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TRAC PAPER TO SASH CONFERENCE '92

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"WE DEMAND FAIR REDISTRIBUTION OF THIS COUNTRY'S LAND" THE STRUGGLE FOR THE RESTORATION OF LAND

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**"WE DEMAND FAIR REDISTRIBUTION OF THIS COUNTRY'S LAND"
THE STRUGGLE FOR THE RESTORATION OF LAND¹**

WHY IS RESTORATION OF LAND AN IMPORTANT ISSUE NOW?

i) Restoration is a continuation of the struggle against forced removals, for the undoing of the legacy of apartheid

The characteristic pattern of forced removal was either to move people against their will, or deceive them into moving by making promises which were invariably broken later. Between 1960 and 1982, over 614 000 black people were removed from 'black spots' in terms of the National Party's homeland consolidation policy. Many of these people owned their land by holding title deeds, while others although without title, had been residing on land for decades. Communities were removed to barren resettlement areas which were part of or later incorporated into the bantustans. Yet over the years since the removal many communities have never lost their desire to rebuild their homes and lives by going back to their land. Communities have continued to bury their dead on their original land and regularly visit the graves of their ancestors buried there.

Many communities have tried by all legal means to return. They have been prepared to negotiate with a succession of Government officials about their return. But eventually they have become frustrated by long delays or simple Government refusal to discuss the issues. After trying the road of lawyers, petitions and innumerable requests for meetings, they now feel that in the present climate of negotiations, their demands, too, should receive speedy attention. The sheer economic pressure to escape the harsh conditions of the resettlement areas gives their desire to return to the land they used to farm greater urgency. No longer prepared to wait, they often take a well-considered decision that their only option is to re-occupy their land. Thus for TRAC, the struggle for restoration follows directly from our history of resistance to forced removals.

ii) Restoration is a crucial national issue

The restoration campaign has grown into a crucial national campaign. Two national community workshops were held in 1991, the second attended by 20 communities from Natal, Border, Eastern Cape, Western Cape, Northern Cape and Transvaal. These are only some of the communities who may lay claim to their land. Beyond the geographical spread of communities seeking restoration, the issue is one of national importance because it has the potential to influence the future of land reform in South Africa in a decisive manner. The campaign for restoration is the

1. Demand from the resolutions adopted by 13 communities at the end of a national community workshop on restoration of land, 24th March 1991.

most public debate about the land question, next to the debate on the future of the TBVC homelands.

The current legal and political context influences the decision to move back. When the Government started talking about lifting the racial provisions of the Land Acts and engaging in some kind of land reform, there were high hopes that some of the worst wrongs that apartheid inflicted on blacks who owned and occupied land in "white" South Africa would be addressed. These hopes were rudely dashed in the Government's White Paper, published in March 1991.

White Right-Wingers, too, have made sure that the land issue is a high on the political agenda. The attack by white farmers on the Goedgevonden returnees in May last year made clear that the ultra-right is willing to resort to violence to protect their vested interests in land. The clashes between De Klerk and the AWB in Goedgevonden later that month were prompted not least by the conflict around land.

iii) Restoration has implications for land reform

Whether the principle of restoration is accepted will determine the future of land reform in South Africa. This in turn will be a critical factor in determining the shape of the agricultural economy of a future South Africa. The importance of food production cannot be underestimated; think for example of the demand for cheap food by urban people. The rural economy will also be critical in addressing major national issues of housing and unemployment. If people do not find space to live and jobs in the rural areas, the pressure on the cities will increase.

iv) Restoration is an issue which affects the question of property

The issue of restoration is contentious between NP and AWB, as well as between the DP and the ANC. It is contentious between those who have land and those who do not. It is perhaps the most emotive political issue across the political spectrum, because it is a question touching wealth, security and property. The issues of property rights, access to property, security of tenure, different traditions of ownership -- all these are raised by the question of restoration.

THE CONTOURS OF THE STRUGGLE FOR LAND RESTORATION

i) Ongoing attempts to return to the land

Communities who suffered forced removals tend not to be passive victims. The removals were resisted fiercely, and when people were moved, many of them tried all means to return to their land. During 1991 the Mogopa community was given *de facto* permission to stay on their land. The Goedgevonden people successfully occupied their land in April 1991. Other communities have tried to return, but have been arrested and stopped from getting onto their land. The

Barolong people near Machaviestad were arrested for trespass in December 1990. The Mfengus in the Eastern Cape are still seeking ways to return to their land, which has since been sold to white farmers. Numerous Natal communities, including Charlestown, Crimen have been stopped by NPA officials from returning.

ii) Government initiatives

Towards the end of 1990, it became clear that the Government was intending to repeal the Land Acts of 1913 and 1936. This would realize one of the most consistent demands of the opponents of apartheid. What was much less clear, however, was what would replace the racist legislation, and what impact legal changes would have on the reality of unjust land distribution.

In March 1991, the Government published a White Paper on Land Reform, accompanied by five Bills to make new arrangements for land affairs. The repeal of racist legislation was a major victory for the majority of South Africa's people.

The negative aspects, however, overshadowed this victory. The White Paper unequivocally rejected restoration of land to the victims of forced removals. It claimed that it was "impractical" and "difficult". It made no mention of a Land Claims Court, or any other mechanism by which land claims could be settled. The only way in which black people are going to get land is by paying market prices.

After years of destitution caused by forced removals, very few black communities are in a position to buy back the land. What is more, they do not see why they should buy land which they regard as having been stolen from them by the Government. As with so many other reforms, the Government was doing the minimum necessary to placate overseas opinion (in particular the EC, where sanctions were being discussed at the time) and to create the illusion of change, without conceding anything meaningful.

iii) The answer from communities: land occupations

Given the Government's refusal to address restoration, many communities felt that their only chance was to occupy the land and make their claim known in this way.

Goedgevonden

The community of Goedgevonden was removed in 1978 from trust land² which they had occupied for 31 years, and incorporated into Bop against their will in 1984. Thirteen years of

2. Trust land belonging to the South African Development Trust (SADT), which was created in 1936 to hold land intended for incorporation into the homelands.

petitioning the Government to talk to them about their plight fell on deaf ears. On 9th April 1991, 450 members of the community reoccupied Goedgevonden. A week later, they were attacked by right-wing farmers in the area. They then lost a court case brought against them by the Government together with seven white farmers. They were granted leave to appeal against the decision, which opened up space for negotiations.

The resolution of the Goedgevonden crisis has become a major political issue. The Government has established a "task group" to seek a resolution to the situation. It wants to solve the problem on a technicist basis. The Government officials see land use and agricultural potential as the basis on which to resolve the problem. While the good use of agricultural land is an important consideration, the roots of the conflict are obviously political, and the only just solution will be one which reverses the injustice done to the Goedgevonden people.

Such a solution is possible. The land is owned by the State, and could be returned after the termination of the temporary leases of the white farmers.³ The farmers concerned all have their own farms, and only use Goedgevonden for additional grazing. The community used the land productively for thirty-one years, and feel they could do so again. All they need is for the land which apartheid denied them to be returned.

iv) The battle for Land Claims Court

One of the major demands of rural communities in response to the White Paper has been that a mechanism should be created to hear the land claims of those disadvantaged by apartheid policies, and to adjudicate conflicting land claims. A Land Claims Court was suggested. The Government's initial White Paper completely ignored this suggestion. In lobbying around the Bills which were to replace the Land Acts, substantial pressure was exerted on Government to accede to this demand. The response was once again a typical half-hearted compromise.

The Government announced an Advisory Commission on Land Allocation (ACLA). This Commission has no decision-making powers; and it is appointed by the State President rather than elected. The Commission will be about

"the allocation of undeveloped land State land ... In other words, this is not about claims of right: it is about State largesse. Rights do not enter into it at all."⁴

The regional and national community workshops held in August and September 1991 focused on

3. The Government leases Goedgevonden to the white farmers on leases which can be terminated with one month's notice, at 17c per hectare.

4. Geoff Budlender, 1991, 'Notes on a process for land claims', paper to NADEL conference 23/8/91, p.2. This paper is recommended for a concise, clear exposition of the questions surrounding the Advisory Commission.

the proposed ACLA. The communities outlined clear principles on which an acceptable commission should be based:

1. It must be based on land rights, not the discretion of the State;
2. The Commission must be legitimate, and therefore cannot consist of the State President's appointees;
3. The Commission must begin by accepting the principle of restoration;
4. The Commission must have the power to make decisions, in particular to make awards (whether in the form of land, money or divided ownership).

To add insult to injury, the Government rejected the names put forward by the 20 restoration communities to sit on the Commission. After several meetings between community representatives and the then Minister of Development Aid Jacob de Villiers, the communities identified 5 people who would have their confidence if they were appointed. Not a single one of them was included. When questioned on this issue by Adrian Steed on the Agenda programme, Minister de Villiers was still vague: all he would commit himself to was that "after cases have been defined and substantiated, the Advisory Commission will give its advice to the State President".⁵

Much more work is needed to make a detailed, practicable proposal as to how a Land Claims Court should be set up. The Centre for Applied Legal Studies at Wits has begun some research. Intensive lobbying will be required to persuade the Government to accept a more powerful mechanism than an Advisory Commission.

REFLECTING ON THE STRUGGLE FOR THE RESTORATION OF LAND

The struggle for re-occupation is occurring against a background of land dispossession. The land question in South Africa is inextricably linked to political and economic considerations. In turn, communities' return to their land can change economic realities, and also challenge Western conceptions of land ownership and productive agriculture.

i) Different concepts of land

The struggle for the land is not *only* to gain political and economic power, it is also about establishing a different **understanding** of the land. Many claims to the land are based on title deeds, but as often they are not. There are other values in African society which give rise to claims to the land.

5. Transcript of Agenda programme, screened 7/1/92.

African people claim the land because they were born on it, because their ancestors are buried there, because they have farmed the land productively for many years and they know they can farm it well again in future, because they know this particular piece of land well and regard it as their home, and because the wrong that was done to them in the name of apartheid ideology must be reversed.⁶ These factors give every person the right to access to land, but do not make them owners of the land in the Western sense, i.e. that you have an absolute right to do anything with your property, including selling it.

Black rural communities are not saying that they want all the land for themselves, and will leave nothing for white farmers. Despite three centuries of dispossession, black farmers are still prepared to share the land with white farmers. It is only when the white farmers refuse to share that they forfeit their right to be part of a new distribution of land in South Africa. What they are saying is that the concept of the right to land must change.

ii) Land rights, productivity and sustainability

The demand for land raises the question whether that land will be used well. If land is to be given to black farmers, certainly it must be done in a way that is both productive and sustainable. Yet government officials (be they Nationalist or ANC) who make "agricultural productivity" and "carrying capacity" an imposed criterion which prevents people returning to the land, will surely fail. The questions about sustainability are serious and must be asked, but the way in which they are asked is crucial. The debate about property rights is shaped by the different conceptions of land and rights to land. If they are imposed from above, they will be rejected; if the community's own interest in creating a sustainable future is developed, it may succeed. Let me illustrate what I mean by expanding further on the case of the people of Goedgevonden.

Goedgevonden

In the negotiations that followed their re-occupation, the community has argued that they have a political right to return to their land. The starting point to any solution is a return of the community to Goedgevonden.

The Government has an entirely different starting point. The committee they have set up is composed of agricultural "experts", headed by an ex-chair of the STK, the SADT's technical arm. Their starting point is the carrying capacity of the land. They want to divide the land into "economically viable" units. They say that their technical studies reveal that no more than 21 farmers (with their families, and two families of workers too) can be accommodated on

6. See Catherine Cross, 1990, 'Conceptions of the Land Right in Contemporary African Rural Areas', unpublished paper?, Rural-Urban Studies Unit, CSDS, University of Natal, Durban; for a clear description of African concepts of land rights.

Goedgevonden. In the name of economic viability, people are thus prevented from returning to their land.

The Government has tried to shift the debate onto a technicist basis, seeking to determine land distribution on agricultural, economic grounds, the decisions to be made by committees of "experts". They want the historical issues to be simply forgotten, and to start with a clean slate. This is clearly impossible. You cannot simply wish away unpleasant realities which you yourself have created. As Geoff Budlender, prominent land rights lawyer, has put it, the question the Government asks is "what is the least we have to give these people in order to satisfy them, so that we can get on with building the future?"⁷

The community is not opposed to considering issues such as the carrying capacity of the land. Their own farming practices in the past included limitations on the new people moving onto the farm. The committee used to check annually, at dipping time, the number of cattle in the community. If the total number was deemed too high, those with too many head of cattle would be asked to sell off the surplus to the agricultural cooperative.

In the process of negotiations, again, the community demonstrated a commitment to limit themselves to make farming sustainable. They did not express this in the same technical terms as the Government, but said they would use a maximum of 400 ha. for residential use, and keep most of the farm (another 6,600 ha.) for farming.

Clearly, the community knows that it could not allow unlimited numbers of people to farm at Goedgevonden. In the past, there were clear criteria for new people moving onto the farm. These criteria were administered by a committee of *voorsitters*, responsible to the local commissioner. Nor did the community allow overgrazing of the farms. They want to hand over the farms to their children in as good a state as they found them, if not better. They need neither agricultural extension officers nor environmental experts to tell teach them the basics of farming - they know from working the land. They are certainly open to hearing outside advice, but in the end they believe that they are the farmers, those who put their hands to the plough, and they will make the decisions.

The case of the Goedgevonden negotiations shows two fundamentally different approaches to questions of agricultural productivity. One approach makes productivity an obstacle to the desire of the people to return to their land and farm. Serious questions regarding sustainability become illegitimate in the eyes of the community (and thereby politically unsustainable) because they are yet another set of imposed criteria. All that has changed is that the terms which prevent them from having access to land are no longer outright racism, but economic rationality or

7. Geoff Budlender, 1991, 'A process for addressing land claims', unpublished paper, Legal Resources Centre, Johannesburg.

environmental concern.

This approach makes "productivity" the only and absolute value to be considered. Taking a more balanced macro-economic perspective would lead one to consider other values too. Rural land is crucial in providing a place to stay for people. The agricultural economy has the capacity to provide many jobs. Subsistence production is critical for the rural population's nutrition and therefore their health. Land provides a social "safety net" for rural people. All these are important macro-economic goals which should be balanced against the aim of productivity (as in producing for the market). No one can be considered to the exclusion of the others, especially in the South Africa context with its high ratios of unemployment, homelessness and malnutrition.

The other approach is to look for the practices in the community that promote sustainable development. If "agricultural productivity" and "carrying capacity" are truly in the interests of the community, there must be ways of getting the community to see its own interests. It is only in this way, drawing on the local knowledge of the community, and indeed by appealing to their self-interest, that debate about sustainability will take root in black farming communities.

iii) The restoration campaign and landlessness

The campaign for restoration is a specific, narrow campaign, aiming at restitution for victims of forced removals. In a sense, this group of communities represent the "easy cases" -- they were obviously the victims of recent injustice; in many cases, their land is still owned by the State and can be handed back; people are not occupying arbitrary pieces of land, but are returning to land that is theirs, that they lived on before; and the number of communities is limited. It is crucial, however, that this "spearhead" is not separated from the long stick following it, i.e. the millions of landless people in South Africa.

This is not to deny that the return of victims of forced removals to their land has been groundbreaking. It has challenged the National Party Government's willingness to change, and put the question of restoration on the agenda in a most direct, physical way. It is not harking back to ancient conflicts, its main aim is to undo the injustices of the last 40 years, i.e. the period that the present ruling party has been in power. As Paul Lepee, a black farmer who was removed from Magogoane in the Western Transvaal said:

"I haven't had a chance to plough since the removal. My children do not know how to plough... Just because of the removal, we don't have an idea to plough".⁸

These first struggles are aimed at a most obvious target, the racist denial of land to black people.

8. Paul Lepee at a workshop of 6 rural communities in the Transvaal, 10th to 11th August 1991.

The demand is for political justice, a reversal of recent historical wrongs. But the question of landlessness goes further than that.

There are millions of black people living in "white" rural South Africa -- farmworkers on white farms, labour tenants, and communities living on company land. Farmworkers also want access to land. They too were deprived by apartheid laws and economic disadvantage from access to land. If a Land Claims Court were set up, families of labour tenants would want to apply. There are differences in their demands; in many cases, farmworkers want better working conditions, and labour tenants might want security of tenure, not necessarily a title deed.

But there are many similarities. Farmworkers and labour tenants too can show that they occupied the land for generations, that they have historical rights to the land. They too were removed by the harsh laws of the apartheid government, most often the Prevention of Illegal Squatting and Trespass Acts. **It is crucial that the demand for restoration includes the right to access to land and security of tenure for farmworkers and labour tenants too.** There is a real danger that the Government might concede the demands of the 20 communities presently engaged in the restoration campaign, but then close off the process. Instead, those fighting for the rights of the landless should ensure that the campaign for restoration of victims of forced removals broadens out into a campaign for land rights for all South Africans.

iv) Moral and political issues in the restoration campaign

Property rights vs. land rights

Land is a key form of property. To address the questions of restoration deeply affects property rights. People need a place to live, therefore they need land. If all land is privately owned, people have no choice but to break the law and to occupy land which belongs to someone else.⁹

Land is different from other first generation human rights in that it is material, and affects very directly basic needs of people. Food and shelter can only be had with land. So one person's property may deprive others of their basic needs. This is particularly the case if private property is treated as an absolute right, which gives the owner control over all the benefits deriving from that land.

This dilemma is also reflected in constitutional debates. Is it more important to uphold the right of a person to own unlimited amounts of land, even if it is unused, or to uphold the right of the population to have access to land to live on? Some countries entrench the right to property in the constitution, others have balanced it with opposing material rights of shelter, life and

9. See a forthcoming book by Aninka Claassens dealing with a Land Claims Court, and the property debate (title?).

adequate nutrition for all.¹⁰ The Canadians are writing these balancing rights into a Social Charter.

Albie Sachs and Aninka Claassens have written a paper on land rights¹¹ in which they suggest that part of the solution to conflicting land claims may lie in **de-absolutizing concepts of land ownership**. Rights to property such as land, instead of being lumped into one big bundle could be broken up -- into the right to plough, the right to passage, mineral rights, right to sell (or not to sell). Western society gives the owner, i.e. the person who paid money for a piece of property, absolute rights to that property. In African society, every member of a community has a right to **access** to land, and her or his membership of the community gives them **security of tenure**. Breaking down property rights into their constituent parts would make it easier to sort out the complex history of conflicting land claims.

A practical example of how this might work is an agreement between a Weenen farmer and a group of labour tenants.¹² In settling a Supreme Court case out of court, the parties came to an agreement that farmer would retain ownership of the land, but agreed to lease out the land to the tenants on a two-year basis. The tenants have the option to renew the lease. This option, together with the reasonably long period of the lease, gives them security of tenure. The farmer retains ownership, and derives some income from the land. Thus owner and occupiers both benefit.

Land rights vs. productivity

In the current debate about land reform, black land rights are considered often still considered less important than technicist criteria. The Government will not allow the Goedgevonden community to return because it considers that their numbers will exceed the carrying capacity of the land (which capacity is determined by the same Government officials). This is particularly ironic in the light of the attitude the Government still takes to white land rights, assuring farmers that their title deeds are safe, and refusing to call in debts of unproductive white farmers. If the debate is skewed like this, the choice will become either/or -- either one supports land rights, or one supports sustainable agriculture. It is crucial that organisations like the Black Sash continue to assert the right to land, and champion a community-based approach to introducing considerations of sustainability.

10. *ibid.*

11. A. Sachs and A. Claassens, 1990, 'Rights to the land', pp. 104-138 in Sachs Protecting Human Rights in a New South Africa, Oxford University Press, Cape Town.

12. 'Memorandum of Agreement of Settlement made and entered into by and between Muziwabantu Majozi [and seven others] and Peter Kenneth Channing', signed 2nd December 1991. The Association for Rural Advancement played an important role in brokering this agreement.

Limits of the restoration campaign

It is critical that those supporting the restoration campaign realize its limits. Only a small number of communities is presently involved; the majority of landless people, in particular farmworkers and labour tenants, are still left out. The campaign can only benefit them too, if it is a process that opens up the issue of land claims, rather than closes them down. Neither the restoration campaign, nor a Land Claims Court can address the entire problem of landlessness. It can win back land for a group of communities that have become symbolic of dispossession in South African history. This process has placed the issue on the national political agenda in no uncertain terms. It must go on to widen its scope to include all those who need access to land and security of tenure.

A judicial process (e.g. a Land Claims Court) can result in the transfer of ownership of land to a limited number of communities. A much broader programme of land redistribution is needed to address the great land hunger that exists beyond that. This is inherently a political process, and not one that can be decided in a court.

Bureaucratic mechanisms vs. community-driven processes

There has been concern about defining the cases that could be heard by a Land Claims Court more clearly. Will there be a cut-off date? Is there enough land to meet all the demands? How will the necessary expropriations and compensations be paid for? These are all valid questions, yet there are important advantages to a flexible process, that deals with each case on its own merits. Administrative procedures (i.e. solutions that treat all cases according to officially pre-determined categories) provide neater solutions, but they lack legitimacy because of the history of administrative edict ruling black lives in South Africa. Administrative solutions leave the initiative in the hands of the State, and mean that land claims would be a matter of state largesse. Instead, the process should be one of the State hearing people's claims based on their rights.

A Land Claims Court should hear each case, guided only by the underlying, nationally negotiated principles (such as the four mentioned above). In addressing the practicalities of possible solutions, the hard questions regarding cut-off points etc. must be answered. This is not foreign to the communities. The Mfengu people, for example, are quite realistic about the fact that new vested interests in their land now exist, and that the white farmers' needs must also be addressed. The critical issue is that a flexible mechanism is created, which enables people to advocate their own interests and protect their rights within negotiated framework. For too long have black rural people been subject to official decree. Choosing a flexible approach might mean giving up formulae which can deal with each case; it may be slower; but it will probably produce more lasting solutions.

WHAT SASH CAN DO !

The Black Sash is one of the few organisations which has consistently concerned itself with land issues. Sash is therefore well placed to lobby for the principles of restoration and land reform. Before Sash can do so, it must adopt national policy positions on some of the questions raised in this paper. In addition to a land claims procedure, there is the need to lobby for a political commitment to a programme of land redistribution. The issues of restoration and land reform need to be debated at CODESA. Sash should seek ways to influence that agenda.

Sash has already been lobbying for a Land Claims Court. The Government's proposed Advisory Commission comes nowhere near the flexible process required. The Centre for Applied Legal Studies is doing some research on possible models for such a court, but more investigation is still needed. It would be appropriate for Sash to be involved in the debates around the land claims mechanism, and to lobby for a community-driven process.

Sash needs to continue to educate and inform its own constituency regarding the issues of restoration and land reform, in particular as they touch on the property question. The debate around different conceptions of land rights should alert us to the complexities of property questions, and make us self-critical of our assumptions what rights property ownership confers, and how these rights need to be balanced against the rights and needs of other people. The issue of Sash magazine dealing with land issues has begun this work.