

# DECISION ON THE RULE OF LAW

## REASONS FOR AND CONSEQUENCES OF THE JUDGEMENT

### “MIKE CAMPBELL V THE REPUBLIC OF ZIMBABWE”

*Christian Roschmann / Benedikt Brandmeier*

“We are no longer going to ask for the land, but we are going to take it without negotiating” – this statement by Robert Mugabe, President of Zimbabwe, symbolises what represented the start of the Michael Campbell case. Michael Campbell was one of many settlers of European descent in Zimbabwe and, like most of the farmers and large landowners, he was threatened by expropriation without compensation by the Zimbabwean government under the so-called Fast-Track Land Reform (FTLR) shortly after the turn of the millennium. What caused the Michael Campbell case to attract attention around the world was the fact that he openly resisted and took up the fight against the Zimbabwean government.

The dispute culminated in the court case *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*, in which the SADC Tribunal, the international court of law of the South African Development Community, ruled in favour of the applicant in 2008, condemning forcible land acquisition. But ultimately, reality caught up with Campbell and he could not prevent his expropriation. The Zimbabwean state did not adhere to the ruling, nor did other SADC member states exert sufficient political pressure on it to enforce compliance. The repercussions that the ruling had in the disparity between claim and reality of the rule of law developed into a crucial test for law and order in Zimbabwe and for the future of the entire SADC. By turning into a separate political issue, the conflict took on a life of its own as a manifestation of the violation of international law, and it did not come to a conclusion with Mike Campbell’s death in 2011 either. Instead, developments culminated in the



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suspension of the SADC Tribunal itself, which is still in effect today. The long-term consequences cannot be foreseen as yet.

The judgement has been examined in detail and evaluated by both journalists and academics. While most papers have dealt predominantly with the content and legal aspects of the ruling, there has not been much in the way of a detailed investigation of the political background and the repercussions of the judgement. In fact, Michael Campbell's life story is linked intimately with Zimbabwe's recent history. The way it affected him reflects the lives of many others and his own significant influence on it is still being felt today.

### **FAST-TRACK LAND REFORM – AN EXAMPLE OF HOW A STATE CRISIS CAN DEVELOP**

Forcible land acquisition, now known as Fast-Track Land Reform (FTLR), formed the starting point for the SADC judgement and its repercussions. The background to the expropriation wave of 2001 and 2002 is a story of the misjudgement and neglect of simmering conflicts, which ultimately erupted violently.

#### **Misjudgement of the Land Issue**

**The land redistribution was essentially a matter of just distribution. Over 50 per cent of the land of what was then South Rhodesia belonged to the white settlers, who constituted a vanishingly small proportion of the total population.**

The reasons for handling the land redistribution in the manner it transpired are of a diverse political, economic and social nature. But essentially it was a matter of just distribution. The enormous pressure within Zimbabwean society and politics to make changes to the way the land issue was handled was mainly due to the historic distribution of arable land. The 1930 Land Appointment Act cemented the structures that had developed since the beginning of the colonisation movement and guaranteed over 50 per cent of the land of what was then South Rhodesia to the white settlers, who constituted a vanishingly small proportion of the total population, while roughly half of the native African population had to live in overpopulated so-called Reserves.<sup>1</sup>

1 | For a more detailed description of the land distribution and its history see Tapera Knox Chitiyo, "Demilitarisation and Peacebuilding in Southern Africa: National and regional experiences", >

Against this backdrop, it is all the more astounding that neither the population nor the subsequent government under Robert Mugabe recognised the importance of this issue and gave it sufficient consideration. During the negotiations with the UK about the independence of the then newly named state of Zimbabwe, recognised under international law, the land issue was afforded relatively little importance.<sup>2</sup> Accordingly, the Lancaster House Agreement would later be “infamous for its weaknesses”<sup>3</sup> relating to the land issue and laid the foundation for its subsequent enormous escalation. This was because orderly, peaceful land reforms that were carried out during the following two decades, which involved compensation payments, could do little to alleviate the described fundamental situation, since a lack of funds meant that only a fraction of the white farmland could be redistributed, and even back then the intended target group, namely impoverished peasants, enjoyed little benefit from the land redistribution because of the self-enrichment pursued by the new black elite.<sup>4</sup> When the UK under the new Labour government stopped its payments in 1997 for this reason<sup>5</sup> this marked the conclusive failure of “peaceful land reform”.

**During the negotiations with the UK about the independence of the then newly named state of Zimbabwe, the land issue was afforded relatively little importance.**

in: Peter Batchelor, Kees Kingma and Guy Lamb (eds.), *International political economy of new regionalisms series, Demilitarisation and Peace-building in Southern Africa*, 2004, Vol. 2, 49 et sqq., [http://www.ccr.uct.ac.za/archive/two/9\\_1/zimbabwe.html](http://www.ccr.uct.ac.za/archive/two/9_1/zimbabwe.html) (accessed 12 Mar 2012).

- 2 | Robert Mugabe himself, for instance, then heading the negotiations on behalf of the “Patriotic Front”, did not even mention the land issue in an article about the Lancaster talks: Robert Mugabe, “Struggling for Nationhood: The Birth of Zimbabwe”, in: *Encyclopaedia Britannica*, <http://britannica.com/EBchecked/topic/396102/Robert-Mugabe> (accessed 12 Mar 2012).
- 3 | This is the frequently quoted expression from: Lonias Ndlovu, “Following the NAFTA Star: SADC land reform and investment protection after the Campbell litigation”, <http://ajol.info/index.php/idd/article/view/68293/56375> (accessed 12 Mar 2012).
- 4 | For a more detailed description of this development see Chitiyo, n. 1, 61 et seq.; or of its economic impact see Kenneth Ingham, “Zimbabwe”, in: *Encyclopaedia Britannica*, <http://britannica.com/EBchecked/topic/657149/Zimbabwe> (accessed 12 Mar 2012).
- 5 | In corroboration of this the open letter by the UK Development Minister Claire Short to the Zimbabwean government, printed in: Chris McGreal, “Blair’s worse than the Tories, says Mugabe”, *Mail & Guardian*, Johannesburg, 22 Dec 1997.

### **Side-effects of the Land Crisis: The Impending Zimbabwean State Crisis**

The increasing tensions regarding the land issue in the course of the second half of the 20<sup>th</sup> century had their counterpart in a general socio-economic crisis developing in Zimbabwe, with numerous correlations between the two. Ever since independence, there had been an initially rather creeping process of economic decline, whose repercussions, which were reinforced by the FTLR itself, would not manifest in their full extent until a later date. The fact that it was ultimately not possible to make sufficient funds available for compensation payments within the framework of the peaceful land reform may well have been a substantial contributing factor for the ultimate failure of the “peaceful” land reform.

The impending socio-economic crisis manifested mainly in an increasing fragmentation of the population into diverse interest groups, each of which the government favoured in turn as and when it suited it, thus intensifying the tensions between the groups. While the government could initially rely on support particularly from the urban population, the agricultural workers employed by the large agricultural businesses as well as white settlers because of the restraint it showed in its policy relating to the land issue, it increasingly came under the influence of the radical War Veterans Association (WVA), which itself had close links to the rural population. Both groups then received greater consideration in subsequent land distribution measures ahead of the FTLR. Particularly members of the WVA were allocated larger adjoining businesses,<sup>6</sup> simultaneously forced through massive compensation payments and thus established close links to government circles, with the result that they still represent part of the country’s new elite even today.<sup>7</sup> The people losing out in this power dis-

6 | Sam Moyo and Paris Yeros, “Land Occupations and Land Reform in Zimbabwe: Towards the National Democratic Revolution”, in: idem (eds.), *Reclaiming the land: the resurgence of rural movements in Africa, Asia, and Latin America*, 2005, 165 et sqq., 187.

7 | In support of this, the analyses in: Human Rights Watch, *Fast Track Land Reform in Zimbabwe*, No. 1 (A), 2002, <http://hrw.org/legacy/reports/2002/zimbabwe/ZimLand0302.pdf> (accessed 12 Mar 2012); Chitiyo, n. 1, 61 et seq.; Moyo and Yeros, n. 6, 185 et seq.

tribution were predominantly Mugabe's former supporters. They joined together to form a new party, the Movement for Democratic Change (MDC). This party was to develop into the greatest challenge to Mugabe's ZANU-PF since Zimbabwe gained independence.<sup>8</sup>

Due to the convergence of these developments in 2000, the Zimbabwean government became subject not only to pressure exerted by its affiliate, the WVA, but also by deep-rooted legitimisation problems. With an eye on the impending 2002 presidential elections, President Mugabe and ZANU-PF were in fear of losing power because of the new MDC. Pressure on the government escalated to a crescendo when the majority of the population voted against the constitutional reform in a referendum in February 2000. At that time, the land issue, which had not yet been satisfactorily resolved, presented itself as an obvious way to avert the government crisis, and the political pressure was discharged at the same time – albeit in a chaotic and violent manner.

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#### **Shift of the Conflict into the Legal Arena: "Mike Campbell versus the Republic of Zimbabwe"**

In the context of the land issue, Michael Campbell was initially only a typical example of the numerous victims of the FTLR. The real significance of the Michael Campbell case lies in the fact that he mounted a defence in a court of law using the means of the rule of law.

The first attempt by the government to enforce the expropriation of his property officially took place in June 2001. Although the Zimbabwean judiciary had ruled this to be unconstitutional, members of the WVA occupied his farm without any attempt by the police to intervene. After an amendment to the Zimbabwean constitution was passed, the expropriation was legalised retrospectively in a man-

8 | For details on the influence exerted by the MDC on government activities: Lionel Cliffe, Jocelyn Alexander, Ben Cousins and Rudo Gaidzanwa, "An overview of Fast Track Land Reform in Zimbabwe: editorial introduction", *Journal of Peasant Studies*, No. 5, 2011, 907 et sqq, <http://dx.doi.org/10.1080/03066150.2011.643387> (accessed 12 Mar 2012).

ner that was questionable in terms of the rule of law and confirmed by the Supreme Court in 2008.<sup>9</sup>



Most of the farmers and large landowners were threatened by expropriation without compensation by the Zimbabwean government under the so-called "Fast-Track Land Reform" (FTLR) shortly after the turn of the millennium. | Source: Peter Casier (CC BY-NC-ND).

In the meantime, Mike Campbell had already turned to the Tribunal of the South African Development Community (SADC), of which Zimbabwe is also a member. In October 2007, he submitted a claim against the government to the Tribunal, accompanied by an application for an interim measure protecting his rights. He was joined by 77 co-applicants. The Tribunal responded to the claim on 13 December 2007 with an injunction, in which it granted Campbell's application, as well as with a corresponding judgement on the main issue on 28 November 2008.<sup>10</sup> It appeared that Mike Campbell and his co-applicants had been successful in defending their rights, thereby generally calling the FTLR into question.

9 | Full text of judgement accessible at: <http://www.saflii.org/zw/cases/ZWSC/2008/1> (accessed 12 Mar 2012).

10 | Ibid.

## ZIMBABWE'S SITUATION AFTER THE FAST-TRACK LAND REFORM – WAYS OUT OF THE STATE CRISIS

Even though it is too early to speak of an official end to the FTLR, we are now beginning to see a differentiated picture after its virtually complete implementation. In fact, Zimbabwean agriculture is now characterised predominantly by small-scale farming structures, with the majority of arable plots no longer in the hands of just a few.<sup>11</sup> This has gone hand in hand with a general significant movement away from export goods, such as tobacco in particular, towards staple foods,<sup>12</sup> with production volumes rising once again during the last few years.<sup>13</sup>

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In spite of this it is apparent that Zimbabwean agriculture has not yet regained its former strength and that this will not be achievable in the foreseeable future. There are undeniable weaknesses inherent in the new system, including a lack of government support for the new farmers, the loss of large parts of agricultural knowhow through the disorderly departure of white farmers and inadequate adaptation of the infrastructure to the increasing population density in rural areas.<sup>14</sup> Ultimately, the potential of the fertile Zimbabwean soil remains greatly underutilised or even unused.

This is partly due once again to the widespread cronyism, which, in spite of mostly small-scale structures, has led to a considerable proportion of farmland being allocated to people close to the government, especially in the form of large-scale landholdings.<sup>15</sup> Due to a lack of experience in

11 | For an overview of numerous analyses produced since then see: Cliffe et al., n. 8, 922 et sqq.; as an example of an extensive, particularly comprehensive study: Sam Moyo, "Changing agrarian relations after redistributive land reform in Zimbabwe", *The Journal of Peasant Studies*, No. 5, 2011, 939 et sqq., <http://tandfonline.com/doi/abs/10.1080/03066150.2011.634971> (accessed 12 Mar 2012).

12 | For a detailed analysis of the produced agricultural products see also: Cliffe et al., n. 8, 926.

13 | For a precise description of the development see Moyo, n. 11, 937.

14 | For details on these problem areas see: Human Rights Watch, n. 7, 13; taking into account more recent data see also: Moyo, n. 11, 953 et seq.

15 | Cf. Moyo, n. 11, 945; who actually states on page 954 et seq. that this group also benefits disproportionately from infrastructure measures.

running agricultural businesses and widespread disinterest in working the land, large areas of the acquired large-scale holdings are left to lie fallow, although these would actually be ideal for producing the export products that are so crucial to the country's economy.<sup>16</sup>

In the course of these developments, further massive problems were building up in the economic, political and social situation. The economy declined further and the ensuing hyperinflation set a new world record; food shortages developed; the human rights situation reached an all-time low; the number of people who had left the country was meanwhile estimated at close to 5 million. The situation probably bottomed out around the time of the presidential elections in 2008, as a result of which Robert Mugabe was forced to bring opposition leader Morgan Tsvangirai into the government as Prime Minister. To what extent the state crisis will continue to settle after the halting improvement of the situation since then remains to be seen.

### **DISREGARD FOR THE RULING OF THE SADC TRIBUNAL – A DEMONSTRATION OF THE ABSENCE OF THE RULE OF LAW**

Public attention was soon diverted from the Campbell case by these events. Due to the undisputed contribution that the Campbell judgement also made to the above-described general repercussions of the FTLR, it is not always easy to differentiate between the direct and indirect consequences of the court case.

One should state first of all that the judgement in the Campbell case was not executed. The Zimbabwean government refused to put the SADC judgement into practice. It cited various arguments supporting the idea that it was not bound by Tribunal ruling with respect to its own actions<sup>17</sup> and described it specifically as an illegitimate intrusion into national sovereignty,<sup>18</sup> probably increasingly understood to

16 | For a detailed description see: Human Rights Watch, n. 7, 16.

17 | Cf. Dwyer Arcer, "Zimbabwe not bound by regional court rulings: justice minister", *Jurist*, <http://jurist.org/paperchase/2010/07/zimbabwe-is-not-bound-by-sadc-rulings-justice-minister.php> (accessed 12 Mar 2012).

18 | Even though one should not afford it too much significance due to the historic context, the first confirmation of such attitudes was already evident in a very absolute statement ▶



mean the sovereignty of President Mugabe and ZANU-PF itself.

Since virtually all parties affirm the legally binding effect of the SADC statutes as well as the Tribunal's ruling<sup>19</sup> and it is also virtually inconceivable that the Zimbabwean government misunderstood the facts of the case in view of their obvious nature, there can be

no doubt that it wilfully disregarded the binding effect of the ruling. This as well as the support of this stance by the national courts thus places a new aspect of the land reform in the spotlight, namely the erosion of the rule of law, although the writing had probably been on the wall for some time already.

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In this respect as well the FTLR caused something of a step change. During the 1980s and 1990s, the government conducted the land redistribution on the basis of the legal foundations it had itself created. It not only respected the arrangements made under the Lancaster House Agreements, but even took active measures against uncoordinated land acquisitions by farm occupiers referred to as "squatters".

With the start of the FTLR, it became common practice to regularly leave it until after the completion of an expropriation campaign to create the legal basis to justify it. In 2005, this finally culminated in the adoption of the 17<sup>th</sup> amend-

made by Mugabe at the Lancaster House negotiations: "Zimbabwe must be a sovereign republic in which the sovereign nation pursues its own destiny, totally unshackled by any fetters or constraints." Cf. "Constitutional Conference Held at Lancaster House, London September - December 1979 - Report", United Kingdom/Zimbabwe, 21 Dec 1979, 9, <http://zwnews.com/Lancasterhouse.doc> (accessed 12 Mar 2012).

Similar the assessment by Heather Chingono, "Zimbabwe sanctions: An analysis of the 'Lingo' guiding the perceptions of the sanctioners and the sanctionees", *African Journal of Political Science and International Relations*, Vol. 4(2), 66 et sqq., <http://academicjournals.org/ajpsir/pdf/pdf2010/February/Chingono.pdf> (accessed 12 Mar 2012); Jonathan S. Johnson, "Enforcing Judgments in International Law: Campbell v Zimbabwe", <http://www.jdsupra.com/post/documentViewer.aspx?fid=26d7323d-17e9-433f-a916-2dea33a32a80> (accessed 12 Mar 2012).

19 | Cf. Ndlovu, n. 3.

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ment to the Zimbabwean constitution, which represented the full formal and retrospective legalisation of the FTLR. The Campbell case demonstrated particularly clearly the extent to which the constitutional prohibition of *ex post facto* laws was violated. Campbell was not able to claim the protection of trust in the validity of current law, as is guaranteed in a state based on the rule of law – neither with the argument that he was in possession of a “Certificate of no Interest”, with which the Zimbabwean state had officially precluded the planned expropriation of Campbell’s property, nor due to the fact that he had already paid for his farm in full by 1999.

The fact that after having pronounced the government’s action illegal a few years beforehand the Zimbabwe Supreme Court now gave a different ruling on the basis of the changes in the law made in 2008 and 2009 and condoned this explicitly<sup>20</sup> should not lead to doubts in the Zimbabwean state’s contempt for the rule of law. In fact, there have since been direct interventions on the part of the government in the appointment of judges, replacing incumbent decision-makers with party faithfuls. This new jurisprudence is therefore actually testament of the last step towards the absence of the rule of law: the absence of an independent justice system.

#### **ENFORCEMENT OF THE RULING – ABSENCE OF THE NECESSARY POLITICAL WILL**

As the voluntary implementation of the ruling failed to materialise, so did the consequence of this failure that one might have expected, namely the enforcement of the ruling. What is less surprising is that there was no enforcement of the Tribunal’s ruling in the narrow sense, i.e. its enforcement by means of legally provided sanctions, since the Tribunal’s ruling came up against a largely insurmountable incapability to effect execution.<sup>21</sup>

20 | See the following ruling on this subject: “High Court of Zimbabwe (PATEL J), Gramara (PRIVATE) Limited and Colin Bailie Cloete v. Government of the Republic of Zimbabwe and Attorney-General of Zimbabwe and Norman Kapanga (Intervener), Opposed Application”, Harare, 2010, [http://kubatana.net/docs/landr/high\\_court\\_patel\\_gramara\\_goz\\_100126.pdf](http://kubatana.net/docs/landr/high_court_patel_gramara_goz_100126.pdf) (accessed 12 Mar 2012).

21 | For a precise analysis of the manifested lack of enforcement ▶

Aside from the execution through national courts, which was denied in this case, the only route remaining to the court according to a directive within the SADC agreements was to call upon the SADC summit as the highest SADC body, without the available response options having been clearly defined. Ultimately, enforcement would only have been possible through political pressure, comparable to that which actually induced the Zimbabwean government to implement the FTLR in the first place, although that had been of a different type. This type of pressure could have been exerted by a critical press and by civil society in Zimbabwe, if they had made it clear that they were not prepared to accept their own state openly violating international law. But this "Fourth Power", the ultimate control mechanism for the protection of the rule of law, which a legally unambiguous ruling might have initiated, failed to take action.

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This might be due to the fact that the political climate in Zimbabwe made it very difficult for a critical public to form. For one, the country's population was deeply divided for historic reasons; and secondly, the human rights situation deteriorated increasingly under Robert Mugabe,<sup>22</sup> a development that particularly affected freedoms protecting democracy such as freedom of opinion, freedom of the press, the right to assembly and freedom of association. In addition, one is probably justified in doubting the required political will among the opposition movements. As the only significantly strong movement opposing the government, the MDC did use the official stage initially to voice massive criticism of the government's response to the SADC judgement. But after the unity government was formed in 2008, this criticism faded to the point where MDC representatives actually expressed relative satisfaction with the de facto suspension of the SADC Tribunal.

capability see: Ndlovu, n. 3, 77; Ademark Moyo, "Defending human rights and the rule of law by the SADC Tribunal: Campbell and beyond", *African Human Rights Law Journal*, No. 2, 2009, 590 et sqq., [http://www.chr.up.ac.za/test/images/files/publications/ahrlj/ahrlj\\_vol09\\_no2\\_2009.pdf](http://www.chr.up.ac.za/test/images/files/publications/ahrlj/ahrlj_vol09_no2_2009.pdf) (accessed 12 Mar 2012).

22 | On the human rights situation in Zimbabwe see: Chingono, n. 18, 72.

What appears even far more surprising is that the Mugabe government was not subjected to any pressure from the other SADC members whatsoever. After all, the response of the community of states to the coup in Madagascar, which ended in the country's expulsion from the SADC, showed that the community would indeed have had sufficient capability to act.<sup>23</sup> In this instance, the SADC members were also affected considerably more strongly by the Zimbabwean conduct, as it jeopardised the promising future of the community of states, particularly as the judgement in the Campbell case had been welcomed as confirmation of a functioning and sustainable legal foundation.

**At a summit in Windhoek, the Heads of State and Government decided to temporarily suspend the Tribunal's activities, without giving the public any detailed explanation.**

In actual fact, the ruling in the Campbell case was not even mentioned during the subsequent summit in 2009. Without any great advance notice, a decision on this issue was then made in August 2010. At a summit in Windhoek, the Heads of State and Government decided to temporarily suspend the Tribunal's activities, without giving the public any detailed explanation; this suspension was last extended by a further year in May 2011.<sup>24</sup> Simultaneously, the terms of five Tribunal judges were not extended, which meant that the proper composition of the Tribunal could no longer be guaranteed for the future.

The willingness of the SADC states to put into question its own past integration achievements as well as future opportunities can be explained mainly by the esteem that Robert Mugabe enjoys in certain quarters. In spite of the renown, which he gained in the 1980s, having receded worldwide to the point of ostracism, he was still viewed as a hero of the struggle for freedom against former colonial suppres-

23 | Supporting this assessment: Ndlovu, n. 3, 76; Johnson, n. 18, 10.

24 | As an example of the corresponding reporting: Stefan Fischer, "SADC-Tribunal bleibt stumm", *Allgemeine Zeitung*, 23 May 2011, <http://az.com.na/afrika/sadc-tribunal-bleibt-stumm.127378.php> (accessed 12 Mar 2012); the lines "Summit decided that a review of the role functions and terms of reference of the SADC Tribunal should be undertaken and concluded within 6 months" represent the only public statement by the Summit on this issue, SADC, Communique of 30<sup>th</sup> Jubilee Summit of SADC Heads of State, 18 Aug 2010, <http://www.sadc.int/index/browse/page/782> (accessed 12 Mar 2012).

sion by the Heads of Government of Southern Africa.<sup>25</sup> As a pioneer of the independence and Africanisation movement he could also rely on the support of the populations of these countries.

This support ultimately added to the pressure on the international community, the third party to potentially exert political pressure, to exercise great restraint in its sanction options.

**Concrete sanctioning measures by the UN were vetoed by China and Russia. South Africa was playing a leading role among the opponents of international intervention.**

In the end, concrete sanctioning measures by the UN were vetoed by China and Russia,<sup>26</sup> with South Africa significantly playing a leading role among the opponents of international intervention.

The action has therefore been restricted to measures taken by a few individual states of the European Union and the USA.<sup>27</sup> Sanctions were first imposed at the beginning of the FTLR, while human rights violations connected to the 2008 elections elicited an expansion and tightening of the sanctions later on. There was no further mention of the Campbell case in this connection.<sup>28</sup>

The outcome of these sanctions has also been sobering. Serious economic impact has been averted to a large extent through measures taken by other countries, significantly

25 | Cf. Christian von Soest and Julia Scheller, "Regionale Integration im südlichen Afrika: Wohin steuert die SADC?", *GIGA Focus Afrika*, Oct 2006, 1 et sqq., [http://giga-hamburg.de/dl/download.php?d=/content/publikationen/pdf/gf\\_afrika\\_0610-pdf](http://giga-hamburg.de/dl/download.php?d=/content/publikationen/pdf/gf_afrika_0610-pdf) (accessed 12 Mar 2012); *What options for Zimbabwe?*, Solidarity Peace Trust, 31 Mar 2012, 8, [http://solidaritypeacetrust.org/download/report-files/what\\_options\\_for\\_Zimbabwe.pdf](http://solidaritypeacetrust.org/download/report-files/what_options_for_Zimbabwe.pdf) (accessed 12 Mar 2012).

26 | Summary of negotiations: "Abstimmung im Weltsicherheitsrat – Russland und China blockieren Sanktionen gegen Simbabwe", *The Epoch Times Deutschland*, 13 Jul 2008, [http://epochtimes.de/311231\\_russland-und-china-blockieren-sanktionen-gegen-simbabwe-.html](http://epochtimes.de/311231_russland-und-china-blockieren-sanktionen-gegen-simbabwe-.html) (accessed 12 Mar 2012).

27 | For a comprehensive description see: Chingono, n. 18. See also "Simbabwe warnt die Welt vor Bürgerkrieg", *Welt Online*, 11 Jul 2008, <http://www.welt.de/politik/article2201739/Simbabwe-warnt-die-Welt-vor-Buergerkrieg.html> (accessed 12.03.2012) as well as "EU verschärft Sanktionen gegen Simbabwe", *Frankfurter Allgemeine Zeitung*, 22 Jul 2008, <http://faz.net/aktuell/politik/ausland/bruessel-eu-verschaerft-sanktionen-gegen-zimbabwe-1665636.html> (accessed 12 Mar 2012).

28 | Even the extensive description by Chingono, n. 18, does not mention the Campbell case at all; the FTLR is merely mentioned as an aside.

by South Africa and other SADC states,<sup>29</sup> as well as China, with which Mugabe had established close links through a purposeful “look-east-policy”.<sup>30</sup>

**Mugabe and ZANU-PF were successful in conveying the idea that the sanctions were a further attempt of a neo-colonial attack on Zimbabwe’s hard-fought-for national sovereignty.**

Finally, the indirect objective of mobilising Zimbabwean civil society against the regime must also be considered to have failed to a large extent. The consistent message, which was conveyed in connection with the international sanctions, did not reach large parts of the population. Mugabe and ZANU-PF, on the other hand, were successful, and according to a widely held opinion<sup>31</sup> even extraordinarily successful, in conveying the idea that the sanctions were a further attempt at a neo-colonial attack on Zimbabwe’s hard-fought-for national sovereignty, echoing the rhetoric against the Tribunal judgement in the Campbell case.

#### **REPERCUSSIONS OF THE VIOLATION OF LAW: EROSION OF CERTAINTY AND TRUST**

The achievements of the SADC in terms of integration were openly put into question by the de facto suspension of the SADC Tribunal at the latest. This suspension is still ongoing. In addition, the community of states commissioned

a Swiss consultancy company in November 2010 to carry out a thorough revision of the “role, responsibilities and terms of reference” of the SADC Tribunal. With the thereby intended adaptation of the agreements to Mugabe’s stance of disregard for the rule of law, the community of states is adopting this stance – an approach that appears to be modelled on Mugabe’s conduct in connection with the FTLR.

29 | These countries still represent the most important trading partners of the Zimbabwean economy. Confirmed by the analysis by Moyo, n. 11, 958; see also the data from: “Exportbericht. Südliches Afrika”, Außenwirtschaftsportal Bayern, Feb 2009, <http://www.auwi-bayern.de/awp/inhalte/Laender/Anhaenge/Exportbericht-Suedliches-Afrika.pdf> (accessed 12 Mar 2012).

30 | In support: Moyo, n. 11, 943; Chingono, n. 18, 71; Solidarity Peace Trust, n. 25, 7.

31 | Also supporting this view: Moyo, n. 11, 940; Chingono, n. 18, 72 et seq.; Solidarity Peace Trust, n. 25, 9.

The suspension of the Tribunal, itself mostly a direct consequence of the disregard for the Campbell judgement,<sup>32</sup> further fuelled speculation as to whether the SADC project as a whole might actually have failed, since it now lacked an objective supervisory body.<sup>33</sup> This is all the more significant for the integration process of the SADC as its most urgent goal is the deepening of economic relationships, which rely particularly strongly on rightfully protected trust.<sup>34</sup>

**The suspension of the SADC Tribunal is all the more significant for the integration process as its most urgent goal is the deepening of economic relationships, which rely particularly strongly on rightfully protected trust.**

In fact, there was no subsequent faltering of the integration process to be noticed, and the self-set targets were largely achieved.<sup>35</sup> The best example of this is the successful establishment of a free trade zone by the SADC states in January 2008.<sup>36</sup> This reluctance to deal with legal violations on the part of the Zimbabwean government has since been described by the euphemistic term of "quiet diplomacy".<sup>37</sup>

32 | Supported by the analysis in: Andreas R. Ziegler, "Regional economic integration agreements and investor protection in Africa – the case of SADC Why institutional overlap may be necessary in certain cases", [http://wti.org/fileadmin/user\\_upload/nccr-trade.ch/wp2/publications/wp\\_2011\\_59.pdf](http://wti.org/fileadmin/user_upload/nccr-trade.ch/wp2/publications/wp_2011_59.pdf) (accessed 12 Mar 2012); Brigitte Weidlich, "SADC Tribunal in limbo", *The Namibian*, 11 Nov 2010, <http://www.namibian.com.na/news/full-story/archive/2010/november/article/sadc-tribunal-in-limbo> (accessed 12 Mar 2012).

33 | Cf. Soest and Scheller, n. 25.

34 | A description of the development of the integration goals of the SADC in: Ziegler, n. 32, 5; Oliver C. Ruppel, "Das SADC-Tribunal: Eine juristische Zwischenbilanz", *Allgemeine Zeitung*, 5 Feb 2009, <http://az.com.na/afrika/das-sadc-tribunal-eine-juristische-zwischenbilanz.80234.php> (accessed 12 Mar 2012). Analysis drawing a parallel with similar cases in connection with so-called international investment protection agreements: Ziegler, n. 32; Ndlovu, n. 3.

35 | For a precise analysis of the integration progress and the relevant reasons see: Soest and Scheller, n. 25.

36 | As one example of the reporting on this issue: Daniela Schöneburg-Schultz, "SADC ist nun Freihandelszone", *Allgemeine Zeitung*, 11 Jan 2008, <http://az.com.na/afrika/sadc-ist-nun-freihandelszone.61458.php> (accessed 12 Mar 2012).

37 | The term was originally coined by the South African government itself, which was seeking to justify its official stance towards the Zimbabwean state in a statement of government policy. For a more detailed overview of the history and versions of the term see: Miriam Prys, "Developing a Contextually Relevant Concept of Regional Hegemony: The Case of South Africa, Zimbabwe and 'Quiet Diplomacy'", *Giga Working Papers*, No. 77, May 2008, [http://giga-hamburg.de/dl/download.php?d=/content/publikationen/pdf/wp77\\_prys.pdf](http://giga-hamburg.de/dl/download.php?d=/content/publikationen/pdf/wp77_prys.pdf) (accessed 12 Mar 2012).

The fact that the SADC continues to be accepted by other African states and communities of states as a trustworthy negotiating partner in this way, for instance during negotiations about the creation of a pan-African free trade zone, is all the more astounding if one considers that its own trustworthiness presumably suffered greatly through the way it dealt with the Campbell case, since it not only adopted the Zimbabwean contempt for the law but also the ensuing objective decrease in trustworthiness.

Just of late, it appears that there has been some movement regarding the question of the future of the SADC Tribunal. In mid-June 2012, the Ministers of Justice of the member states convened in Luanda to approve concrete proposals for a new version of the Tribunal statutes, which have not been published to date and are to be submitted to the SADC summit for a decision in August.<sup>38</sup>

**The future role of the Tribunal in the SADC and thereby the future integrity of the community of states itself might be that of a paper tiger, without comprehensive and, most importantly, binding decision-making powers.**

However, this does not say much about the future role of the Tribunal in the SADC and thereby the future integrity of the community of states itself. It is still totally unclear as to whether it is actually possible for an

agreement to be reached on this issue among the member states, and even if it is possible it is not inconceivable that the future position of the court of law will be that of a paper tiger, without comprehensive and, most importantly, binding decision-making powers. This will in turn depend not just on declarations of intent anchored in contractual agreements but also on the way future rulings are dealt with in practice. Because it was the disregarding of the ruling in the Campbell case without any ensuing sanctions that determined the fate of the Tribunal; its official suspension was only the formal confirmation.

At a national level, too, the most obvious impact of the Campbell case is the loss of trust in the Zimbabwean government's willingness to adhere to applicable law. Large numbers of the new small-scale farmers are still waiting to receive an official ownership certificate; duplicate certi-

38 | As an example for the corresponding reporting: Catherine Sasman, "Southern Africa: SADC Still Committed to Tribunal", *The Namibian*, 20 Jun 2012, <http://allafrica.com/stories/201206200222.html> (accessed 22 Jul 2012).



ificates have been issued for some farms; boundaries are not defined clearly and there are no detailed arrangements in place for the distribution of natural resources, such as access to water.<sup>39</sup> As a consequence, sustainable management of the agricultural operations is still rare, and there is no appetite for making major investments.<sup>40</sup>

This aspect of the lack of legal certainty might also be due to the above-described disregard for the rule of law, and the events following the Campbell ruling might be a manifestation rather than a trigger. But the decisive factor is that the Campbell case has brought the extent of the disregard for the rule of law to greater attention and has thereby probably contributed to the actual root cause of the uncertainty, namely the loss of trust.

**The decisive factor is that the Campbell case has brought the extent of the disregard for the rule of law to greater attention and has thereby probably contributed to the actual root cause of the uncertainty.**

This is all the more likely as there are clear parallels apparent between Campbell's situation and that of the present-day new landowners. Not only did Campbell initially think he could trust in the stability of the political climate, he too was in possession of officially approved documents that were supposed to protect his property rights: a Certificate of no Interest, a legally valid judgement by the Zimbabwean judiciary, three legally valid rulings by the SADC Tribunal. But in the end, none of these did him any good.

## **OUTLOOK: THE FUTURE OF ZIMBABWE AND OF THE SADC WITHOUT THE STRUCTURES OF THE RULE OF LAW**

Michael Campbell died in April 2011 aged 78, according to his family as a consequence of severe ill-treatment during the forcible takeover of his farm. He was merely able to win a small legal victory when the South African Gauteng High Court released some land holdings of the Zimbabwean government for judicial sale in order to use the proceeds to compensate expropriation victims, one of whom was Michael Campbell. He had lost the battle against Robert Mugabe all the same.

39 | For a detailed description with examples see: Moyo, n. 11, 946 et seq.

40 | For more detailed data on the areas not utilised or under-utilised: Cliffe et al., n. 8, 926 et seq.

He thought he had the rule of law on his side until, partly with international backing, Robert Mugabe proved that the law lacks enforcement capability. But whether Robert Mugabe will be able to mark this down as a victory in the long term is questionable. Because not only has the Campbell case made the probably most significant contribution to drawing attention to the Zimbabwean government's departure from the rule of law, it also established specific risks to the future stabilisation of the situation of the Zimbabwean state: a thorough undermining of the trust in Mugabe's regime and infection of the community of states in Southern Africa with tendencies based on a disregard for the rule of law.

How dangerous it can prove to underestimate the significance of the rule of law for the stabilisation of a country is demonstrated by the background to the FTLR itself. Although in this context one is dealing with the problems of a lack of structures of the rule of law and not of land distribution, it seems that history is repeating itself when the SADC appears to model its actions on Mugabe's past conduct and appears to simply disregard these issues that are so central to its future. The enormous political pressure that can result from such neglect and the consequences of this pressure being discharged can still be felt throughout Zimbabwe today.

**Not only has the Campbell case made the contribution to drawing attention to the Zimbabwean government's departure from the rule of law, it also established a thorough undermining of the trust in Mugabe's regime.**

Preventing history from repeating itself and generating new trust in the rule of law ultimately require a brutally honest assessment of past events, namely the Campbell case, which will play a key role in re-establishing trust due to its global notoriety. If this file is not finally closed, the "White African" may yet become a stumbling block – for the stability of the SADC, of Zimbabwe, of ZANU-PF and for his opponent Robert Mugabe.