

# The contribution of *Campbell v Zimbabwe* to the foreign investment law on expropriations<sup>1</sup>

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## Introduction

The Zimbabwean Parliament passed two amendments to the Constitution of Zimbabwe: one on 19 April 2000 (Amendment 16),<sup>2</sup> and one on 14 September 2005 (Amendment 17).<sup>3</sup> The two amendments authorised the seizure of white-owned farmlands without compensation. Since 2000, the Zimbabwean Government has expropriated a string of white-owned commercial lands without compensation.<sup>4</sup> In March 2008, in a consolidated case (*Mike*

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<sup>2</sup> Constitution of Zimbabwe Amendment No. 16, Act 5 of 2000 (hereinafter *Amendment 16*).

<sup>3</sup> Constitution of Zimbabwe Amendment No. 17, Act 5 of 2005 (hereinafter *Amendment 17*).

<sup>4</sup> Constitution of Zimbabwe paragraph 16A(1) (hereinafter *Zimbabwean Constitution*): “In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance [–]

- (a) under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;
- (b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;
- (c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land; and accordingly –

*Campbell (Pvt) Ltd & Others v Zimbabwe*,<sup>5</sup> 79 applicants filed an application with the Southern African Development Community (SADC) Tribunal to challenge the legality of the acquisition of certain agricultural lands by the Zimbabwean Government. On 28 November 2008, the Tribunal ruled that the expropriations of agricultural lands by the Zimbabwean Government were illegal because they were based on racial discrimination and did not compensate the applicants.

This article seeks to understand the contribution that the *Campbell* case brings to the law on foreign direct investment, especially the principle that expropriations must not be discriminatory. Investment law generally prohibits discriminatory expropriations or nationalisations on the basis of race, with the notable exception of post-colonial expropriations carried out to end the economic domination of the nationals of the former colonial power.<sup>6</sup> By declaring that the expropriations of white-owned agricultural lands in Zimbabwe were illegal because they amounted to racial discrimination,<sup>7</sup> the SADC Tribunal in *Campbell* appears to develop the investment law jurisprudence on expropriations by creating an exception to the exception. Accordingly, the question that this article addresses centres on the extent to which a country can expropriate property as part of a general Government programme to correct present economic inequalities brought about by a colonial past.

The article starts with a presentation of the legal position on expropriations from an investment law vantage point and, more specifically, on the requirements that expropriations must not be discriminatory and that they must be for a public purpose. The article continues with a brief of the *Campbell* case and an explanation of the contribution, if any, that the case makes to the jurisprudence on expropriations. The article ends by concluding, in light of the

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- (i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and
  - (ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement”.

<sup>5</sup> *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe*, SADC (T) Case No. 2/2007 (hereinafter *Campbell*).

<sup>6</sup> Sornarajah, M. 2004. *The international law on foreign investment*. Cambridge: Cambridge University Press, p 398.

<sup>7</sup> *Campbell*, at 53.

foregoing discussion, whether the SADC Tribunal rightly decided the *Campbell* case and, if not, how the case could and should have been decided.

## **Expropriations in investment law**

### ***Application of foreign investment law to Campbell***

To understand the change that *Campbell* may have brought about in foreign investment law, it is first necessary to verify that foreign investment law applies to the case. To start with, the SADC Tribunal is an international court tasked with the duty to develop SADC jurisprudence having regard to applicable treaties, public international law and any rules and principles of the law of the 15 SADC states.<sup>8</sup> In *Campbell*, the SADC Tribunal used an international human rights law approach and not an investment law approach, though nothing forbade nor obliged it to apply investment law.

Foreign investment law applies to *Campbell* because of the foreign nationality or British origins of the investors in some of the Zimbabwean corporations whose lands were expropriated.<sup>9</sup> In *Funnekotter v Zimbabwe*, a case involving Amendment 17 and the expropriations of white-owned agricultural lands in Zimbabwe, the claimants were variously of Dutch and Italian nationalities<sup>10</sup> and they claimed that the Zimbabwean Government had violated a bilateral investment treaty (BIT) between the Netherlands and Zimbabwe.<sup>11</sup> Finally, the settlement of the *Funnekotter* dispute by the International Center for the Settlement of Investment Disputes (ICSID) is evidence of the application of foreign investment law. It follows from the foregoing that the changes or contribution that the *Campbell* case may have wrought on the international law of expropriations applies to foreign investment law as well.

### ***Basic distinctions***

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<sup>8</sup> Protocol on Tribunal in the Southern African Development Community, Article 21(b) (hereinafter *SADC Tribunal Protocol*).

<sup>9</sup> In *Campbell*, 28 private companies registered in Zimbabwe were among the applicants.

<sup>10</sup> *Bernardus Henricus Funnekotter & Others v Republic of Zimbabwe* (ICSID Case No. ARB/05/6) at 1 (hereinafter *Funnekotter*).

<sup>11</sup> Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Zimbabwe and the Kingdom of the Netherlands, 11 December 1996.

Sornarajah, a leading foreign investment scholar and a Professor at the National University of Singapore, distinguishes between three types of takings which are often used interchangeably, namely *confiscation*, *expropriation*, and *nationalisation*.<sup>12</sup> He states that *confiscation* is the capricious taking of property by the rulers of the State for personal gain. *Expropriation* (or *compulsory acquisition* as it is termed in the Zimbabwean Constitution) refers to the taking by States for an economic or public purpose, whereas *nationalisation* refers to the across-the-board takings designed to end or diminish foreign investment in the economy or in sectors of the economy.<sup>13</sup>

From Sornarajah's basic distinctions of takings, it is evident that the fundamental issue in *Campbell* is not whether compulsory takings of commercial farms in Zimbabwe constitute illegal expropriations, as the SADC Tribunal and the parties frame it. Rather, the real dilemma is whether the compulsory takings amount to confiscations or nationalisations.

Sornarajah's basic distinctions between the different meanings of *takings* by the State also reveal that, given the across-the-board scale of takings in the agricultural sector in Zimbabwe since 2000, it would be more accurate to characterise the Zimbabwean land redistribution measures as *nationalisation* rather than *expropriation*. The legal implications of both nationalisations and expropriations are the same in a relevant respect: they both trigger compensation mechanisms. Nevertheless, nationalisations and expropriations have different impacts: unlike expropriations, nationalisations can be crippling and devastating for a host country's economy, as is the case for Zimbabwe.<sup>14</sup> The nationalisation that started in 2000, after the rejection of President Robert Mugabe's constitutional referendum,<sup>15</sup> resulted in

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<sup>12</sup> Sornarajah (2004:345ff); see also Comeaux, Paul E & N Stephan Kinsella. 1997. *Protecting foreign investment law: Legal aspects of political risk*. New York: Oceana Publications, p 3.

<sup>13</sup> Sornarajah (2004:346).

<sup>14</sup> It is estimated that, in 2005, the unemployment rate in Zimbabwe was in excess of 80%, and in 2008 the gross domestic product (GDP) growth rate in Zimbabwe was -12.6%; Central Intelligence Agency. 2009. *The World Factbook 2009: Zimbabwe*; available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ZI.html>; last accessed 18 November 2009. Moreover, the compulsory acquisition of agricultural lands caused a steep decline in agricultural exports and shortages in hard currency, which in turn caused hyperinflation and chronic shortages in imported fuel, food and consumer goods. See Human Rights Watch. 2002. "Fast track land reform in Zimbabwe", *Human Rights Watch*, March, 14(1)(A).

<sup>15</sup> "Mugabe accepts referendum defeat", *BBC Africa*, 15 February 2000; available at <http://news.bbc.co.uk/2/hi/africa/644168.stm>; last accessed 18 November 2009. The article reported that voters in Zimbabwe had rejected a constitution proposal to consolidate presidential powers and

Zimbabwe beating world economic records (highest inflation rate, smallest domestic market size, and lowest foreign direct investment).<sup>16</sup>

## ***Expropriations***

Expropriations are “the most severe form of interference with property”,<sup>17</sup> even though they are prima facie lawful.<sup>18</sup> States enjoy the right to expropriate or the “the right of eminent domain”, which is an entitlement that emanates from the States’ territorial sovereignty.<sup>19</sup> Foreign investment law says that expropriations or nationalisations constitute a political, non-commercial risk that can be insured against by dint of insurance guarantees from national investment insurance agencies or the World Bank’s Multilateral Investment Guarantee Agency (MIGA). In foreign investment law, a *political risk* is a risk faced by an investor that a host country will confiscate all or a portion of the investor’s property rights located in the host country.<sup>20</sup>

Nonetheless, the sovereign power of States to expropriate property is not unfettered or boundless. States trade credibility for sovereignty, as foreign investment law not only restricts the regulatory conduct of States to an unusual extent, but also subjects it to control through compulsory international adjudication mechanisms,<sup>21</sup> such as the ICSID and the SADC Tribunal. In particular, the power of States to expropriate is circumscribed by the requirements that the expropriation serve a public purpose and that the State compensate individuals aggrieved by expropriation. Apart from scaring away foreign investment, a policy that would permit States to take property without restrictions would increase the costs of

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allow the Government to confiscate white-owned land for redistribution to black farmers without compensation.

<sup>16</sup> World Economic Forum, International Bank for Reconstruction and Development/World Bank & African Development Bank. 2009. *The Africa Competitiveness Report 2009*. Geneva: World Economic Forum, p 237.

<sup>17</sup> Dolzer, Rudolf & Christoph Schreuer. 2008. *Principles of international investment law*. Oxford: Oxford University Press, p 89.

<sup>18</sup> Sornarajah (2004:395).

<sup>19</sup> Dolzer & Schreuer (2008:89).

<sup>20</sup> Comeaux & Kinsella (1997:1).

<sup>21</sup> Van Aaken, Anne. 2009. “International investment law between commitment and flexibility”. *Journal of International Economic Law*, 12:507, 509.

doing business in those States, like it did in Zimbabwe.<sup>22</sup> Such a policy would also reduce the incentive of States to be careful about what they take and would dilute drastically the very idea of property ownership.<sup>23</sup>

The fundamental rule of English law that property could be taken only for a public purpose and on payment of compensation settled in the written constitutions of most Commonwealth States<sup>24</sup> such as Botswana, Malawi, Zambia and Zimbabwe.<sup>25</sup> When compensation follows a taking by the State, expropriations or nationalisations amount to forced sales.<sup>26</sup> When, on the other hand, no compensation is paid for expropriations or nationalisations, the taking amounts to a *confiscation*, as the author submits later in this article.

Therefore, for an expropriation to be legal in international law, it has to comply with the following requirements:

- It must be for a public purpose
- It must not be discriminatory, and
- The State must pay compensation for expropriation.

These requirements form part of customary international law and must be met cumulatively,<sup>27</sup> which means that, if any of those requirements is violated, there is a violation of customary international law. Accordingly, the SADC Tribunal in *Campbell* sat to determine whether the Government of Zimbabwe had complied with these three conditions. However, for the purposes of this article, the next sections zero in on the public purpose and non-discrimination requirements.

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<sup>22</sup> The World Economic Forum et al. (2009:237) suggest that Zimbabwe is one of Africa's least competitive countries.

<sup>23</sup> See Harrison, Jeffrey L & Jules Theeuwes. 2008. *Law and economics*. New York: WW Norton & Co., pp 102–103. The World Economic Forum et al. (2009:237) also state that Zimbabwe has the weakest property rights protection system.

<sup>24</sup> Allen, Tom. 2000. *The right to property in Commonwealth constitutions*. Cambridge: Cambridge University Press, p 36.

<sup>25</sup> In 2002, the Commonwealth of Nations suspended Zimbabwe from membership following abuses committed during the land redistribution process and the elections in the early 2000s.

<sup>26</sup> Harrison & Theeuwes (2008:108).

<sup>27</sup> Dolzer & Schreuer (2008:91).

## Requirements for lawful expropriations

### *Public purpose*

#### *The doctrine*

The first requirement for a lawful expropriation is that it must be for a public purpose.<sup>28</sup> Thus, while the compensation requirement makes an expropriation that is non-discriminatory and for a public purpose conditionally legal, an expropriation that is discriminatory or not for a public purpose is illegal in itself, whether or not compensation is paid.<sup>29</sup> In *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice (PCIJ) defined *public purpose* as “reasons of public utility, judicial liquidation and similar measures”.<sup>30</sup> The doctrine probably originates from the statement by Hugo Grotius of public purpose as a limitation on the powers of eminent domain.<sup>31</sup>

#### *The uncertain status of the doctrine*

It is still uncertain whether *public purpose* is a requirement for lawful expropriations. Even though *public purpose* is, on a preponderance of authorities, a requirement for lawful expropriation,<sup>32</sup> some still maintain that *public purpose* is not so much of a limitation today,<sup>33</sup> others go as far as declaring that it is not a requirement at all.<sup>34</sup> Earlier authors tend to favour

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<sup>28</sup> Permanent Sovereignty over Natural Resources, GA Res. 1803 (XVII), UN Doc. A/5217 (14 December 1962), p 4: “Nationalization, expropriation or requisition shall be based on grounds or reasons of public utility, security, or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign”; *Texaco v Libya* (1977) 53 ILR 389.

<sup>29</sup> Comeaux & Kinsella (1997:78).

<sup>30</sup> *Certain German Interests in Polish Upper Silesia*, 1926 PCIJ, Series A, No. 7, p 22.

<sup>31</sup> Sornarajah (2004:396).

<sup>32</sup> See *Sabbatino v Banco Nacional de Cuba* (1961) 193 F Supp. 375 at 384, which held that nationalisation in Cuba was invalid for want of a public purpose.

<sup>33</sup> Sornarajah (2004:395).

<sup>34</sup> See *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic* 63 ILR 140 (1977) at 194: “As to the contention that the said measures were politically motivated and not in pursuance of a legitimate public purpose, it is the general opinion in international theory that the public utility principle is not a necessary requisite for the legality of a nationalization”; *Shufeldt Claim* (1930) UNRIIAA 1079 at 1095: “[I]t is perfectly competent for the Government of Guatemala to enact any decree they like and for any reasons they see fit, and such reasons are no concern of the

the public purpose doctrine,<sup>35</sup> whereas modern authors tend to disfavour it.<sup>36</sup> The author's position in this debate is that one cannot meaningfully conceive of *expropriation* without *public purpose* for the simple reason that the definition of *expropriation* subsumes *public purpose*. In other words, a taking would not even qualify as an expropriation if it is not for a public purpose. It therefore makes more logical sense to say that *public purpose* is one of the elements definitive of an expropriation rather than a requirement for lawful expropriations.

### *The doctrine in practice*

Very few cases revolve on the question as to whether an expropriation is for a public purpose, and those that do indeed address the question usually play down the significance of the public purpose doctrine. In *James v United Kingdom*, the European Court of Human Rights declared as follows:<sup>37</sup>

The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless the judgment be manifestly without reasonable foundation.

The small number of cases on the substance of *public purpose* may be imputable to the fact that an expropriating State can effortlessly couch any taking in terms of some 'public purpose'.<sup>38</sup> In *Campbell*, the Government of Zimbabwe had formulated the taking of white-

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Tribunal"; *Oscar Chinn Case* (1934) PCfJ Series A/B, No. 63 at 79, which held that the Belgian state was "the sole judge" of the situation.

<sup>35</sup> Wortley, BA. 1959. *Expropriations in public international law*. Cambridge: The University Press, pp 24–25; McNair, L. 1959. "The seizure of property and enterprises in Indonesia". *Netherlands International Law Review*, 6: 218, 243.

<sup>36</sup> Sornarajah (2004:395); White, Gillian. 1961. *Nationalisation of foreign property*. London: Stevens & Sons, Ltd, p 150; Friedman, Samy. 1981. *Expropriation in international law: Contributions in comparative colonial studies*. London: Greenwood Press, p 142; Amerasinghe, CF. 1967. *State responsibility for injuries to aliens*. Oxford: Oxford University Press, p 138.

<sup>37</sup> *James v United Kingdom* (1986) 8 EHRR 123.

<sup>38</sup> Sornarajah (2004:395ff); Dolzer & Schreuer (2008:91).



owned commercial farms in terms of “land resettlement purposes”,<sup>39</sup> which is without a doubt a legitimate government purpose.<sup>40</sup>

Foreign investors seldom argue that a host State has not fulfilled the public purpose requirement for at least three possible reasons. First, the determination of what constitutes *public purpose* is a political one<sup>41</sup> and, as stated in the *Restatement of Foreign Relations Law of the United States*, it is not subject to “effective re-examination by other states”.<sup>42</sup> An international forum like the SADC Tribunal would be none the more effective in the re-examination exercise. Second, though a few arbitral tribunals elaborated on the significance of the public purpose requirement,<sup>43</sup> the concept of *public purpose* is generally regarded as broad, vague and ambiguous. Third, State regulation of private property is such a daily feature of national life that it is harder and harder for courts and tribunals outside the State to sit in judgment of the motives behind the takings by the State.<sup>44</sup>

Despite the uncertainty as to its nature, the *public purpose* doctrine is frequently (re-)affirmed in virtually all BITs and in the practice of States. Even in Article 16 of the Lancaster House Constitution<sup>45</sup> that ended colonial rule in Rhodesia,<sup>46</sup> the circumstances under which the State could compulsorily acquire property in the public interest were clearly defined<sup>47</sup> – but the Parliament amended Article 16 twice.<sup>48</sup> Sornarajah believes that the

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<sup>39</sup> Amendment 17, paragraph 16B(2).

<sup>40</sup> See e.g. Amoo, SK. 2002. “The exercise of the rights of sovereignty and the laws of expropriation of Namibia, South Africa, Zambia and Zimbabwe”. In Hinz, MO, SK Amoo & D van Wyk (Eds). *The Constitution at work: 10 years of Namibian nationhood*. Pretoria: VerLoren van Themaat Centre for Public Law, pp 256, 262: “In the context of the constitutional and political history of Namibia, land resettlement and agrarian reform will *legitimately* come within the definition of public interest” [emphasis added].

<sup>41</sup> (ibid.:265).

<sup>42</sup> Restatement (Third) of Foreign Relations Law, Article 712(1)(a), 1987.

<sup>43</sup> Dolzer & Schreuer (2008:91).

<sup>44</sup> Sornarajah (2004:396–397).

<sup>45</sup> The Lancaster House Constitution refers to the Zimbabwean Constitution as adopted at Independence in 1981. Since then, the Zimbabwean Government has amended the Constitution several times.

<sup>46</sup> *Rhodesia* was the name of the formerly British colony of *Southern Rhodesia*, today's *Zimbabwe*, that declared itself independent on 11 November 1965. The international community never recognised Rhodesia, whose governments were dominated by white minorities.

<sup>47</sup> Zimbabwean Constitution, paragraph 16(1)(a).

<sup>48</sup> Amendment 16 in 2000, and Amendment 17 in 2005.

recurrent reference to the *public purpose* doctrine may be due to the “compulsion to follow a time-tested formula rather than to any conviction that the requirement continues to have any force”.<sup>49</sup>

This section has demonstrated that the requirement that expropriation be for a public purpose is not so much of a restriction on expropriations. The succeeding section immediately turns to the analysis of the non-discrimination requirement.

## ***Discriminatory expropriations***

### *Discrimination*

From an extensive body of jurisprudence, it appears that discrimination may be defined by employing three equations. Discrimination has been equated with action –<sup>50</sup>

- motivated by prejudice or “discriminatory intent”
- motivated by factors other than prejudice, or
- which has the effect of disproportionately disadvantaging a particular group defined by sex or race, yet which cannot be justified by other countervailing considerations (the ‘disparate impact’ theory of discrimination).<sup>51</sup>

Though the *Campbell* case features all three conceptions of *discrimination*, the “disparate impact” meaning of discrimination (i.e. indirect discrimination) dominates and determines the case, as the article shows below.

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<sup>49</sup> Sornarajah (2004:396).

<sup>50</sup> McCrudden, Christopher. 1991. *Anti-discrimination law*. Massachusetts: Dartmouth Publishing Company Limited, pp xivff.

<sup>51</sup> In South Africa, when courts consider an equality claim, the primary issue is the impact of the discrimination and not whether it treats different groups identically; Liebenberg, Sandra & Michelle O’Sullivan. 2001. “South Africa’s new equality legislation: A tool for advancing women’s socio-economic equality”. In Jagwanth, Saras & Evance Kalula (Eds). *Equality law: Reflections from South Africa and elsewhere*. Cape Town: Juta Law, pp 70, 78. See also Jayawickrama, Nihal. 2002. *The judicial application of human rights law: National, regional and international jurisprudence*. Cambridge: Cambridge University Press, p 177; Gutto, Shadrack BO. 2001. *Equality and nondiscrimination in South Africa: The political economy of law and law-making*. Cape Town: New Africa Books (Pty) Ltd, p 127.

### *Racial discrimination*

Even a furtive look at any major dictionary reveals that *race* is a notion that does not easily lend itself to any simple or simplistic explanation,<sup>52</sup> not to mention the inescapable tautologies that such explanations would entail. Part of the conceptual difficulty is due to the fact that *race* is not essential, but socially constructed.<sup>53</sup>

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides an authoritative legal definition of *racial discrimination*. Article 1 of CERD is a useful attempt to stabilise the meaning of *racial discrimination*, which it defines as –

... any distinction, exclusion, restriction or preference based on race, color, descent, or natural 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.

Since the SADC Treaty does not define the phrase, the SADC Tribunal and other SADC institutions must consider the definition of *racial discrimination* in the CERD.

### *Racial discrimination in foreign investment law*

A racially discriminatory taking is a violation of international law. The principle against racial discrimination and the principle of non-discrimination in general are well-established norms of international law. Effectively, racial discrimination is castigated by the main international legal instruments, including the CERD,<sup>54</sup> the Charter of the United Nations,<sup>55</sup> the Universal

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<sup>52</sup> The *Oxford Dictionary of Current English* (Fourth Edition) (2006:742) defines *race* as follows:

1. each of the major divisions of humankind, based on particular physical characteristics
2. racial origin or the qualities associated with this
3. a group of people sharing the same culture or language, or
4. a group of people or things with a common feature.

<sup>53</sup> See United Nations Convention on the Elimination of All Forms of Racial Discrimination, Preamble, 7 March 1966, 660 UNTS 195 (hereinafter *CERD*): "... any doctrine of superiority based on racial differentiation is scientifically false ...".

<sup>54</sup> CERD, Article 1.

<sup>55</sup> United Nations, Charter of the United Nations, Article 1(3), 24 October 1945, 1 UNTS XVI (hereinafter *UN Charter*).

Declaration of Human Rights (UDHR),<sup>56</sup> the United Nations (UN) Covenant on Civil and Political Rights (CCPR),<sup>57</sup> and the UN Covenant on Economic, Social and Cultural Rights (CESCR).<sup>58</sup> Furthermore, like the European Convention on Human Rights (ECHR)<sup>59</sup> and the American Convention on Human Rights,<sup>60</sup> the African Charter on Human and Peoples' Rights (*African Charter*) proscribes racial discrimination.<sup>61</sup>

The status of the principle against racial discrimination as a peremptory norm of international law is unclear and debatable. Some legal scholars suggest that there is widespread support to elevate anti-discrimination (including anti-apartheid) to the status of a *ius cogens* norm, from which no derogation is permitted.<sup>62</sup> Other scholars claim that racial discrimination is already a *ius cogens* principle.<sup>63</sup>

SADC,<sup>64</sup> the regional economic community of southern Africa, has an equivalent anti-discrimination provision in its constitution, the SADC Treaty.<sup>65</sup> Article 6(2) of the SADC Treaty ordains that –<sup>66</sup>

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<sup>56</sup> United Nations, Universal Declaration of Human Rights, Article 2, GA Res. 217A, at 71, UN GAOR, 3rd Session, 1st Plenary Meeting, UN Doc. A/810 (12 December 1948) (hereinafter *UDHR*).

<sup>57</sup> United Nations Covenant on Civil and Political Rights, Article 2(1), 16 December 1966, at 999 UNTS 171 (hereinafter *CCPR*).

<sup>58</sup> United Nations Covenant on Economic, Social and Cultural Rights, Article 2(1), 16 December 1966, 993, UNTS 3 (hereinafter *CESCR*).

<sup>59</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14, 213 UNTS 222.

<sup>60</sup> Organization of American States, American Convention on Human Rights, Article 1(1), 22 November 1969, OASTS No. 36, 1144 UNTS 123.

<sup>61</sup> Organisation of African Unity, African Charter on Human and Peoples' Rights, Article 2, 27 June 1981, 21 ILM 58 (1982) (hereinafter *African Charter*).

<sup>62</sup> Dugard, John. 2005. *International law: A South African perspective*. Lansdowne (Cape): Juta & Co. Ltd, p 43.

<sup>63</sup> Sornarajah (2004:398).

<sup>64</sup> SADC is a 15-member regional economic community. SADC Member States are Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. SADC welcomed back the Seychelles at the 28th SADC Heads of State and Government Summit in August 2008.

<sup>65</sup> SADC, Treaty of the Southern African Development Community, 17 August 1992, 32 ILM 116 (hereinafter *SADC Treaty*).

<sup>66</sup> (*ibid.*).

SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, *race*, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit. [Emphasis added]

Article 6(2) of the SADC Treaty is the applicable and most relevant provision in the *Campbell* case. More precisely, the legal question in the case was whether the Government of Zimbabwe had violated Article 6(2) of the SADC Treaty by enacting and implementing Amendment 17.

### *Remedying racial discrimination*

Litigation, enforcement by a regulatory agency, and contract compliance are the three main institutions for the redress of discrimination.<sup>67</sup> Two other remedies may be mentioned, namely providing a monetary substitute for a lost opportunity, and requiring a re-run of the occasion, minus the discrimination.

By far the most popular way of remedying instances of discrimination is by advancing members of a historically disadvantaged group, such as blacks and women. It is a method widely known as *affirmative action* in most countries in the world and as *positive action* in the United Kingdom (UK). Certainly, Amendment 17 is on its surface aimed at advancing black Zimbabweans. Since the white settlers themselves 'expropriated' the lands of black Zimbabweans before the country's independence from the UK on 18 April 1980, Amendment 17 sets out to even out the economic imbalances that colonialism created by expropriating lands acquired during the colonial days. Such provisions lay bare the homeopathic paradox of reversing *past* structural discrimination by *present* structural discrimination.

### *Exceptions to racial discrimination in investment law*

Either as an end in itself or as a means to an end, anti-discrimination is not absolute. It is limited by its own purposes or by a metaprinciple such as substantive equality, often in the form of affirmation action. Thus, post-colonial expropriations carried out to end the economic domination of the nationals by the former colonial power are an exception to the general prohibition on racial discrimination in foreign investment law.<sup>68</sup>

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<sup>67</sup> McCrudden (1991:xxviff).

<sup>68</sup> Sornarajah (2004:398).

Non-discrimination or anti-discrimination can be seen in two basic ways: either as an end in itself or as a means to an end.<sup>69</sup> With the first alternative, anti-discrimination is a principle worth supporting in its own right and one which attempts to advance a goal different from other goals such as justice and equality.<sup>70</sup> However, this is a limited principle and it is limited in scope by the very goal which it is advancing. With the second alternative, on the other hand, anti-discrimination is a mediating principle, a partial translation of another principle such as substantive equality and justice.<sup>71</sup> Here, anti-discrimination is open-ended, ambiguous or standardless, and thus in need of interpretation in light of the other principle (the metaprinciple) on which it is based.<sup>72</sup>

With either alternative, post-colonial expropriations to reverse the adverse economic legacies of colonialism are in principle legitimate and lawful. Following the comparatively recent accession to political independence by the black majority in Zimbabwe (1980),<sup>73</sup> Namibia (1990), and South Africa (1994), the Constitutions of Zimbabwe,<sup>74</sup> Namibia<sup>75</sup> and South Africa<sup>76</sup> subject equality to affirmative action. Affirmative action animates and inspires their respective land redistribution programmes, which all aim to rectify the economic ills of

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<sup>69</sup> McCrudden (1991:xviii).

<sup>70</sup> (ibid.).

<sup>71</sup> (ibid.).

<sup>72</sup> (ibid.).

<sup>73</sup> The Constitution of Zimbabwe was published as a Schedule to the Zimbabwe Constitution Order 1979 (SI 1979/1600 of the United Kingdom).

<sup>74</sup> Constitution of Zimbabwe, paragraph 23(3)(g): “Nothing contained in any law shall be held to be a contravention of [the provision prohibiting discrimination] to the extent that the law in question relates to ... the implementation of affirmation action programmes for the protection or advancement of persons or classes of persons who have been previously disadvantaged by unfair discrimination”.

<sup>75</sup> Constitution of the Republic of Namibia, Article 23(2), Act No. 1 of 1990 (hereinafter *Namibian Constitution*): “Nothing contained in [the Article providing for the right to equality in the Namibian Constitution] shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices ...”.

<sup>76</sup> Constitution of the Republic of South Africa, section 9(2), Act No. 108 of 1996 (hereinafter *South African Constitution*): “... To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”.

apartheid and colonialism. Similarly, the Constitutions of South Africa<sup>77</sup> and Zimbabwe<sup>78</sup> subordinate the right to private property to the Government power to expropriate property for land redistribution purposes. However, depending on whether one assumes the peremptory nature of the principle against racial discrimination, exceptions to the general prohibition on racial discrimination violate international law as *ius cogens* norms are by definition non-derogable. David Schneiderman even noticed that international investment law may be counter-majoritarian and side against public purpose, as investment rules can be viewed as a set of binding constraints designed to insulate economic policy from majoritarian politics.<sup>79</sup>

## ***Campbell v Zimbabwe***

### ***The case***

#### *Core issues*

The questions of law in *Campbell v Zimbabwe* are –<sup>80</sup>

- whether the SADC Tribunal had jurisdiction to entertain the application
- whether or not the applicants had been denied access to the courts in Zimbabwe (i.e. the Respondent)
- whether or not the applicants had been discriminated against on the basis of race, and
- whether or not compensation is payable for the lands compulsorily acquired from the applicants by Zimbabwe.

This article, however, only focuses on the issue of racial discrimination.

#### *Facts*

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<sup>77</sup> South African Constitution, section 26(4), (6), (7), (8) and (9); in particular, paragraph 26(8): “No provision of this section may impede the state from taking legislative and other measures to achieve *land, water and related reform, in order to redress the results of past racial discrimination ...*” [emphasis added].

<sup>78</sup> Amendment 17, paragraph 16B(2).

<sup>79</sup> Schneiderman, David. 2008. *Constitutionalizing economic globalization: Investment rules and democracy's promise*. Cambridge: Cambridge University Press, p 3.

<sup>80</sup> *Campbell*, at 16–17.

On 14 September 2005, the Zimbabwean Parliament passed an amendment to the Constitution of Zimbabwe (Amendment 17). Section 16B(2) of Amendment 17 read in relevant part as follows:

- (a) all agricultural land ... [reference to national gazettes where specific agricultural lands for resettlement purposes are identified] ... is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii), with effect from the date it is identified in the manner specified in that paragraph; and
- (b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

Following Amendment 17, the Zimbabwean State expropriated a number of white-owned agricultural lands. Mike Campbell (Pvt) Limited, a Zimbabwean-registered company, and William Michael Campbell commenced legal action in the Supreme Court of Zimbabwe, the country's highest court, challenging the acquisition of their land by the State.<sup>81</sup> Concurrently, on 11 October 2007, the two applicants filed an application with the SADC Tribunal challenging the taking by the State of their agricultural land as well as applying for interim measures in terms of Article 28 of the Tribunal Protocol.<sup>82</sup> On 13 December 2007, the SADC Tribunal granted the interim measure, which ordered Zimbabwe to refrain from taking any step or permitting any step, directly and indirectly, to interfere with the peaceful residence on, and beneficial use of, the land in question.<sup>83</sup> On 22 February 2008, however, the Supreme Court of Zimbabwe dismissed the two applicants' claims entirely.<sup>84</sup>

Later, 77 other persons applied to intervene in the proceedings and applied to the Tribunal for interim measures, which the Tribunal granted.<sup>85</sup> The *Mike Campbell (Pvt) Limited and*

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<sup>81</sup> *Mike Campbell (Pvt) Ltd & Others v The Minister of National Security Responsible for Land, Land Reform and Resettlement and the Attorney-General* (SC 49/07) (2007).

<sup>82</sup> Protocol on Tribunal and the Rules of Procedure Thereof (hereinafter *SADC Protocol*).

<sup>83</sup> *Mike Campbell (Pvt) Limited & Another v The Republic of Zimbabwe*, Case No. SADCT 2/07 at 8.

<sup>84</sup> *Mike Campbell (Pvt) Ltd & Others v The Minister of National Security Responsible for Land, Land Reform and Resettlement and the Attorney-General* (SC 49/07)(2007).

<sup>85</sup> *Gideon Stephanus Theron v The Republic of Zimbabwe & Others*, Case No. SADC (T) 2/08; *Douglas Stuart Taylor-Freeme & Others v The Republic of Zimbabwe & Others*, Case No. SADC (T) 03/08; *Andrew Paul Rosslyn Stidolph & Others v The Republic of Zimbabwe & Others*, Case No. SADC (T) 04/08; *Anglesea Farm (Pvt) Ltd & Others v The Republic of Zimbabwe & Another*, Case No. SADC (T) 06/08.



*William Michael Campbell* case and the cases of the 77 other applicants were then consolidated into one case. Though the main hearing was set for 28 May 2008, it was postponed until 16 July 2008.

However, between these two dates, Michael Campbell, 76, one of the two early applicants, and his family were brutally beaten up on their farm in Zimbabwe and allegedly forced to sign a paper declaring that they would withdraw the case from the SADC Tribunal.<sup>86</sup> On 20 June 2008, the applicants referred to the Tribunal the failure by Zimbabwe to comply with the Tribunal's decision regarding the interim reliefs. Yet, after 28 November 2008, when the SADC Tribunal decided for Campbell, his home of 50 years was burnt to the ground by farm invaders in September 2009.<sup>87</sup>

#### *Parties' submissions*

The applicants were represented by one Namibian lawyer<sup>88</sup> and three eminent and senior advocates from South African,<sup>89</sup> Zimbabwean<sup>90</sup> and English<sup>91</sup> bars. On the respondent's side, the Government of Zimbabwe was represented by its Deputy Attorney-General<sup>92</sup> and Chief Law Officer.<sup>93</sup>

The applicants deployed several arguments to buttress their main contention that Zimbabwe was in breach of Article 6(2) of the SADC Treaty, prohibiting racial discrimination, by enacting and implementing Amendment 17. First, they submitted that expropriations, carried out pursuant to Amendment 17, were based solely or primarily on consideration of race and ethnic origin, and that they were being directed at white farmers, whether or not white farmers had acquired the land during the colonial period or after Independence. The

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<sup>86</sup> Ruppel, Oliver C & Francois-X Bangamwabo. 2008. "The SADC Tribunal: A legal analysis of its mandate and role in regional integration". In Namibian Economic Policy Research Unit (Eds). *Monitoring regional integration in southern Africa: Yearbook 2008*. Windhoek: NEPRU, p 7.

<sup>87</sup> Chimhavi, Dominic. 2009. "Prize Zim farm attacked", *NEWS24*, 3 September 2009; available at [http://www.news24.com/Content/Africa/Zimbabwe/966/850667d917044a828d997a2869379abc/03-09-2009-10-08/Prize\\_Zim\\_farm\\_attacked](http://www.news24.com/Content/Africa/Zimbabwe/966/850667d917044a828d997a2869379abc/03-09-2009-10-08/Prize_Zim_farm_attacked); last accessed on 18 November 2009.

<sup>88</sup> Elize M Angula.

<sup>89</sup> Jeremy J Gauntlett, SC.

<sup>90</sup> Adrian Phillip de Bourbon, SC.

<sup>91</sup> Jeffrey L Jowell, QC.

<sup>92</sup> P Machaya.

<sup>93</sup> Nelson Mutsonzwa.

applicants further argued that, even if Amendment 17 made no reference to the race and colour of the owners of the land expropriated, its legislative intent was clearly directed only at white farmers and apparently had no other rational categorisation. Finally, they contended that the Government of Zimbabwe had expropriated the targeted farms and distributed them to certain senior political, judicial or military officers politically connected to the Government.

In reply to the applicants' submissions that Amendment 17 violated Article 6(2) of the SADC Treaty, the Government of Zimbabwe denied that its land reform programme targeted white farmers only. It explained that the programme was for the benefit of the people who had been disadvantaged under colonialism and it is within this context that the applicants' farms had been identified for acquisition by the Zimbabwean Government. The farms expropriated were suitable for agricultural purposes and happened to be largely owned by the white Zimbabweans, who were inevitably the people most likely to be affected by the expropriations. According to the Zimbabwean Government, such expropriation of land under the programme could not be attributed to racism but circumstances brought about by colonial history. And, contrary to the submissions by the applicants, not only lands belonging to white Zimbabweans had been expropriated, but also those of the few black Zimbabweans who possessed large tracts of land.

### *Holdings*

The main hearings took place in July 2008 before the SADC Tribunal at its official seat in Windhoek, the capital city of Namibia. It was a five-member bench,<sup>94</sup> consisting of Isaac Mtambo (Malawi), Luis Mondlane (Mozambique), Dr Rigoberto Kambovo (Angola), Dr Onkemetse Tshosa (Botswana) and, as President of the Tribunal, Ariranga Pillay (Mauritius). Justice Mondlane delivered the majority judgment, whereas Justice Tshosa handed down a brief dissenting opinion on the issue of racial discrimination.<sup>95</sup>

From the outset, the SADC Tribunal noted that discrimination of whatever nature was outlawed or prohibited in international law.<sup>96</sup> The Tribunal cited several provisions in

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<sup>94</sup> The SADC Tribunal consists of ten members, including the President of the Tribunal appointed from SADC Member States. See "Legal instruments" on the official website at <http://www.sadc-tribunal.org>.

<sup>95</sup> *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe*, SADC (T) Case No. 2/2007 (Tshosa, J, dissenting; hereinafter *Dissenting Opinion*).

<sup>96</sup> *Campbell*, at 45.

international legal instruments that prohibited discrimination based on race.<sup>97</sup> It then proceeded to define *racial discrimination*, noting that the SADC Treaty neither defined *racial discrimination* nor offered any guidelines to that effect.<sup>98</sup> The Tribunal reviewed the provisions of the CERD, the CCPR, and the CESC.<sup>99</sup> In the process, it distinguished between formal and substantive equality,<sup>100</sup> on the one hand, and between direct and indirect discrimination,<sup>101</sup> on the other.

After it had addressed the definition of *racial discrimination*, the Tribunal moved on to determine whether Amendment 17 fitted that definition. It first observed that Amendment 17 affected all agricultural lands or farms occupied by the applicants and that the applicants were white farmers.<sup>102</sup> It held that, even though Amendment 17 did not explicitly refer to white farmers, its implementation affected white farmers only and, consequently, constituted indirect discrimination or substantive inequality.<sup>103</sup> It added that the differentiation of treatment meted out to the applicants also constituted discrimination as the criteria for such differentiation were not reasonable and objective but arbitrary and based primarily on considerations of race.<sup>104</sup> The Tribunal concluded that, implementing Amendment 17, the Government of Zimbabwe had discriminated against the applicants on the basis of race and thereby violated its obligation under Article 6(2) of the SADC Treaty.<sup>105</sup>

### ***Analysis of the case***

The SADC Tribunal seems to have handled most facets of the case well. It brushed a generally limpid picture of the events that had led up to the trial; it faithfully recited the procedural history of the case as well as the submissions of the applicants and the Government of Zimbabwe. Furthermore, it rightly and unanimously adjudicated on the issues of its own jurisdiction to hear and determine the case, the alleged denial of access to the

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<sup>97</sup> *Campbell*, at 45ff.

<sup>98</sup> *Campbell*, at 48ff.

<sup>99</sup> (ibid.).

<sup>100</sup> *Campbell*, at 49–50.

<sup>101</sup> *Campbell*, at 50–51.

<sup>102</sup> *Campbell*, at 51.

<sup>103</sup> *Campbell*, at 52.

<sup>104</sup> *Campbell*, at 53.

<sup>105</sup> (ibid.).

courts by the Zimbabwean Government, and the payment of compensation. On all those issues, the SADC Tribunal found against the Zimbabwean Government.

It is the parts of the *Campbell* judgment on racial discrimination and public purpose that contain disputable assertions.

### *Racial discrimination*

*Campbell* provided the Tribunal with an excellent opportunity to develop the meaning of *racial discrimination* in the SADC Treaty. At the same time, the issue of racial discrimination, the kernel of the case, defied the SADC Tribunal as a trier of fact and as a finder of law in *Campbell*. To be sure, racial discrimination was the only issue that was not unanimous, as Justice Onkemetse Tshosa dissented with good reason from the rest of his brethren. As a trier of fact, the SADC Tribunal wrongly assumed that all the persons affected by Amendment 17 were white Zimbabwean farmers,<sup>106</sup> an omission that Justice Tshosa corrected.

As a finder of law, the SADC Tribunal did not adequately disentangle the difficult matters of discrimination and the racial ground of the alleged discrimination. As Justice Tshosa himself admitted, –<sup>107</sup>

I observe that during the deliberations on the case, it was not entirely clear to us how the issue of racial discrimination would be resolved. It was only towards the end of the deliberations, that is, a day before the judgment was to be delivered, that the majority were inclined to hold that Amendment 17 indirectly discriminated against the applicants.

Something of a circular argument lies in the Tribunal's finding that the Zimbabwean Government's land resettlement programme, as spelt out in Amendment 17, is racially discriminatory because it is based on considerations of race.<sup>108</sup> The circularity of the Tribunal's finding becomes obvious when one realises that the land resettlement policy in Zimbabwe, as in Namibia and South Africa, are redistributive and in the nature of affirmative action measures.<sup>109</sup> In most southern African countries that achieved independence through

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<sup>106</sup> Dissenting Opinion, at 3–4.

<sup>107</sup> Dissenting Opinion, at 1–2.

<sup>108</sup> *Campbell*, at 53.

<sup>109</sup> Compare Zimbabwean Constitution, paragraph 23(3)(g); Namibian Constitution, Article 23(2); and South African Constitution, section 9(2).

liberation wars, colonial land policies and land tenure systems were the seeds of liberation struggles.<sup>110</sup> Admittedly, affirmative action measures intend to bring about substantive equality by differentiating on the ground of race in order to offset the present effects of the race-based injustices of the past. A Namibian scholar once outlined the purposes of affirmative action as implying the augmentation of representativeness in areas dominated by the white minority and the redistribution of wealth.<sup>111</sup> Therefore, to say that Amendment 17 is racially discriminatory is as redundantly repetitive as saying that affirmative action measures are founded on considerations of race.

Once it found that race-based classifications had occurred in *Campbell*, the SADC Tribunal should not have stopped its inquiry at that point. The next inquiry should have been whether or not the race-based discrimination was unfair.<sup>112</sup> South African and Namibian courts would have investigated the fairness or otherwise of alleged discrimination.<sup>113</sup> In foreign investment law, this inquiry would have turned on the question whether the alleged racial discrimination in *Campbell* fell under the exception to the general prohibition on racial discrimination. This further inquiry is necessary because not all race-conscious classifications are unfair. Indeed, some race-conscious classifications are imperatively mandated by the ideal of equality, and rejecting rather than accepting the imperative of race-conscious classifications would undermine people's confidence in that ideal.<sup>114</sup>

The SADC Tribunal did not actually embark on a full-fledged inquiry into the fairness of the allegedly discriminatory provisions of Amendment 17. Instead, after concluding that Amendment 17 was discriminating against the applicants indirectly on the basis of race, Justice Mondlane only uttered the following dictum:<sup>115</sup>

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<sup>110</sup> See Amoo (2002:265).

<sup>111</sup> Jauch, Herbert M. 1998. *Affirmative Action in Namibia: Redressing the imbalances of the past?*. Windhoek: New Namibia Books (Pty) Ltd, p 20.

<sup>112</sup> See *Union of Refugee Women v The Director: The Private Security Regulatory Authority* 2007 4 SA 395 (CC), which held that discrimination against refugees (as opposed to permanent residents and citizens) was not unfair. See also *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC); *City Council of Pretoria v Walker* 1998 2 SA 363 (CC); *Jordan & Others v The State (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 6 SA 642 (CC); *Volks NO v Robinson & Others* 2005 5 BCLR 446 (CC).

<sup>113</sup> See the Namibian and South African leading cases of *Müller v President of the Republic of Namibia* 1999 NR 190 (SC), and *Harksen v Lane* NO 1998 (1) SA 300 (CC) 23.

<sup>114</sup> See Sadursky, Wojcieh. 2008. *Equality and legitimacy*. Oxford: Oxford University Press, p 122.

<sup>115</sup> *Campbell*, at 53.

We wish to observe here that if: (a) the criteria adopted by the respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated lands[;] and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalised individuals or groups, *rendering the purpose of the programme legitimate, the differential treatment afforded to the Applicants would not constitute racial discrimination.* [Emphasis added]

### *Public purpose*

The above dictum by Justice Mondlane reflects what went wrong with the SADC Tribunal's rulings on racial discrimination. First, although *public purpose* is a definitional element and requirement of lawful expropriation, it does not belong to international courts like the SADC Tribunal to pronounce themselves on the legitimacy of a sovereign State's legislative purposes. This is so despite the high probability that a challenge to an expropriation based on a claim that the expropriation was not for a 'public purpose' would possibly be effective in the case of a dictator, like Robert Mugabe, seizing property clearly for his or her personal use.<sup>116</sup> Second, the compensation of parties afflicted by expropriation is a separate requirement for lawful expropriations and not a benchmark for determining an expropriation's public purpose or its legitimacy.

Justice Mondlane's third observation is more pertinent to the implementation of Amendment 17. It is a fact that the Zimbabwean Government did not distribute most lands taken from white commercial farmers to poor, landless and other disadvantaged and marginalised Zimbabweans but to the adherents of the ruling party, the Zimbabwe African National Union – Patriotic Front (ZANU–PF). It is also a fact that rhetoric by Zimbabwe President Robert Mugabe and most tenors of the ruling clique has long been anti-British, if not downright racist.<sup>117</sup> However, while these facts justify the SADC Tribunal's finding of indirect discrimination, it does not explain why the Tribunal declared that Amendment 17 violated

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<sup>116</sup> Comeaux & Kinsella (1997:80).

<sup>117</sup> For instance, ahead of a high-level visit by a European Union (EU) delegation in Zimbabwe on 11 September 2009, Robert Mugabe told a meeting of his ZANU–PF youth party that “[w]e have not invited these bloody whites. They want to poke their nose into our own affairs”. See Cornish, Jean Jacques. 2009. “Mugabe criticises sanctions as Zuma makes new deals”, *Radio France International*, 11 September 2009; available at [http://www.rfi.fr/actuen/articles/117/article\\_5101.asp](http://www.rfi.fr/actuen/articles/117/article_5101.asp); last accessed on 18 November 2009.

Zimbabwe's obligation under Article 6(2) of the SADC Treaty not to discriminate on the basis of race.<sup>118</sup> The Tribunal should have distinguished between the text of Amendment 17 and the way it was implemented by the Zimbabwean Government. After all, that is exactly what a finding of indirect discrimination entails.<sup>119</sup> As the Tribunal itself recognised, the text of Amendment 17 does not expressly or explicitly refer to race, ethnicity or people of a particular origin.<sup>120</sup>

Moreover, conflating the purpose of the Zimbabwean Parliament with that of the executive or the ruling party is a long stretch because, notwithstanding the fact that legislators often dissemble, land resettlement legislation evolved in Zimbabwe over a long period of time<sup>121</sup> through the countless inputs of countless individuals and different political parties with different sectional interests. In cases where racial considerations are the only motives, the taking is clearly illegal, like Hitler's takings of Jewish property in Germany<sup>122</sup> and Idi Amin's takings of Indian property in Uganda. But a major conundrum arises, as in *Campbell*, where both economic and racial considerations motivate a taking. In such cases, it is difficult to determine which motive prevails, "for when economic nationalism is the reason for the taking both motives are present in equal strength".<sup>123</sup> In *Campbell*, the Tribunal could have sorted out this intricate situation by ruling that the *enactment* of Amendment 17 was not illegal, while its *implementation* was not only illegal but also contrary to the statutory purpose of Amendment 17.

Finally, in his dissenting opinion, Justice Tshosa even disputed that the discrimination was indirectly racial and insisted that, for the purposes of Amendment 17, classifications only targeted certain lands and not certain people:<sup>124</sup>

Amendment 17 targets agricultural land and [the applicants] are affected not because they are of white origin but because they are the ones who own the land in question. Thus, the target of Amendment 17 is agricultural land[,] not people of a particular racial origin. This

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<sup>118</sup> *Campbell*, at 58.

<sup>119</sup> The SADC Tribunal used the following definition of indirect discrimination: "Indirect discrimination occurs when a law, policy, or programme *does not appear to be discriminatory but has a discriminatory effect when implemented*"; *Campbell*, at 53; emphasis in original.

<sup>120</sup> *Campbell*, at 51.

<sup>121</sup> See Consolidated Land Acquisition Act, 2002 (No. 16 of 2002); Amendment 16.

<sup>122</sup> *Oppenheimer v Inland Revenue Commissioner* (1795) 1 All ER 538.

<sup>123</sup> Sornarajah (2004:399).

<sup>124</sup> Dissenting Opinion, at 3.

means that in implementing the Amendment it was always going to affect those in possession of the land, be they white, black or [from any] other racial background.

In this section, the article explained in what respects the SADC Tribunal's holdings on racial discrimination and public purpose were deficient. It highlighted that the SADC Tribunal could have differentiated between the purpose of Amendment 17, which is legal, and the manner in which the Zimbabwean Government implemented it, which was illegal. The next part of the article recasts the issues and puts forth an alternative way of resolving them.

## Compensation and unlawful nationalisations

If, as Justice Tshosa let out, the SADC Tribunal did not know how to go about deciding the issue of racial discrimination, one interrogation that arises is this: why did the Tribunal not decide the case by relying solely on the issue of compensation? The same holds true for the issue of public purpose. Public purpose was not raised by the parties as an issue for the Tribunal's determination, but it was an essential part of the Tribunal's analysis of the applicant's claim that the compulsory acquisition of farmlands was based on racial discrimination. The issue of public purpose was also an integral part of the Zimbabwean Government's counterclaim.

For an applicant to succeed on a claim of illegal expropriation, he or she needs to establish that a respondent did not satisfy *at least one* of the three requirements for lawful expropriations, and not all of them. In *Funnekotter*,<sup>125</sup> the ICSID eschewed in its arbitral award the thorny questions of public interest and racial discrimination. Rather, it decided the case solely on the basis of compensation, ignoring the public interest and racial discrimination allegations raised by the claimants.<sup>126</sup>

The SADC Tribunal could have settled the *Campbell* case by taking up the issue of compensation exclusively, especially because of the want of conclusive evidence for a finding of direct discrimination. The legal question would have been whether the compulsory acquisition of the applicants' agricultural lands without compensation constituted an unlawful

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<sup>125</sup> *Funnekotter*.

<sup>126</sup> *Funnekotter*, at 98: "The Tribunal will first examine whether or not the subparagraph (c) relating to the provisions of a just compensation has been breached. If it arrives [at] the conclusion that it has, it will not be necessary for it to consider whether, as alleged by the Claimants, the other conditions provided for in that Article or the provisions of Article 3 have also been breached".



nationalisation. In addition, given the fact that the Zimbabwean Government dished out the expropriated lands to the ruling party adherents, the real question would have been whether the compulsory acquisition of the lands without compensation resulted in confiscation.<sup>127</sup> It appears that the facts that are common cause in the *Campbell* case would tip the balance in favour of a finding of confiscation, but the chief factor speaking against such a finding is that in modern times the term *confiscation* is seldom used.<sup>128</sup>

The article does not definitively answer these alternative questions, the main point here being that the SADC Tribunal could have broached these controversial issues by focusing exclusively on the requirement of compensation.

### **Contribution of *Campbell* to expropriation law**

The precedential value of *Campbell* is equivocal on the question as to the extent to which a country can expropriate property to correct the economic inequalities caused by colonisation. On the one hand, *Campbell* clearly creates an exception to the exception. It implies that, if they are based on race and do not compensate the plaintiffs, expropriations can be illegal even if they are part of policies aimed at redressing economic inequalities brought about by colonialism.

On the other hand, *Campbell* loses sight of the general exception that post-colonial expropriations to redress economic inequalities are lawful. As a matter of principle, the failure by the SADC Tribunal to contextualise the Zimbabwean expropriations as a form of affirmative action policies or an exception to the general prohibition on discriminatory expropriations contradicts foreign investment law and creates a constitutional crisis in the SADC region. Unlike most African countries that achieved political independence in the 1960s, Zimbabwe, Namibia and South Africa are unique on the continent in that the black majority reclaimed political power from the white minority fairly recently. Namibia and South Africa have provisions in their Constitutions which exempt affirmative action policies and other measures to redress past injustices from the general prohibition on racial discrimination. The *Campbell* case creates a crisis by suggesting that these policies and

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<sup>127</sup> See *Siderman de Blake v Argentina* 965 F 2d 699 (1992), which held that the confiscation of property in that case had a “discriminatory motivation based on ethnicity” and was illegal.

<sup>128</sup> Sornarajah (2004:348): “In modern law ... it is best to refer to takings by states as expropriation [as opposed to confiscation], as in most instances these takings are carried out for an economic or a public purpose”.

measures potentially or actually violate their obligations under the SADC Treaty. The difference, however, between Zimbabwe and its Namibian and South African counterparts is the orderly, gradual and procedurally fair process that characterises land redistribution in Namibia and South Africa.

On the issue of compensation, the SADC Tribunal rightly ruled that the absence of compensation for the expropriations of white-owned farmlands rendered the expropriations unlawful.<sup>129</sup> In so doing, the SADC Tribunal conformed to the battered paths of international law on expropriations.

## Conclusion

So how far can Zimbabwe or other countries take and redistribute property as part of a general Government programme to redress the economic legacies of colonialism? This article's main argument is that the *Campbell* case gives an ambiguous, equivocal answer to that question. The value of *Campbell* as a precedent for these questions in foreign investment law is watered down by the partly wrong reasoning in that case. Although the outcome of *Campbell* is what a proper interpretation of the applicable law would have dictated, the process by which the Tribunal reached this outcome is incorrect, as far as discriminatory expropriations are concerned. In that sense, this article is more like a concurring opinion than a dissent from the *Campbell* judgment.

Expropriations to redress past injustices are, as a matter of law, an exception to the non-discrimination principle and, thus, legal. Nevertheless, the Zimbabwean land invasions are, as a matter of fact, a violation not only of foreign investment law but also of the spirit and stated purpose of Amendment 17.

The *Campbell* case could have and would have enjoyed full precedential value if it had ruled that –

- race-based expropriations are not unlawful, as a matter of principle, if they aim at redressing the economic inequalities caused by a colonial past
- race-based expropriations to correct the effects of colonialism are an exception to the non-discrimination principle, but

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<sup>129</sup> *Campbell*, at 57.

- expropriations as an exception to the non-discrimination principle are unlawful if the expropriating State does not pay compensation to the plaintiffs (i.e. if the expropriating State confiscates the plaintiff's property).