the power to expropriate for resettlement or land reform, subject to the payment of just and equitable compensation. More than 23 years after the attainment of freedom in South Africa, the dream of freedom has yet to be realized. The return of the land of African people remains further and further away. Hence, today, a new reality is emerging, not controlled from the centre, but springing from the ground, asking the difficult questions of the unfinished business of the revolution. Until and unless there is a fundamental shift in the existing property relations, it is impossible to speak of freedom, of equality and of dignity, values that we cherish

in our constitutional settlement. Hence in my country, the notion of expropriation without compensation has gained firm ground.

Perhaps Namibia got the constitutional scheme and its enforcement right. But, the reality of the situation has been brought home in the time I have spent listening at the commissions in the past 2 days. Ancestral lands are yet to return. Quibbles about definitions of who is entitled to what dominate our discourses. Like in my country, commercial agricultural land remains in the hands of the few. Like in South Africa, many are unable to enter the property market through lack of access to finance. In sum millions starve, while a fortunate few relish the wealth from the land of the country. The guarantee in Article 16(1) that all Namibians have the right to 'acquire' and 'own' property rings hollow to many. I am now convinced that contrary to external appearances, the land question in Namibia, remains an unresolved one. History has imposed on this generation the duty to face the question.

But how do we do this? The land surface that was taken away remains the same. Yet the number of people inhabiting the land has multiplied over the years. The

cultural, language and even race complexions of the people from whom the land was taken have evolved over time.

In the remaining minutes of my time, I want to sketch a few avenues which I believe are worthy of consideration, when we take the next steps forward.

- The first is the examination of how the land will be acquired. I have referred to the complexities of constitutional property protections and their restrictive design. Yet your own constitution is potentially an expansive, radical and revolutionary in its character. It contains an explicit power to expropriate 'in the public interest'. When the power is used, the constitution gives no guarantee that the owner will receive 'market based' price or value for the land. It simply talks of 'just compensation'. The shift from 'value' to 'compensation' is significant, and reflective of the fact that non-financial forms of compensation are within the scope of consideration.
- Second, if expropriation must be considered to be a key mechanism for the acquisition of land, the notion of 'just' compensation comes up for debate.

Just compensation, which has not been defined, is based on the idea of justice. Expropriation in the public interest is not intended to cause injustice, but to reverse an injustice of history. Despite the existence of a permissive constitution, Namibia has followed the models of South Africa and the state of Zimbabwe. By hallowing their constitutions instead of providing them concrete and tangible meanings consistent with the anti-colonial aspirations of their people, both those countries, have hollowed the constitutions out of meaning. My argument is that it is time to take the Constitution off the shelf. Dust it off. And put it on the land to work. Defining the content of 'just compensation' requires imagination not to resolve past questions, but today's questions. I can offer a few clues of the factors which may be considered to arrive at a figure: how the land was acquired, what investment was made by the state, what input was made by the owner, is the land required for speculation or is being used productively, does the owner have alternative land?

- Third, many candidates present themselves for expropriation: vacant land, underutilized land, abandoned land, land held by absentee landlords, land held for speculation and illegally acquired land.
- The fourth is taking ancestral land seriously. The meaning of this term need not be contentious. In many instances, we can work out with relative certainty what areas were occupied by what groups at the time of colonial conquest. In my own country, the topic of tribal title has been used as an instrument to open up ethnic cleavages, a clever tactic of the apartheid and colonial state. We should resist this. Land is important. But after the land, we still want the country.
- Fifth, working out who was where need not have the same utilitarian function of resettlement in those same areas. The legitimacy of the claim to a particular piece of ground should not be conflated with the entitlement to that land. Tribal, ethnic or ancestral claims must yield necessarily to the national interest. Samora Machel reminded us eloquently ‘for the nation to live, the tribe must die’.

The issue of ancestral claims to the land, however remains of significance. The focal point, as always, is the reversal of the obliteration of history, of memory of existence of a people. The restoration of these precepts of existence is sometimes emotional, it is often spiritual, it is often about a sense of belonging. Changing of names, for instance, to reflect the richness of the cultural inheritance of Namibia could be a major step forward. And so will be the symbolism of passing a law that entitles everyone access to their sites of spiritual significance, such as graves, without any payment of compensation to the present owners of the land where those sites are located. So if land cannot contribute to nation-building, it has not served its purpose. If the return of the land simply results in the splitting of the nation, then how different are we to those who came to this continent by boat, to pillage and to plunder it?

- Sixth, the debate about expropriation without compensation should not be closed altogether. It is happening in South Africa. It may soon be law there. If we close it in Namibia, it will not be killed,

but pushed underground. Like water, the debate will simply follow the path of least resistance and inevitably emerge again in a new form. In Europe, it has long been the law that expropriation without compensation is not unlawful, *per se*. But it should not impose an excessive burden on the individuals. Therefore, a deprivation of property without compensation can only be justifiable under exceptional circumstances.

- Seven, it is now plain for everybody to see that land reform in Zimbabwe enriched the political elite at the expense of the nation. Those with access to the machinery of state were the clear winners who took all, until there was an internal rapture about sharing the spoils of land looting. The South African land reform programme is challenged by crony capitalism which will further marginalize true subaltern interests. I have no doubt that the risk of land reform turning into an enrichment scheme by the politically connected is present here. We cannot accept a narrow nationalistic discourse, underpinned by ethnic chauvinism. We need a truly progressive land

reform, which privileges the interests of the marginalized. To achieve this we should not be happy with the rhetoric that uses the name of 'our people'. We should be demanding greater transparency and accountability. We should ask who has benefitted from farm allocation, which criteria were used, how much was paid, where did the money go? In as much as land reform must address the national question, it should recognize that class remains one of the major threats to democracy. The big question therefore, remains: what is the class agenda of land reform.

- Eight, addressing the class question challenges us to face the issue of the ethics that drive land reform. Writing in *The Wretched of the Earth*, in the Chapter entitled 'Pitfalls of National Consciousness' Frantz Fanon, once pointed to the paradox of freedom – having defeated the French, the new Algerians had adopted the morally corrupt ways of the French. In South Africa we make the argument explicit: now that we have defeated the whites, have we not adopted their morally corrupt

ways? This level of self-introspection is as important for Namibia, as it is for South Africa.

As I conclude, I have tried to make the case that the question of land is no longer a national, or local question. In historical terms, it has always been an African question. We need a regional, and a Pan-African approach to it.

But we should not slip into the belief that land reform is a destination. I see it as a way of being in the world: a way of imagining the world. What have identified this week as impediments can also be viewed as enabling conditions for a fundamental and sustainable shift to a new order. For as long as land disparity exists there will be a drive to overcome it, 'there will be a tension that keeps alive the idea that things can be different. When all the challenges are gone, that is when the real danger arises. That is when we slip into a useless self-congratulatory complacency, a misplaced euphoria that where we are now is the only place to be. That is when we stop dreaming, imagining and planning that things could be different, could be better.'¹

¹ Words borrowed from Pius Langa – see speech on transformative adjudication.

In forging ahead with the struggle for a just society, we always look back to understand the present. We remember the words of the novelist, William Faulkner *in Requiem for a Nun* (1951) who writes '*The past is not dead. In fact, it's not even past.*' The cries of Soweto, of Langa, of Katutura must reverberate with us once again. We should remember why this all started. And here, I can do no better than to cite words which will be familiar to you.

Namibia, land of the brave

Freedom fight we have won

Glory to their bravery

Whose blood waters our freedom