Chapter 12

Land reform in Zimbabwe: context, process, legal and constitutional issues and implications for the SADC region

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1. Introduction

Land reform in Zimbabwe has put the country in the international spotlight, mostly in a negative way. There is continuing controversy over the way in which land reform was implemented in Zimbabwe and the effect of this process on the agricultural sector in that country. Although the process has been blamed for the economic meltdown in Zimbabwe, the land seizures and redistribution, now spanning nearly a decade, still continue. The Western powers have unanimously condemned the manner in which the process of land reform has taken place in Zimbabwe but no international body has pronounced on the legality of the Zimbabwean land reform process. Certainly, the Southern African Development Community (SADC) has not been vocal on the issue, choosing to support the process implicitly through inaction or random endorsements by some SADC leaders, although this seems to be changing.

Zimbabwe is a member of SADC, which is an international organisation with an international identity, and is bound by international law (SADC Treaty, Art. 3). SADC has a Tribunal, established by Article 9 of the SADC Treaty, which serves as a dispute resolution mechanism and which is tasked with adjudicating all disputes relating to the interpretation and application of the SADC Treaty. A White Zimbabwean farmer, Michael Campbell, has brought a case to this Tribunal, alleging that Zimbabwe's Constitutional Amendment Act (No. 17) violates SADC law in that it infringes his human rights. He also alleges that the process of land reform in Zimbabwe is not in accordance with SADC principles. By implementing its land reform programme, so he alleges, Zimbabwe has violated its obligations under the SADC Treaty.

The Tribunal granted an interim order for a stay of his eviction from his farm pending a final adjudication on the matter. Campbell had felt compelled to approach the

SADC Tribunal in October 2007 after the Zimbabwean Supreme Court had failed to respond, within a reasonable time, to his challenge of the constitutional validity of Amendment 17. Although Campbell had lodged his challenge in May 2006, the Supreme Court of Zimbabwe only gave judgment on the matter in January 2008, finding that the acquisition in question was legal, thereby authorising the government to proceed with the acquisitions.[1]

This is the first time that an internal matter has simultaneously been brought before the SADC Tribunal and this is its trial of strength. This paper will attempt to explain the issues in the Campbell case by evaluating the land reform process in Zimbabwe and the issues that shaped it. The SADC Tribunal will also be discussed as the region's most critical institution and one that has pronounced on the legality of Zimbabwe's land reform programme.[2] The paper will also discuss the impact of the land reform process in Zimbabwe on the region.

2. Mike Campbell (Pty) Ltd and William Michael Campbell v The Republic of Zimbabwe, SADC (T) 2/07

2.1 The case

William Michael Campbell instituted action on his own behalf and as the Managing Director of Mike Campbell (Pty) Ltd, the owner of the farm 'Mount Carmell', as well as on behalf of the employees of the company and their families who live and work on the farm. Mr Campbell's argument is that Constitutional Amendment 17 of Zimbabwe infringes the principles of human rights, democracy and the law as espoused by the SADC Treaty, and that the actions and conduct of the Zimbabwean government in effecting the farm acquisitions also contravene Zimbabwe's treaty obligations under SADC.

The first efforts at acquiring Mount Carmell by the Zimbabwean government were made on 22 July 2001, but the High Court of Zimbabwe quashed the acquisition order.[3] The first invasion of the property by war veterans took place between September and October 2001. The police did not respond to calls for assistance. In 2006, an attempt was made by the Minister for Land, Land Reform and Resettlement

[1] *Mike Campbell (Pvt) Ltd & Anor* v *Min of National Security & Ors* S-49-07.
[2] For a comprehensive analysis of the SADC Tribunal, see Ch. 8 of this publication.
[3] Campbell Case: Heads of Argument Summary. [Online]. Available: http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=13001:campbell-case-heads-of-argument-summary&catid=31:top%20zimbabwe%20stories&Itemid=66 [27 July 2008].

to allocate the whole of Mount Carmell to former government minister Nathan Shamuyarira, but this was opposed by the Campbells and there was no response from government.[4] On 14 September 2005, the Constitution of Zimbabwe Amendment Act (No. 17) came into effect, effectively extinguishing any judicial recourse or remedy for farmers who wished to object to the acquisition of their farms. On 15 May 2006, the applicants instituted legal proceedings in the Supreme Court of Zimbabwe challenging the constitutional validity of Amendment 17, thus delaying their eviction from Mount Carmell.[5] Because the Supreme Court had failed to give judgment in this matter within a reasonable period of time, the applicants launched proceedings in the SADC Tribunal on 11 October 2007, challenging the government's acquisition of Mount Carmell and also the validity of Amendment 17. A simultaneous application was filed in terms of Article 28 of the Protocol on Tribunal,[6] read in conjunction with Rule 61 Sub-rules (2)–(5) of the Rules of Procedure which requested

> ...an interim measure restraining the government of Zimbabwe from removing or allowing the removal of, the applicants from the agricultural land...and mandating the respondent (Government of Zimbabwe) to take all necessary and reasonable steps to protect the occupation by the applicants of the said land until the dispute has been finally adjudicated.[7]

An interim order was granted on 13 December 2007 after the Tribunal, headed by the Honourable Justice Dr Luis Anthonio Mondlane, had satisfied itself that the application fulfilled all the criteria for granting interim measures.[8] In the meantime, the Supreme Court of Zimbabwe delivered a judgment on 22 January 2008, dismissing the applicants' challenge to Amendment 17 and authorised the government of Zimbabwe to proceed with the acquisition of Mount Carmell. In March 2008, a total of

[4]Campbell Application to SADC Tribunal on Land Seizures. [Online]. Available: www.polity.org.za/attachment.php?aa_id=9294.
[5] Campbell Case: Heads of Argument Summary.
[6] Article 28 reads: 'The Tribunal or the President may, on good cause shown, order the suspension of an act challenged before the Tribunal and may take other interim measures as necessary.'
[7]Mike Campbell (Pty) Ltd and William Michael Campbell v The Republic of Zimbabwe, SADC (T) 2/07 http://www.saflii.org/sa/cases/SADCT/2007/1.html (18 July 2008).
[8] These criteria are: a) a *prima facie* right that is sought to be protected; b) an anticipated or threatened interference with that right; c) an absence of any alternative remedy; and d) the balance of convenience is in the favour of the applicant, or if a discretionary decision in favour of the applicant that an interdict is the appropriate relief in the circumstances (*Mike Campbell v Republic of Zimbabwe.)*

78 other White farmers from Zimbabwe were joined in the case and granted the same interim relief as the Campbells ('SADC Tribunal' 30 May 2008).

The matter was to be heard on 29 May 2008, but it had to be postponed to 16 July 2008 because the Zimbabwean government had failed to file its papers by the required date. The Tribunal again convened on 16 July 2008 to hear the main case, but on 17 July 2008 the Zimbabwean government lawyers walked out in protest after the Tribunal had allowed the applicants to bring an urgent application to hold the Zimbabwean government in contempt of court for failure to guarantee the undisturbed possession and enjoyment of the property of the White farmers, as per the Tribunal's interim order. The Zimbabwean government was referred to the SADC Summit for contempt and breach for having failed to ensure the safety of the property and personal security of the White farmers who were protected by the interim order. To date it is not known whether the Summit has decided this matter.

Issues to be considered by the Tribunal were whether Amendment 17 and actions of the Zimbabwean government in connection with the farm acquisitions comply with Zimbabwe's obligations under the SADC Treaty. The applicants submitted that Amendment 17 was subject to SADC law. The applicant's contention was that the Zimbabwean government failed to pay compensation for the seized land; and where the government decided that compensation would be paid it failed to perform the necessary assessment or to follow other procedures laid down by the legislation in question. There are no clearly stated criteria for the selection of farms for acquisition except that the farms are owned by White farmers. The applicant argued that this was a racist criterion.

It is necessary to consider the principle of land reform in general, the substantive content of land reform in Zimbabwe, as well as Amendment 17 and its implications. In a judgement delivered on 28 November 2008, the Tribunal ruled in favour of the farmers, ruling Amendment 17 to be in contravention of SADC Treaty obligations.[9] The Zimbabwean government was ordered to protect the farmers' possession and ownership of their land and property. In its determination of the case, the SADC Tribunal considered the issue of jurisdiction, whether the farmers had been denied access to the courts in Zimbabwe, whether the farmers had been racially

[9] *Mike Campbell (Pty) Ltd and William Michael Campbell v The Republic of Zimbabwe*, SADC (T) 2/07.

discriminated against and, lastly, whether the government of Zimbabwe had an obligation to pay compensation to the farmers already dispossessed of their farms. As illustrated by the judgement as well, regional and international law has played a role in determining the legality of Amendment 17 and this in turn has a bearing on the land reform process in Zimbabwe and in the region.

3. The SADC Tribunal

The Tribunal is created by Article 9 of the SADC Treaty as the proper platform for the interpretation of the provisions of the SADC Treaty and for ensuring adherence to them.[10] Article 14 of the Protocol on the Tribunal provides that the Tribunal has jurisdiction over all disputes and all applications referred to it in accordance with the SADC Treaty which relate to the interpretation and application of the Treaty. The Campbell case was about the interpretation and application of the SADC Treaty in relation to the basis of human rights.

3.1 Jurisdiction of the Tribunal

Article 15 extends the Tribunal's jurisdiction to disputes between states and between natural and legal persons and states.

Although natural and legal persons are required to exhaust all domestic remedies before making an application to the Tribunal (Protocol on Tribunal, Art. 15(2)), applications in terms of Article 15 are not subject to the provisions of Article 14 in the same way as all other applications are (i.e. disputes between states and the Community, disputes between natural or legal persons and the community, and disputes between community and staff) (Protocol on Tribunal, Art. 17. 18. 19). While this has been interpreted to mean that disputing member states could agree to authorise the Tribunal to deal with matters not covered by the SADC Treaty (Oosthuizen 2006: 209), the implications of this with regard to disputes between states and individuals are unclear. Usually when natural or legal persons take their case to the Tribunal, they have failed to resolve the matter within their state.

Interestingly, the consent of the other party to the dispute is not required where a dispute is referred to the Tribunal by any party (Protocol on Tribunal Art. 15(3)). This

[10] Article 16 (1) of the SADC Treaty.

means that only the Tribunal will decide if any dispute falls outside its jurisdiction. If the dispute falls outside the Tribunal's jurisdiction, it means that persons who fail to find legal remedy within the jurisdiction of their states are without remedy within SADC. Such a situation is a very serious anomaly that needs to be addressed. On the other hand, SADC has not yet reached that stage of political integration that would allow the Tribunal to have supranational authority and perhaps act as the final arbiter of all disputes between a state and its citizens, whatever the basis of the dispute. Still, the fact that the consent of the other party is not required when bringing a dispute means that the Tribunal has compulsory jurisdiction over all matters referred to it. By virtue of ratifying the SADC Treaty and the Protocol on Tribunal, a member state binds itself to the Tribunal's jurisdiction over all disputes referred to the Tribunal that involve such a state.

3.2 *Locus standi* in the Tribunal

By giving natural persons *locus standi* before the Tribunal, SADC has adopted the modern practice of recognising individuals as participants and subjects of international law (Shaw 2003: 232). This is particularly relevant in the sphere of human rights protection and human rights law. In that particular regard, even though SADC lacks a comprehensive human rights instrument or Protocol, save for a few provisions that make mention of aspects of human rights, SADC ought to be commended as it has transcended even the International Court of Justice where the jurisdiction of the Court *ratione personae* is not extended to natural persons.

The only condition that individual applications are contingent upon is the exhaustion of all available local remedies. The exhaustion of local remedies rule must conform to generally recognised principles of international law and must not only be viewed in terms of domestic law, especially when the remedies may be non-existent or manifestly inadequate or the process may be unduly prolonged.

In the Campbell case, there was no realistic prospect of exhausting domestic remedies because Amendment 17 precludes one from instituting any legal proceedings with regard to the matter. When the applicants in the Campbell case sought an interim order, the government of Zimbabwe objected on the grounds that all internal remedies had not been exhausted as the matter was still pending before

the Supreme Court of Zimbabwe.[11] However, in this instance the applicants had instituted their legal challenge to Amendment 17 in May 2006, and by the time they applied to the Tribunal, the Supreme Court had done nothing about the matter. Clearly, there was no possibility of proceeding under the domestic jurisdiction.[12] Also, as indicated in the judgement, some circumstances make the exhaustion of local remedies requirement meaningless. In this particular case, Amendment 17 explicitly ousted the jurisdiction of the courts in any case involving the compulsory acquisition of agricultural land and thus leaving the farmers without the option to institute proceedings in any domestic court.

3.3. Issues that had to be decided by the Tribunal

The major issue in the Campbell case was the validity of the land reform process in Zimbabwe. Central to this determination was Constitution of Zimbabwe Amendment (No. 17) Act 2005 which was promulgated in September 2005. This amendment inserts a new s16B into the constitution which effectively confirms and validates all government acquisition orders for agricultural land for resettlement purposes and pre-empts all legal challenges to such acquisitions. In terms of s16B(1), farm owners are precluded from instituting legal proceedings opposing the acquisition of their farmland and can use the court system only to dispute the amount of compensation payable for improvements effected on their farms (Zimbabwe 2004).

Although all agricultural land that is earmarked for acquisition is listed in a new schedule to the Constitution (Zimbabwe 2004: Schedule 7),[13] this does not create enough certainty on the position of farmers as the Act also makes provision for the acquisition of unlisted property should that land be required in the future for any purposes.[14] Such acquisitions would also be immune from legal challenge. The implications of this amendment, in particular its effort to exclude judicial intervention in the acquisition of agricultural land in Zimbabwe, are what was being challenged by the Campbells.

[11] *William Campbell v The Republic of Zimbabwe.*
[12] See Article 15 (2) of Protocol to Tribunal.
[13] Schedule 7 itemises agricultural land gazetted on or before the 8 July 2005.
[14] See Section 16B (2), (a) (ii) and (iii) of the Constitution of Zimbabwe.

4. Land Issues in Zimbabwe

4.1 Land distribution prior to the fast-track land reform.

Land distribution at Zimbabwe's independence was highly unequal and heavily skewed in favour of white farmers who constitute a tiny minority of the total Zimbabwean population. The difference in land size was also paralleled by the difference in land quality: land in the best agro-ecological zones and best suited for intensive farming was occupied by white commercial farmers (Thomas 3003: 694). Expectations were high among peasants for the immediate redistribution of land upon independence, but very little was achieved in redressing the land situation and this partly explains why, two decades after independence, white farmers found themselves the victims of farm invasions and farm seizures that mirrored the land seizures of the colonial period. Between 1980 and 1990, the Zimbabwean government was constrained by the Lancaster House Constitution which basically sought to protect white property ownership through the 'willing seller – willing buyer' principle and compensation for land had to be paid in foreign currency. Expropriation of land was only allowed in the case of under-utilised land but with compensation at full market value. Upon expiry of the Lancaster House guarantees in 1990, the Zimbabwean government set the wheels in motion for a more effective land reform programme. Little had been achieved during the period when the original Lancaster House restrictions were in place.

Amendments were made to the Constitution (Amendment Act (No. 11) Act No 30 of 1990; Amendment Act (No.12) Act No4 of 1993) to allow for the acquisition of land by government for resettlement purposes. Section 16 of the Constitution, on property rights, and, previously guaranteeing white property ownership, was amended and the Land Acquisition Act (LAA) of 1992 was promulgated. Although the LAA was mostly a compromise to serve the Zimbabwean government's conflicting interests, it was met with tremendous criticism both locally and internationally, particularly from some international donors and financial institutions (Mlambo 2003: 74-75). Interestingly, according to the British based Economist Intelligence Unit, the legislation was '... legally hardly to be distinguishable from provisions for compulsory purchase practised in the UK.' The LAA empowered the President of Zimbabwe to acquire any land where it was reasonably necessary for purposes set out in the Act. Its deviation

from the Lancaster house provisions was that 'any land' could be acquired; 'fair' compensation would be paid within a 'reasonable' time as opposed to 'adequate' compensation and 'prompt' timing. Also, since the market-based land reform had resulted in the haphazard scattered acquisition of land, making it difficult to put in place support systems, the LAA introduced the system of land designation (Coldham 1993: 83). This designation was necessary both for planning purposes and enabling the government to acquire larger blocks of land for 'proper resettlement schemes where the necessary infrastructure could be economically provided (Coldham 1993*:* 83).' Although this largely meant to pacify the rural electorate that needed land, this land legislation only went to benefit the rich and the ruling elite who engaged in a massive 'scramble' for the best land. The taking and allocation of land was riddled with corruption and political clientelism (De Villiers 2003:17 19). The majority of processed applications and allocations of land went to the newly created 'elite black farmers, aspiring black investors and agriculture graduates.' There was a shift from allocating land to the needy to those who are 'capable' to develop the land and from 1991 onwards the long-standing land resettlement lists were simply shelved (Moyo 1999: 5). The LAA was not such a drastic departure from the Lancaster House Agreement. Had it received the necessary support from White farmers and donors, and had the government implemented the Act effectively, it would have gone a long way towards preventing the land seizures of the early 2000s.

4.2 Post-1997 land invasions

Despite the above-mentioned efforts, the land question remained largely unresolved for most of the 1990s. Although the demand for land was always there, it did not have enough voice to make its demands felt[15] while, on the government's part, land reform remained largely in the realm of rhetoric throughout the 1980s and 1990s.

The late 1990s had seen a surge in political opposition to the ruling party as well as civil society organisations demanding good governance and participation in policy making (Sachikonye 2003: 101-106). Zimbabwe was also going through an economic crisis towards the late 1990s. Improperly implemented, the Economic Structural Adjustment Programme (ESAP) had devastating consequences for the majority of

[15]Black lobby groups, such as Affirmative Action Group and the Zimbabwean Farmers Union (ZFU), which claimed to represent the rural landless, were fighting for the same constituency as government and, as a result, they were 'controlled politically and co-opted financially' (Moyo 1999: 15).

the population through price increases, decreased earnings and job losses (Ndlela 2003: 137–140). This was exacerbated by the unbudgeted lump sum payments and monthly pensions to members of the Zimbabwe National War Veterans Association as compensation for their role in the war of liberation, as well as the deployment of troops to the DRC to assist the DRC government in fighting rebels (Ndlela 2003: 142). The economic crisis had also extended into a social and political crisis.

Deteriorating conditions and government's insistence on turning a deaf ear to the calls for improved governance through consultation resulted in the emergence of a strong opposition, the Movement for Democratic Change (MDC). In alliance with a variety of constituencies such as academics, youth, professionals, commercial farmers and big business (Sachikonye 2003: 112), the MDC successfully mobilised for a 'NO' vote in the February 2000 Referendum for the new draft Constitution which did not properly reflect the views of the people on the contents of a new constitution (Sachikonye 2003: 115). A credible opposition party had emerged, and one that could potentially dethrone the ZANU-PF government. But how does this changed political landscape relate to the chaotic land reform process that followed?

Government launched the second phase of land resettlement in 1997 where farms were to be acquired on the basis of the guidelines set out in the 1990 Land Policy Statement.[16] Britain had backtracked on its earlier compensation promises through a 1997 letter in which the British Minister for International Development stated: '… we do not accept that Britain has a special responsibility to meet the costs of land purchase in Zimbabwe. We are a new government...without links to the former colonial interests' (Thomas 2003: 708). An International Donors Conference was convened in 1998 to mobilise support for the government's land reform programme but donors indicated that they were more interested in land development than in land reform.

Progress under this land resettlement programme was very slow and the number of families resettled by the end of 2000 still fell short of the 1980 targets.[17] The referendum defeat of 2000 led to the government orchestrating a radical process of

[16] Farms were to be acquired according to the following criteria: a) the farmer is an absentee, b) the farm is derelict or under-utilised or c) the farm borders on a communal area. (Thomas 2003 *Third World Quarterly* 700)

[17] Only 75000 families had been resettled as opposed to the target of 120000 families by 1985.

land occupation. The government exploited the racial divide in land distribution, the people's need for land and the failure of the British government and other donors to live up their compensation promises. The 'people' had to be seen to be showing their disgruntlement and the war veterans led the farm invasions. The government supported these farm invasions which were violently carried out and in complete violation of the law. Large numbers of farm labourers were displaced. The state security machinery conveniently turned a blind eye on the violence and the killings (Sachikonye 2003:117). In June 2000, ZANU (PF) ran the elections with the motto, 'Land is the economy, economy is the land' (De Villiers 2003). The government proceeded to adopt and implement a Fast Track Land Resettlement Programme which was initiated by an amendment to the constitution in April 2000 and amendments to the LAA in May 2000,[18] both of which empowered the government to compulsorily acquire land without paying compensation.

4.3 Constitutional and legislative amendments at issue in the Campbell trial

Despite its referendum defeat in February 2000, the Zimbabwean government proceeded with constitutional reforms in order to fast-track its land reform programme. Section 16A (1) of the Constitution articulates the foundation and the basis for land reform, the nature and history of land dispossession of the Zimbabwean people. It evokes nostalgia for the nationalistic impetus that drove people to fight against the minority rule and for land. The land reform and resettlements have come to be called the 'Third Chimurenga' since they operate on the same nationalist dogma as in the war of liberation. Most importantly, this constitutional amendment shifts full responsibility for the payment of compensation for compulsorily acquired farms from Zimbabwe to Britain as the former colonial power.[19] The amendments provide that where compensation is deemed to be payable, a variety of factors will be taken into account[20]: the resources available to

[18] Section 16A of the Constitution of Zimbabwe sets the foundation and basis of land reform; the nature and history of land dispossession of the Zimbabwean people; shifts full responsibility for the payment of compensation for compulsorily acquired farms from Zimbabwe to Britain as the former colonial power; and sets out ambiguous factors to be considered in determining compensation. The compensation assessment principles in the LAA were changed, with compensation payable only for improvements on or to the land. The land itself would be taken without compensation and echoed the same sentiments, placing an obligation upon the British government to set up a special fund for the payment of compensation to farmers whose land is compulsorily acquired (Coldham 2001: 228).

[19] See Section 16A (2) of the Constitution of Zimbabwe.

[20] See Section 16A (2) of the Constitution of Zimbabwe.

the acquiring authority in implementing the programme of land reform, any financial constraints that necessitate the payment of compensation in instalments over a period, and any other relevant factor that may be specified in an Act of Parliament.[21] Given the deepening economic crisis in Zimbabwe since 2000 and the level of inflation at present, it is obvious that these factors would be used to justify payment of a pitiful small amount of compensation. It would also be possible for the government simply to create further restrictive criteria through an Act of Parliament, something which the government has not shown an aversion to, particularly when it serves its political interests.

With these constitutional amendments in place, the government speedily proceeded, without much discussion, to amend the LAA (Coldham 2001:228). The compensation assessment principles were changed, compensation being payable only for improvements effected on or to the land. The land itself would be taken without compensation. According to the Constitution, claims for compensation would have to be directed to the British government as the Zimbabwean government disowned responsibility for paying for compensation. As expected, the amendments to the LAA echoed the same sentiments, placing an obligation upon the British government to set up a special fund for the payment of compensation to farmers whose land is compulsorily acquired (Coldham 2001: 228).[22]

Part 1 of the new Schedule to the Act sets out the assessment principles for compensation for specific kinds of improvements but it does not clarify how an improvement is to be valued. What is clear, however, is that the original cost or the approximate cost of the improvement at the time of acquisition is not the basis of the assessment (Coldham 2001:228). Payment of compensation continues to be payable in instalments, but with a reduced initial payment. Only one quarter of the compensation is payable at the time of acquisition or within a reasonable time thereafter, with another quarter payable within two years and the remainder in five years.[23] There is no provision for payment of interest on the compensation and, given

[21] Other factors specified are: the history of land ownership, use and occupation of the land; the price paid for the land when it was last acquired; the cost or value of improvements on the land; the current use to which the land and any other improvements on it are being put and any investment which the state or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it.
[22] Section 29C (i) of Land Acquisition Act.
[23] See Section 29C (3) of Land Acquisition Act of 1992.

the astronomical current rate of inflation in Zimbabwe, it is inevitable that by the time compensation is paid out, it will be worthless – in other words, it would neither be prompt nor effective. Recourse to judicial review is still available if a claimant is dissatisfied with the assessment made for compensation but this would only be on the basis that the principles set out in the Act were not adhered to in determining the amount of compensation. If the owner believes that the compensation offered is not 'fair', he or she has no right to appeal to a court of law.[24] While all the amendments apply only to agricultural land, there is no obligation on the part of the government to prove the need for or the suitability of the land for resettlement (Coldham 2001: 228).

These radical amendments to both the Constitution and the LAA rendered the land designation process redundant, for, having divested itself of the obligation to pay compensation for acquired land, there was no need for the government to earmark farms for future acquisition (Coldham 2001: 228).

As from 31 July 2000 an intensive land acquisition process began (Thomas 2003: 701), complemented by farm invasions led by the war veterans. In September 2002, further amendments were made to the Constitution to expedite the land acquisition process. The 90-days' eviction notice that was previously required was reduced to seven days and the fine for failure to comply with an eviction order was increased.[25] The government's radical methods for acquiring farms were so effective that by the end of October 2002 only an estimated 600 to 800 of the 4500 white farmers remained on their land (De Villiers 2003: 21). Despite the above amendments to the LAA, farmers continued with court challenges to the acquisition of their farms and sought eviction orders in respect of the government-sponsored squatters on their properties. According to government reports, '... almost every court action brought by the owners of the land targeted for acquisition challenged the right of the state to acquire the land, not the level of compensation payable for the improvements to the land' (Zimbabwe 2004), as provided for in the LAA. The courts by and large confirmed the government's acquisition orders, but the judicial review process did delay the process of land acquisition. The government needed to prevent these legal challenges to its competence to acquire farms compulsorily. This it did by means of a

[24] See Section 29D, Land Acquisition Act of 1992. The Supreme Court of Appeal still remains the highest court of appeal on such objections.
[25] See Section 9 of Land Acquisition Act of 1992.

constitutional amendment that confirmed all acquisitions that had previously taken place (Zimbabwe 2004).

ZANU (PF) won the June 2000 election, which was considered neither free nor fair by Western election observers, with the majority of its support deriving from the rural areas where land reform was of more immediate concern than in the urban areas. The failure by the police to evict war veterans from farm properties prompted farmers to approach the courts for relief. An order to evict the land invaders was issued but this was not enforced. Further legislation was passed in 2005 that expedited the process of land expropriation and precluded farmers from contesting the expropriations in court. The government has since continued to acquire farmland belonging to white farmers and it is against the above history and background that Amendment 17 is being challenged in the SADC Tribunal.

Section 3 of the Zimbabwean Constitution proclaims the supremacy of the Constitution and how it supersedes all law and invalidates any law that is inconsistent with the Constitution. In *Smith v Mutasa* (in Naldi 1993: 592),[26] it was declared that such supremacy '... is protected by the authority of an independent judiciary, which acts as the interpreter of the constitution and all legislation' (Naldi 1993: 592).' The judiciary should have the power to review, when called upon, all decisions of the legislature and the executive, for consistency with the constitution. Section 18 (9) of the Constitution guarantees an individual's right to judicial redress within a reasonable time in determining his or her civil rights and obligations as well as their parameters. By excluding the jurisdiction of the courts on land acquisition matters, Amendment 17 essentially violates the substantive due process of law by allowing individuals to be arbitrarily deprived of their property without judicial recourse (Naldi 1993: 593).

The very existence of Section 18(9) creates a presumption of a hearing every time individuals' civil rights have to be determined (Naldi 2003:599). It should be pointed out that s16(2) of the LAA attempted to oust the courts' jurisdiction to determine what constitutes a 'fair' compensation.[27] This was met with outrage from the judiciary, and

[26] See Supreme Court of Zimbabwe, 1989, in Law Reports of the Commonwealth (Constitutional) (London) 87.

[27] Part of section 16 (2) reads '... and no such law shall be called into question by any court on the ground that the compensation provided by that law is not fair.'

the then Chief Justice of the Supreme Court, Mr Anthony Gubbay, declared publicly that the courts would invalidate any legislation that violated the fundamental principles of the Constitution (Naldi 2003: 589). Such court ouster was, however, circumvented by other provisions providing for a Compensation Court as well as an Administrative Court whose decisions could be appealed in the Supreme Court. This worked to keep the executive and legislature in check through judicial intervention where the two branches overextended their competencies.

Previously, in December 2000, the Supreme Court of Zimbabwe held that the government had abused the Constitution and had violated the law of the land in implementing its land reform programme. The government was held to have failed to protect farmers and their workers from violence and intimidation. Without a 'workable programme of land reform,' the government was to cease its land acquisitions (Dancaescu 2002–2003: 622). With the appointment of new judges in 2001, the Supreme Court overturned the above decision and held all farm seizures to be legal and that farm invaders should not be evicted (Thomas 2003: 709). In doing so, it is suggested that the Court absolved itself of the duty to interpret and uphold the Constitution in favour of political patronage, rendering the process devoid of meaningful judicial oversight. Amendment 17 was enacted in response to the legal challenges instituted by the farmers. It successfully did away with the rule of law in the acquisition of farms and creates a *lacuna* in the process of land reform.[28]

5. Provisions of International Law

There are international instruments that make specific mention of the right to own property. The 1948 Universal Declaration on Human Rights (UDHR) Article 17 provides that 'everyone has the right to own property' and that 'no one shall be arbitrarily deprived of his property.' Having attained the status of international customary law, this provision in the UDHR should secure property rights. However, it fails to address comprehensively the scope of this right by failing to define what constitutes 'arbitrary deprivation' (Shirley 2004: 167). Shirley (2004: 167) provides an interesting analysis. She argues that where land acquisition has been authorised through constitutional amendments and legislative action, due process may be all

[28] When the regulations themselves are not subject to any form of oversight, there might as well be no regulations.

that is needed to satisfy Article 17 of the UDHR, however skewed such 'due process' may be. However, we disagree with this view.

Racial discrimination is evident in the process of land reform.[29] The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), describes, in Article 1, racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. The state's security machinery's refusal to come to the aid of white farmers under attack from war veterans, and refusal to evict illegal squatters can be considered a violation of the right of persons to protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution (ICERD, Art. 5 in Dancaescu 2002–2003: 627). ICERD (Art. 5(d)) goes on to state that everyone is guaranteed equality before the law without distinction as to race and the right to own property alone as well as in association with others. The International Convention on Civil and Political Rights articulates also that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. The ruling party's sentiments on the issue of land reform and White people have the potential to incite discrimination, hostility and violence.

International law lacks a coherent, definite stand when it comes to the expropriation of citizens' land and the protection of citizens' property in general. What is agreed upon, however, is that

- expropriation of property by a state in the national interest is a legitimate measure and is not necessarily illegal under international law (Shaw 2003: 738); and
- expropriation by a national authority of property owned by foreigners should be accompanied by compensation at full market value by the expropriating authority (Shearer 1994: 269-275).

[29] In December 2000, Robert Mugabe told a ZANU (PF), in addition to other racist sentiments, 'We must continue to strike fear into the heart of the white man, our real enemy.' (Kagoro 2002).

International law is explicit when it comes to the taking of foreign-owned property, and over the years, practice, doctrine and case law have come to create a body of principles against the arbitrary acquisition of foreign property.[30] Nonetheless, it is doubtful whether this body of law can be used to determine the Zimbabwean situation, for the farmers cannot rely on their colonial heritage to claim British citizenship and, even if they tried, it would probably be established that their 'dominant and effective nationality' lies with Zimbabwe.[31] In effect, this is a case of Zimbabwe expropriating its own citizens' property. It must be emphasised, however, in relation to Amendment 16 which obliges Britain to pay compensation to the farmers whose land has been acquired, that under international law Zimbabwe cannot create legally binding obligations that are enforceable against another sovereign state without its consent. Much will therefore depend on the interpretation to be given to the Lancaster Agreement, namely, whether the expectations created by the Agreement are legally binding and enforceable on the British government. This writer contends that a political and diplomatic solution may be quicker and more effective, and face saving to the two states.

International law has not offered a state's own nationals the same protection as foreigners when their property is acquired. There is case law and instruments that support, at least by implication, the deprivation of Zimbabwean farmers' property in the public interest. Nationalisation is an act that can be attributed to the exercise of sovereignty by any independent state, and there are numerous United Nations resolutions that reaffirm the permanent sovereignty of states over their natural wealth and resources, starting with Resolution 1803 (XVII) of December 1962.[32] In the *Case Concerning Certain German Interests in Polish Upper Silesia* (1926), the Permanent Court of International Justice found that only 'expropriation for reasons of public utility, judicial liquidation and similar measures' was permissible under customary

[30] Such principles can be compressed into four distinguishable rules. According to Shearer (1994:270) the acquisitions must'

- 'be for a public purpose in accordance with a declared national policy;
- not discriminate between aliens and citizens, or, as between different foreign nationalities
- not involve the commission of an unjustified irregularity
- be accompanied by the payment of appropriate compensation.

[31] The 'dominant and effective nationality' principle was evolved in the *Iran-United States Case* No.A/18, 5 IRAN-U.S. C.T.R. 251 (Iran-U.S Claims Tribunal 1984) (Shirley 2004: 170 – 171).

[32] See also General Assembly Resolution 3171(XXVIII) of 1973; Resolution 3201 establishing the New International Economic Order of 1974; and Resolution 3281 on the Charter on Economic Rights and Duties of States, 1974. The right to permanent sovereignty over resources features in common Article 1 to the International Covenants of 1966 alongside the right to self determination.

international law. Naldi (1993: 596) contends that these principles have since expanded with the advent of contemporary issues.[33] We suggest that one such contemporary issue in the aftermath of colonialism in Africa is to address the unequal distribution of wealth along racial lines, particularly where land is concerned. The principles should then include the developmental needs of developing countries and the imperative to economically empower the previously disenfranchised majority. The compulsory acquisition of land should then be seen within a larger context.

The question is always whether an individual's fundamental human rights and the state's obligation to protect such rights overrides the urgent and paramount interests of the country as a whole. Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1954 protects the individual's right to property, 'except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. The right to property is not among the rights included in the main instrument adopted in 1950. Similarly, the above article of the Protocol provides that the state has the right to '…enforce such laws as it deems necessary to control the use of property in accordance with the general interest…' The European Court of Human Rights decided, however, that this reference to international law does not apply to the taking by a state of the property of its own nationals.[34] From judicial interpretations of this Article regarding dispossession of land and compensation two principles have emerged (Naldi 1993: 597):

> (i) 'prompt, adequate and effective compensation in accordance with the general principles of international law ... does not apply to the taking by a state of the property of its nationals but is designed for the protection of aliens'; and
>
> (ii) Article 1 did not guarantee a right to full compensation in all circumstances since legitimate objectives of 'public interest' such as pursuing measures of economic reform, might call for less than full compensation.

[33] *Permanent Court of International Justice* (The Hague), Series A, 7, 1926: 22.
[34] *Lithgow*, *European Court of Human Rights*, Series A No.102;75 ILR p.438 (Shaw *International Law* 739)

These principles indicate that the Zimbabwean concept of 'less than adequate' compensation regarding compulsory acquisition of property was not a novel idea and the LAA fell within acceptable international law norms. On the question of later amendments to the constitution and LAA, which take away the right to compensation, there is no precedent in international law. It can be assumed that some form of compensation is always required and, in balancing the opposing interests, compensation for improvements to the land only might be all that is needed to satisfy the requirements of international law.

United States of America case law similarly confirms the need for land redistribution. In *Hawaiian Housing Authority v Midkiff* 467 US 229 (1984) the US Supreme Court held that land redistribution was constitutional in so far as it 'reduced the perceived social and economic evils of land oligopoly' (Dancaescu 2002–2003: 634).Although circumstances were different in this case as the recipients of the land were already living on the land, the judgment's rationale is important.

The Resolution 41/128 on the Right to Development adopted by the United Nations General Assembly in 1986 recognises in Article 1 that 'development is an inalienable human right by which every human person and all peoples are entitled to participate … (and that the right) also implies the exercise of their inalienable right to full sovereignty over all their natural wealth and resources…'(Dancaescu 2002–2003: 637). Land is one among the resources referred to above and which is in abundance but concentrated in the hands of a few individuals. Decisions on land reform are complicated where the human rights of those initially dispossessed of land through colonisation, racist regimes and economic injustice; mostly African people, are considered (Dancaescu 2002–2003: 638). It essentially becomes a question of whose rights are more important and whether the sins of the past have been extinguished over time to the extent that land initially seized illegally and through violence and force can now be sold back to its 'owners'. The right to development, not articulated in the Universal Declaration on Human Rights, finds expression in the International Covenant on Economic, Social and Cultural Rights, which guarantees the right to an adequate standard of living and the continuous improvement of one's standard of living (International Covenant on Economic Social and Cultural Rights: Article 11). Implicit in this and the right to development generally, is the right to access resources necessary to achieve such improvement or development.

A secured right to property is an important component of those resources. The Draft Declaration on the Rights of Indigenous People recognises the worth of land to a community and the individual. It notes 'the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to land', to allow them to 'freely pursue their economic, social and cultural development' and have the right to redress for 'any action which has the aim or effect of dispossessing them of their lands, territories and resources' (Dancaescu 2002–2003: 639). Like most instruments of international law elaborating on land issues, this instrument does not clarify what such 'redress' entails. This is a huge oversight, especially considering that such instruments apply mainly to developing countries that were themselves the victims of colonisation and that do not have the financial resources necessary for the payment of compensation upon expropriation.

The African Charter on Human and Peoples' Rights is similarly implicit in its support for land reform. Article 14 of the Charter guarantees the right to property but has a claw-back clause that subjects the right to the interests of the public need in accordance with the provisions of appropriate laws. There is no further elaboration on Article 14 on this matter and this in effect leaves such 'public need' entirely at the discretion of the state (Shirley 2004: 168). Thus the extent of the protection of private property from compulsory and arbitrary expropriation by the state has to be sought and determined through international human rights instruments and international law. This poses a problem when one considers the difference on how the First and the Third Worlds view the concept of human rights. Whereas the First World emphasises that the individual and his or her civil and political rights are paramount, the Third World is more concerned with issues of development, and thus from their perspective, social and economic rights tend to dominate other rights (Shaw 2003: 249-252). At face value, Article 14 would suggest that land reform in Zimbabwe has been supported by 'appropriate' laws as there have been various constitutional and legislative amendments (Shirley 2004: 168).

Article 21 (2) of the African Charter states that 'in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property…. 'According to Shirley, the use of the word 'spoliation' could be interpreted as referring to the forced taking of land during the colonial era. This is to be expected of a continent that is still apprehensive about encroachment on its sovereignty, having fought so hard for it.

The Charter also embodies Africanism with a bias towards establishing states free from the vestiges of colonialism (Shirley 2004: 169)

Land seizures such as those in Zimbabwe will continue to fall within a contested domain of international law that separates North from South until such international development law has matured and provides greater clarity on this issue. As yet there is no 'substantial body of binding rules, conferring specific rights upon developing states and imposing duties on developed countries' (Shearer 1994: 358). This is why Zimbabwe cannot enforce Britain's assurances in respect of helping Zimbabwe meet the costs of land reform, not even by constitutionalising them, without a binding agreement between the two countries. There is no global acceptance of the right to development and its scope and, by extension, of the right to resources, as being specific human rights. However, for developing countries, development does not imply 'simply an increase in productive capacity but major transformations in their social and economic structures (and) ... the ultimate purpose of development is to provide opportunities for a better life to all sections of the population' (Shearer 1994: 359).[35]

The major question with regard to development in the Zimbabwean context is whether any such right outweighs the rights of those who previously controlled the country's wealth and resources, to such an extent that such resources can be compulsorily acquired without compensation. Having said this, given the history and process of land reform in Zimbabwe, it is inconceivable that the land acquisitions were solely motivated by developmental concerns. While those issues played a role, particularly the need to distribute land to the majority and ease their poverty, political concerns have certainly played an equivalent role.

6. Campbell case and SADC law

Article 4 of the SADC Treaty (Article 4(c)) demands that member states act in accordance with the principles of 'human rights, democracy, and the rule of law'. According to the Campbell heads of argument, abiding by these principles entails 'a threefold, integrated commitment of the member states of SADC to attaining economic development, encouraging regional peace and cooperation and ensuring

[35] 1970 Report of the United Nations Committee for Development.

respect for basic human rights and the rule of law' and this 'includes other international legal instruments which the member states have ratified'. Given the tone of members of the ruling elite at rallies and in speeches, the government technically endorsed the violence, harassment and intimidation that ensued during the farm invasions. At the very least the Zimbabwean government condoned such violations of the human rights of the farmers and the farm workers.

Removing the right to legal redress for land expropriation violates the very foundations of the rule of law as it emasculates the judiciary which is responsible for ensuring adherence to the law. It also ignores the principle of the separation of powers which is imperative for the prevention of despotism and anarchy as it keeps the other branches of government in check. Zimbabwe has thus not acted in conformity with the provisions of Article 4 of the SADC Treaty. One of the principles upon which the rule of law is founded is the ability of individuals to be given a fair and impartial hearing to determine their rights – this is not possible in Zimbabwe. By legalising farm invasions and acquiring farms without due regard for the human rights of the farm owners and their workers and taking away the only source of redress available, the Zimbabwean government is violating the principles of human rights, democracy and the rule of law. In its judgement, the Tribunal confirmed the above by pointing out that,[36]

> "the concept (*rule of law*) embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation. ... Any existing ouster clause in terms such as "the decision of the Minister shall not be subject to appeal or review in any court" prohibits the court from re-examining the decision of the Minister if the decision reached by him was one which he had jurisdiction to make. Any decision affecting the legal rights of individuals arrived at by a procedure which offended against natural justice was outside the jurisdiction of the decision-making authority so that, if the Minister did not comply with the rules of natural justice, his decision was ultra vires or without jurisdiction and the ouster clause did not prevent the Court from enquiring whether his decision was valid or not".

[36] *Mike Campbell (Pty) Ltd and William Michael Campbell v The Republic of Zimbabwe*, SADC (T) 2/07.

One of the objectives of SADC Treaty (Article 5(b) and (c)) is to 'promote common political values, democratic and other shared values which are transmitted through institutions which are democratic, legitimate and effective as well as to 'consolidate, defend and maintain democracy, peace, security and stability'. The land reform process in Zimbabwe is also linked to the political and economic meltdown that Zimbabwe has experienced since 2000. A wave of terror is constantly unleashed on the opposition and its supporter; hyper-inflation has reached unprecedented levels; and there has been a huge decline in the people's standards of living. The ZANU-PF government has become increasingly autocratic and is identified with repression and anarchy. Democracy in Zimbabwe is questionable as the ZANU-PF government does not tolerate any opposition. The state's institutions and machinery are under the control and influence of the ruling party and have been used for undemocratic purposes. This goes against the spirit and purpose of the above-mentioned objectives.

The SADC Treaty (Article 6(1)) obliges its member states to desist from acting in a manner that would jeopardise the 'sustenance of its principles, the achievement of its objectives and the implementation of the provisions'. SADC member states are also directed to take all necessary steps to give the Treaty the force of national law in their countries (Article 6(5)). In essence this means that in implementing national policy and legislation, states should give due regard to the provisions of the SADC Treaty and maintain consistency with them. A state can therefore not adduce its own national law as a justification for violating the tenets of SADC law. This is aimed at containing SADC states within the parameters of SADC law and the principles that it embodies. By ratifying the SADC Treaty, Zimbabwe bound itself to see that its national laws and policies conform to the SADC legal framework. The government has failed to observe this and, as the country sinks deeper into a crisis, so does it show disregard for SADC principles and objectives.

7. The Tribunal's enforcement mechanisms

The enforcement and execution of the Tribunal's decisions are regulated by Article 32 of the Protocol on the Tribunal which states:

1) The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the state in which the judgment is to be enforced will govern enforcement.
2) States and institutions of the community must take forthwith all measures necessary to ensure executions of decisions of the Tribunal.
3) Decisions of the Tribunal will be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the states concerned.
4) Any failure by a state to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.

If the tribunal finds that these rules have been violated, it must report its finding to the Summit for the latter to take appropriate action. The question remains whether SADC has enough teeth to deal with transgressor states when they fail to execute the decisions of the Tribunal. The effect of this provision is that the Tribunal cannot act unless such failure has been brought to its attention. There are also gaps in Article 32. The Tribunal should have a mechanism to oversee and ensure that its decisions are carried out by member states. For as long as none of the concerned parties bring to the attention of the Tribunal that a decision is not being carried out, the Tribunal cannot report it to the Summit.

To make decisions more effective, the Tribunal should be empowered to follow through and investigate the compliance of member states. However, this is one of the weaknesses of international law in general, especially in circumstances where there is no immediate threat to peace and security. The enforcement and execution of judgments is an issue that many international tribunals and dispute resolution bodies face. For instance, the judgments of the International Court of Justice (ICJ) are final and binding, like those of the SADC Tribunal, but '... once the court has found that a state has entered into a commitment concerning its future conduct it is not the court's function to contemplate that it will not comply with it' (Shaw 2003: 996).[37] This is the instance where the principle of *pacta sunt servanda*[38] kicks in and states are expected to exercise good faith and carry out their treaty obligations. The record of

[37] The Nuclear Tests case, ICJ Reports, 1974.
[38] See Article 26 of the Vienna Convention on the Law of Treaties, 1969.

non-compliance with the ICJ's judgments is well documented but the judgments are more valuable on a political level where they make a much greater impact than on the legal level (Shaw 2003: 997).

To expect the Tribunal, a regional institution still in its infancy, to receive full compliance with the decision of its first landmark case is perhaps asking for too much. On the other hand, it is precisely for the reason of being in its infancy that it needs a decision on Zimbabwe to be implemented. A regional organisation such as SADC and its Tribunal are more likely to have a greater effect on Zimbabwe than an international tribunal would. That is because, in a regional setting, countries are more dependent on each other and, due to historical, social, political and cultural affinity, such institutions would command more respect.

In the Campbell case, having such issues deliberated in a regional court takes away the idea of imperialistic notions tainting the judgment. There is also the possibility that Zimbabwe would give precedence to its own domestic court ruling over the findings of the Tribunal. It must be remembered that the Supreme Court of Zimbabwe deliberated on the same matter before the Tribunal. The Supreme Court gave its judgment on 22 January 2008 when the constitutional challenge to Amendment 17 was dismissed, thus ruling the ouster of judicial recourse in land acquisitions legal. The government's response, in the words of Zimbabwe's land reform minister, Didymus Mutasa, was that the acquisition of Mount Carmell would continue ('Land Challenge Acid Test' 22 July 2008). Already, the interim order of the SADC Tribunal was violated with the government failing to protect farmers from being robbed, assaulted and evicted from their farms ('SADC Tribunal Postpones' 30 May 2008). In response to the Tribunal ruling, the government of Zimbabwe, through its Minister of State for National Security, Lands, Land Reform and Resettlement, Mr Didymus Mutasa, has declared that the SADC Tribunal is 'daydreaming' and the government will proceed with land reform in its current form.[39]Mutasa has declared that the laws of Zimbabwe will not be made by SADC, that the SADC Tribunal has no jurisdiction

[39] "Zimbabwe says it will defy land seizure ruling" *Reuters* 1 Dec 2008 http://www.namibian.com.na/2008/December/national/0840ED5433.html (5 December 2008).

over the matter and, as a consequence, those farmers that return to their farms in line with the SADC Tribunal ruling will meet with the wrath of the law.[40]

It is a well established tenet of international law that, despite legislative sovereignty, violation of an international law or norm cannot be justified by advancing the provisions of a state's domestic law (Shaw 2003: 124). To be able to do so would defeat the very objectives of international law and render the dispute resolutions mechanisms redundant. Transgressor states are therefore precluded from pleading deficiency in their domestic law in the international arena. This tenet is embedded in the 1969 Vienna Convention on the Law of Treaties (Article 27) which provides that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. This provision adds strength to Article 26 which provides that 'every treaty in force is binding on the parties to it and it must be performed in good faith'.

Because the land issue goes to the fundamentals of sovereignty and is a matter that is also significant to other countries within SADC faced with the same kind of uneven distribution of land, the enforcement of the Tribunal's decision, will have far-reaching consequences. The Tribunal has already asserted itself by reporting Zimbabwe to the Summit for its failure to protect the farmers on their property. Very significant to this, is the Zimbabwe Government's previous refusal to recognise or acknowledge domestic court decisions where they have gone against its land reform programmes and its repeated violation of the rule of law with impunity.[41] As pointed out above, the Zimbabwean government has adopteda very contemptuous attitude towards the decision of the Tribunal.

Beyond enforcement issues, the Campbell case will also work to test the mutual support that should exist between the Tribunal and the Summit. Will the Summit be willing to take punitive action against Zimbabwe for failure to heed the Tribunal's rulings? There is no obligation on the Tribunal to give its recommendations on the course of action to be taken should it find against Zimbabwe but most likely it will

[40] "Zimbabwe: Govt violated rule of law – SADC Tribunal" *The Standard* 29 November 2008 http://allafrica.com/stories/200811300007.html (5 December 2008).

[41] 'The court is saying nonsense, it will never happen that blacks should fight each other. I will die with my claim to land. My right to land is a right which cannot be compromised. It is our right. It is our land. We must be prepared to die for it.' Robert Mugabe, speech at Gwanda, Zimbabwe June 14 2000 (Dancaescu 2002–2003: 616)

make such recommendations. Even then, there is no absolute obligation on the part of the Summit to take action. It has discretion when it comes to taking action and punishing a transgressor state.

Punitive measures against any state are covered by Article 33(1)(a) and (b) of the SADC Treaty which provides that sanctions may be imposed against any member state that persistently fails, without good reason, to fulfil obligations assumed under the SADC Treaty and also against a member state that implements policies which undermine the principles and objectives of SADC. There is no guideline as to the kind of sanctions that may be imposed against a state with appropriate action being decided on a case by case basis. The issue of enforcement and execution of decisions of the Tribunal as well as that of sanctions is not comprehensively dealt with in both the Protocol on the Tribunal as well as in the SADC Treaty. The Summit consists of the Heads of State or Government of all member states and is the supreme policy-making institution of SADC; its decisions are taken by consensus and are binding (Article 10(1) and (8). The procedures of Protocol on Tribunal and the SADC Treaty do not deal with the issue of whether the transgressor state can be present when deliberations are taking place about what sanctions to impose on that state (Oosthuizen 2006: 177). The presence of Zimbabwe in the deliberations might stand in the way of taking appropriate action.

8. Implications for the region

The Zimbabwean land crisis resonates widely across the region. Progress on land reform has not been impressive in the Southern African region. In Zimbabwe such progress was only accelerated by the fast-track land resettlement programme. The Campbell case goes way beyond Zimbabwean legislation – whatever ruling the Tribunal makes will have an impact on land reform in the region. SADC as a whole is affected by the following land issues:[42]

- land distribution that is inequitable, with limited rights and access for the majority; there is no land use classification in resettlement and the

[42] S Nanthambwe 'SADC l Land Reform Support Facility: Support to National Programmes' Paper presented at workshop on ' Decentralised Land Reform in Southern Africa' 22-23 April 2008 Gauteng, South Africa http://www.plaas.org.za/research/land/decentralised-land-reform-in-southern-africa/workshop-papers/dlrsa_presentation_snanthambwe.pdf/ (5 December 2008).

resettled population usually does not have the capacity to farm the land, because of lack of planning and infrastructure development;

- weak capacities of government agencies responsible for reform process and administrative processes that are government driven, with little participation of civil society; and
- a judiciary whose capacity is weak and often elite centred and lengthy court processes that delay resettlement and the payment of compensation.

Although applicable to the whole region, such issues are especially relevant to South Africa and Namibia which inherited the same land iniquity when they gained independence and whose land distribution mirrors that of Zimbabwe.

It is clear to see that the fast-track land reform of Zimbabwe is hanging over these countries and there is pressure on government to expropriate land. Such developments, however, have an adverse impact on regional integration in SADC. While Namibia and South Africa might be able to handle their expropriations differently in such a way that their economies and the general standard of living of their people are not affected, unfortunately there exists a catalogued example of the effects of an intensive expropriation and land reform drive. Investors would definitely be worried, wondering if these countries are going down the Zimbabwean way. This does not augur well for the prospects of increased regional integration in the region.

It is amidst the political and economic crisis gripping Zimbabwe that the SADC Free Trade Area has been launched.[43] As previously mentioned, the land crisis goes to the core of Zimbabwe's problems. The Free Trade Area is a product of the SADC Trade Protocol which was signed in 1996. The Trade Protocol contains the legal and structural framework for trade liberalisation in the region. It was signed pursuant to SADC's objectives which include the achievement of economic and economic growth for the region and the enhancement of the standard of life of the people of the region, and the promotion of self-sustaining development on the basis of collective self-reliance and the inter-dependence of SADC member states (SADC Treaty, Article 5).

[43] The SADC FTA was declared at the 28th SADC Ordinary Summit of Heads of States and Government in Johannesburg, South Africa, 17 August 2008.

While the Free Trade Area is the ultimate objective of the Trade Protocol, the Regional Indicative Strategic Development Plan outlines the progression of the Free Trade Area into other areas of deeper integration such as a Customs Union, Common Market and an Economic Community with a central bank and common currency. This is part of SADC's goals of economic, social and political development where the approach to regional integration is not purely market-based but encompasses development in other sectors integral to SADC's development.

Although the Free Trade Area has since been opened, there are still some challenges that inevitably affect its viability. A bigger market created by the Free Trade Area will not guarantee an increase in intra-regional trade. Countries still need to develop and strengthen their industrial base so as counter the supply side constraints that affect manufacturing output. At the same time, industrialisation will ensure the production of competitive and diversified products. As SADC countries struggle to achieve this, however, the deindustrialisation taking place in Zimbabwe and the destruction of an industrial base that was once second only to South Africa negates this effort and is at variance with the objectives of the region. It will be especially difficult for SADC to build and develop its infrastructure when other, already existing infrastructure is being allowed to decay. It is also highly debatable whether the region will be able to piggy-back Zimbabwe in its integration efforts amid the political and economic uncertainty. Eventually, the quiet diplomacy adopted by the region will become a liability for SADC. Part of the funding for the region's development, infrastructural and otherwise, is anticipated to come from foreign direct investment. However, the Zimbabwean political and economic instability makes the region an unattractive investment destination. Having entered into a Free Trade Area, the region markets itself as a whole, and indeed, happenings in one country will reflect on the other countries. Action in regard of Zimbabwe is necessary if the region wants to be taken seriously and have influence on the global market. The movement towards deeper integration entails the harmonisation of trade and other policies. How this is to be achieved in the case of Zimbabwe is a million dollar question. The country's inflation level and its financial crisis are extraordinarily at variance with the rest of the region. Zimbabwe's inflation was pegged at two million percent in April 2008 and by far incomparable to the regional average of between 3 and 17%. As for the interest rates, they are at over 4000% (Makoshori 2008). It

would take a genius to harmonise these statistics with the rest of the region and, ultimately, it is bad for regional integration.

As the region gears itself for 2010,[44] it is uncertain how the Zimbabwean political and economic climate will be. The unity talks between the ruling party and the opposition, which spelled hope for the future of the country, have reached a deadlock. Once again the crisis seems unending. This will have an impact on tourism in the region, which would otherwise be boosted by the 2010 World Cup to be hosted in South Africa.

The Zimbabwean situation has an adverse impact on regional integration and threatens to further drag a process that, at best, is a very slow one. Peace and security are fundamental to regional economic development and integration. Whatever political and economic instability in one country will always spill-over to the neighbouring countries and affect the whole region. This is unfolding in SADC. The Regional Indicative Strategic Development Plan (RISDP) identifies poverty alleviation as one of the most important priority intervention areas, alongside trade, economic liberalisation and development. There is no food security in Zimbabwe, there is rampant inflation, and literacy levels are being threatened by the massive brain drain that has seen professionals leave the country for greener pastures, unemployment has reached crisis levels and, in general, the standards of living for the people of Zimbabwe have decreased dramatically. In a sense, Zimbabwe is contributing to the exacerbation of the poverty problem in SADC. As people escape Zimbabwe in droves, Zimbabwe has become the source of migrant labour, particularly for Botswana and South Africa which, as the better developed economies, have had to absorb the bulk of Zimbabwe's migration problem (HURISA 2007). As the other countries grapple with their own domestic problems, particularly unemployment, Zimbabweans contribute to the competition for jobs and opportunities leading to conflict and xenophobia as people fight for scarce resources.

Political cohesion in the region is the foundation of all integration – without it no integration effort can ever succeed. As SADC begins to show cracks in its approach towards Zimbabwe, it is threatening the political cement that binds the region together and poses a further challenge to regional integration. In recent months,

[44] South Africa will be hosting the FIFA World Cup.

Botswana and Zambia, through its late president, Levy Mwanawasa, have come out as big critics of Zimbabwe's ruling party and its policies, in particular the contested March 2008 elections. Botswana's Ian Khama, in an unprecedented move, this year boycotted the SADC summit on 16 and 17 June in Johannesburg on the basis that Zimbabwe had also been invited; and Botswana has chosen not to recognise the current Zimbabwean Government (IRIN 2008; 'Botswana shuns Summit' 15 April 2008).

This illustrates clearly the urgent need for the resolution of the Zimbabwean crisis as its effects go to the deep of every regional integration initiative and negate SADC's core objectives. Once order and stability have been restored, it is unclear how the land situation will be resolved. A reversal of the land allocations will clearly not be welcomed by the poor, especially the rural electorate; at the same time, the agricultural economy, which once saw Zimbabwe as the breadbasket of Africa, has to be restored. How this challenge will be overcome, is unknown. Even if there is a complete reversal of the fast-track land reform in Zimbabwe, there will still be a need for land reform and resettlement. The Zimbabwean challenge also sends warning signals to the rest of the region with regard to land reform. While land grabs may be appealing to the general electorate and while they may score political points, the land question should not be taken lightly, otherwise it will destroy all the inroads that have been made towards regional integration. This also underscores the urgent need for the SADC Regional Land Reform Technical Support Facility, established under the Food, Agriculture and Natural Resources (FANR) Directorate, to be made operational as soon as possible. This Facility seeks to develop a regional land reform strategy, and if implemented properly, will go a long way towards preventing Zimbabwean style land reform in the region.

In principle, the case for land reform is watertight. The need for the urgent redistribution of land cannot be ignored. Had the Tribunal found in favour of the Zimbabwean government, there is ample evidence that the practice of compulsory acquisition of property is viable and well established in international law. But, however valid the concept of land reform, there are certain human rights norms that have to be adhered to in implementing it. The individual rights of a person must, at all times, be respected. There is no doubt that farmers in both South Africa and Namibia are apprehensive of a spill-over effect from the Campbell case. It does not help that

both these countries are in the process of attempting to expropriate land despite the fact that government's right to expropriate land is entrenched in both their constitutions. The compulsory expropriation of land has been met with resistance from some White farmers, and at the same time they have not been prepared to offer their farms for government acquisition and, where the farmers have been willing to sell, governments have been slow in responding or have waived their right to buy. This begs the question: how is the land situation going to be resolved?

Politics plays a very significant role in resolving the land issues. A judgment by the Tribunal in favour of the Zimbabwean government would have been construed as an exoneration of its efforts at fighting neo-imperialism and bestowing justice upon its people. On the other hand, as the Tribunal has delivered judgement in favour of the farmers, this will probably be seen as a vindication of their legal right to own land and not to have it compulsorily acquired, whatever the need, at least not without full compensation.

What makes the Campbell case so critically important for the future relevance of the SADC Tribunal and regional integration, especially as Namibia and South Africa also look to expropriation, is that land reform on its own, including the manner and form in which it has been carried out, cannot be neatly compartmentalised and decided upon without deciding on other core issues, such as the social and political landscape. So Zimbabwe's Land Reform Programme has been found in breach of Zimbabwe's SADC obligations, but how is it going to be modified to conform to such obligations? Three of the 78 farmers in the Campbell case had already been dispossessed of their farms at the time of the judgement and it was ordered that they be compensated by the Zimbabwean government. One can safely assume that these farmers were hoping for the restoration of their farms and that the Zimbabwean government cannot afford to pay them compensation in any case. What happens to all the farmers whose farms were their source of livelihood and who have been left with nothing? These are all the questions that that would have complicated the Tribunal's position but the judges neatly sidestepped such questions. Nonetheless, such issues will continue to dog Zimbabwe regardless of whether or not the Tribunal's decision is abided by.

The record of SADC in dealing with the Zimbabwe situation has not been impressive, to the extent that SADC can be said to have been complicit in the unravelling of Zimbabwe. President Mugabe has cleverly used the language of anti-imperialism to draw the support of SADC leaders, notably Sam Nujoma, former president of Namibia.[45] The whole land crisis has been skilfully turned into a struggle between Third World and First World countries. British protests at the land reform process and the decay of the rule of law in Zimbabwe are seen as veiled attempts to reinstate its imperialism (Phimister & Raftopoulos 2004: 386-389). Notably, the South African government under the leadership of former president Thabo Mbeki has been most supportive of Mugabe and his land policies, and has chosen to ignore the failure of democracy and the rule of law, preferring instead to use quiet diplomacy in dealing with the situation. At times the South African leadership echoed Mugabe's sentiments in lambasting Britain and the West as the root cause of all of Zimbabwe's social, economic and political ills (Phimister & Raftopoulos 2004: 390-396). This is particularly significant in view of the fact that South Africa is probably the only country in SADC that has the 'economic and political muscle to exert pressure on the Mugabe government' and the Zimbabwean government is heavily reliant on South Africa for its trade, oil and electricity supplies (Sachikonye 2003: 126).

SADC has largely been supportive of the Zimbabwean Government and has, to date, failed to condemn outrightly the human rights abuses that have accompanied the chaotic land reform programme. Only Zambia and Botswana have ventured to criticise Robert Mugabe and his government, but only in their country capacities and not on behalf of SADC.

Zimbabwe has violated a number of provisions of the SADC Treaty. Some of the reluctance to act might stem from the importance that is given to the concept of sovereignty by most African states which have resulted in the failure to establish strong regional bodies. By taking action against Zimbabwe, SADC states would be making themselves vulnerable to such actions themselves. This neglects the fact that integration as a principle entails the violation of sovereignty to a certain extent. In attempting to deal with the Zimbabwean situation behind the scenes, while expressing solidarity with Zimbabwe on the international front, SADC has set a

[45] This alliance is also highly significant when one considers that Namibia is also a former settler colony grappling with iniquities in land redistribution.

dangerous precedent that would make it difficult to take action against Zimbabwe at the Summit. Unfortunately, the region has not yet achieved that level of political maturity where reprimanding the government of Zimbabwe is not construed to be an expression of support for its opposition. This is perhaps one of the reasons why there has been no action on Zimbabwe. In this regard the Campbell case presents a challenge to SADC. If the challenge is taken up and the Summit takes a stand against Zimbabwe this case would then constitute a critical development in the history of SADC and firmly establish the latter as a rules-based institution and should advance the prospects of regional integration. This will encourage and foster, among SADC members, a culture of respect for the many regional agreements that member states sign and never implement. Compliance by one of the region's powerful states will create a precedent of respect for the Tribunal's decisions and credibility. It s highly doubtful, however, if this will actually happen anytime soon, especially considering the immediate reaction of the Zimbabwean government to the ruling. Having said that, if Zimbabwe is again referred to the Summit for non-compliance with the Tribunal hearing, then the above will depend on the Summit and the action it takes pursuant to a referral from the Tribunal.

9. Conclusion

For as long as it is unresolved, the issue of land in Southern Africa will be an emotional issue that is highly susceptible to manipulation from politicians. It will always create irrational inclinations towards harmful radical land reform programmes. The Zimbabwean situation is an example. The level of human rights violations that have come out of the process of land reform in Zimbabwe is unacceptable. This should not detract from the fact that unresolved land iniquities will foster anger and frustration from the landless, directed at those who have the resources. Unfortunately, race will always play a role because, as a legacy of the past political dispensations of minority rule, Whites own most of the resources, especially agricultural land.

While every attempt should be made to redress the wrongs of the past and also to achieve an equitable distribution of resources so as to fight poverty there is no clear direction on how these resources should be reacquired. The affected countries also have to grapple with other socioeconomic issues that affect its financial ability to

acquire land under the free market. Capacity constraints also stand in the way of the pressing need for land redistribution.

International law is conspicuously silent on how to deal with the acquisition of property of citizens in instances of former colonies where the states do not have resources to pay even minimal compensation and yet there is a need to acquire land to meet the urgent and growing public interest over this resource. The Campbell case is, at the end of the day, more than just a decision on the human rights abuses in Zimbabwe. It will be a judgment on land reform as a process and will determine how other SADC countries approach it as they have direction already on how not to do it.

As long as the crisis in Zimbabwe is not resolved, the progress of regional integration will be stalled. Poorly structured, land reform can also stunt economic growth and development. Under its current situation, Zimbabwe cannot effectively implement its obligations with regard to regional economic integration. The outcome of the Campbell case will enhance the credibility of SADC as a regional institution that is committed to democracy, human rights and the rule of law. These are some of the tenets that support economic integration and without which such integration cannot fully succeed.

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