

GOOD FAITH: ZIMBABWE'S OBLIGATIONS UNDER INTERNATIONAL LAW TO ACQUIRE LAND AND PAY JUST COMPENSATION

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EXECUTIVE SUMMARY

What is meant by 'good faith' when acquiring land? And what is just compensation? This paper is a search for answers to these questions. It begins by examining the fundamental principles enshrined in international laws, conventions and treaties to which Zimbabwe is bound and obliged to honour. These provide a benchmark against which to evaluate Zimbabwe's own laws and practices governing the compulsory acquisition of land and compensation. Three fundamental rights take centre stage: the right to fair compensation and prompt payment; the right to the protection of the law and a fair hearing in a court of law; and the right not to be discriminated against on the grounds of race or colour. The rulings of Zimbabwe's Supreme Court governing these rights are compared with those of two international Tribunals: the SADC Tribunal¹ and the International Centre for Settlement of Investment Disputes.² Before drawing conclusions and making recommendations, the paper dwells briefly on the government's responses to the judgments of these international courts.

1. INTERNATIONAL LAW AND PRINCIPLES

INTERNATIONAL LAW, CONVENTIONS AND TREATIES

¹ The Tribunal and its Protocol established in terms of Article 9 as read with Article 16 of the Treaty of the Southern African Development (SADC) Community.

² The International Centre for Settlement of Investment Disputes (ICSID) is a World Bank resolution forum in Washington governed by a Convention applying international law and signed by Zimbabwe in June 19, 1994.

What is international law? The International Law Association defines 'general customary international law' as a rule or principle that is widely, consistently and uniformly practiced (such as diplomatic immunity), which gives rise to legitimate expectations in the future.³ This law is binding on all States, whether or not a particular State believes or consents to the rule. In other words, it is not necessary for the consent of a State for it to be bound by a rule of international law. The main rule of international law considered in this paper is that just compensation for compulsory acquisitions must be based on good faith, due process, and the genuine value of the land acquired by the State.

While many rules of international law are customary, others have come into force through declarations and resolutions of the General Assembly of the United Nations. Foremost amongst these is the Universal Declaration of Human Rights, including:

- The right to own property and not to be arbitrarily deprived of it, as enshrined in section 16 of Zimbabwe's constitution
- The right to the protection of the law and to be heard in an independent and impartial court of law, which forms part of section 18 of our Constitution, and
- The right not to be discriminated against on the grounds of race or colour, enshrined as section 23 of the Constitution.

These rights also form part of the African Charter on Human and Peoples Rights to which Zimbabwe has acceded and is therefore bound.

Zimbabwe has also entered into treaties that are governed by international law, such as the SADC Treaty and Bilateral Investment Promotion and Protection Treaties with various States, including The Netherlands and Germany. As such, Zimbabwe is bound by the Vienna Convention on the Law of Treaties. Two articles of the Convention are particularly pertinent. The first is that every treaty in force is binding upon the parties to it and must be performed by them in good faith. The second is that a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Zimbabwe is also bound by the United Nations resolution on State Responsibility for International Wrongful Acts.⁴ If Zimbabwe is responsible for wrongful acts, then the Pinheiro Principles on restitution for displaced persons apply.⁵ The first principle holds that displaced persons who have been arbitrarily or unlawfully deprived of their housing, land or property

³ International Law Association (2000) *Formation of Customary (General) International Law*, London Conference (p.24)

⁴ *Responsibility of States for Internationally Wrongful Acts* as adopted by the International Law Commission and by the United Nations General Assembly resolution 56/83 of 12 December 2001.

⁵ The United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (2005).

have the right to have them restored, and are entitled to full and effective compensation.

The First Lost Opportunity (1950-1980)

When liberal 'white' politics of the 1950s gave way to 'conservative' white politics of the 1960s, this led to the political constant throughout the interim period, symbolized by '*black nationalists*' on one hand and '*white farmers*' on the other – as the political elites so to speak – and the two became mortal political enemies. This rivalry has been playing itself out since then and continues to do so today. Essentially, each has been poised to take the other out at any opportunity, be it the armed struggle for independence, or the evolving party-political dynamics of recent times.

Much has been written about this period, and my own favourite is the book by Holderness cited above. The period 1953 to 1958 experienced the most 'liberal' white government during Garfield Todd's reign as Prime Minister of Southern Rhodesia. Holderness argues that Zimbabwe then had a firm ground for establishing a stable 'multi-racial' society. The challenge of transformation was in managing the pace of change. Todd was perceived as too fast in embracing blacks and in unravelling the racial laws and infrastructure, and the white electorate un-seated him in 1958 ushering in Edgar Whitehead. Of the 'apartheid' infrastructure that Todd and his supporters had started dismantling included: the Land Apportionment Act (LAA) of 1930 which segregated the races. He also targeted the racial labour, industrial, educational and electoral laws. The white electorate, by electing Whitehead, it seems, wished to slow down the pace. But there was a further white backlash as the Rhodesia Front (RF) party was established and won elections in 1962 on the promise to halt all these reforms. And the RF, in the minds of black nationalists, was essentially the conservative white farmers and, regrettably, the Commercial Farmers' Union (CFU) and its previous formulations were perceived as a proxy of the RF.

I am old enough to remember how my parents engaged these issues of the 1950s. I am also young enough to perceive the continuity of national events up to today into one trajectory. It has been one long attempt to transform from long periods of an apartheid society (1890-1950) to what initially in the 1950's was referred to as 'multi-racial' society. Today we refer to an inclusive and caring democratic society which protects rights of minority groups.

The main tool used by Todd was the parliamentary Select Committees. In the mid-1950s, a Select Committee on Land was established in order to dismantle the racial land laws. The committee recommended that all unallocated European land be designated Special Areas and to be settled by people of any race. For the period leading up to the ushering in of the RF to power, blacks were settled in the Special Areas. The RF abolished the programme, restored the LAA, and removed all blacks settled in the Special Areas without compensation. The RF froze all other similar reforms. This is the point at which the Black Nationalist movement started gravitating towards radical action. After UDI in 1965 both ZANU and ZAPU started crafting the armed liberation struggle, taking a very pointed turn from the nationalist philosophy of "one-man-one vote" to a struggle to "liberate the land".

While I don't imply that the transformation was going to be easier if the white liberals had succeeded in the 1950s, what I can point to is the great affinity and common ground of shared values between the black elites and the white liberals then. In other words a black/white united middle class was a real possibility. Whether or not that would have evolved to transcend major class conflicts I cannot say. One has to appreciate, however, that the black elites that were held in high regard by white liberals in the 1950s included Hebert Chitepo, Leopold Takawira, and many others who went on to lead the military armed struggle. This underscores the radical transformation of these nationalists in the wake of the RF agenda.

PRINCIPLES OF COMPULSORY ACQUISITION AND COMPENSATION

The FAO sets out the main principles for the compulsory acquisition of land and compensation.⁶

Good faith: A government has a primary responsibility to properly plan an acquisition programme in good faith so and those affected do not suffer any injustice. The acquisition, for example, must be reasonably necessary and the government should invite owners to participate and submit their own claims for compensation. In particular, the law must guarantee their right to receive reasonable notice of acquisition and be given a reasonable time to leave their property. In the case of acquiring farms, owners should be allowed sufficient time to harvest their crops, or receive full compensation for them.

Valuation: A fundamental requirement of compensation is the principle of equivalence. It holds that owners must be neither worse nor better off after the acquisition of their land. It involves a fair and equitable valuation process to determine just compensation based on the genuine value of their land. This is normally the market value of the land and improvements. Owners are also entitled to compensation for disturbances to their livelihoods, such as removal expenses and other losses. Possession can only take place after owners have received full payment – or a substantial percentage – of the agreed compensation. Owners are entitled to claim interest on any unpaid compensation from the date of possession.

Appeal: Owners have the fundamental right of notice, the right to be heard, and the right to appeal in an impartial, competent and independent court of law. Appeals may be made:

- Against the purpose of the programme and the reasonable necessity of acquiring the land
- Against the procedures (such as improper notice or processing of claims) as well as delays in payment

⁶ FAO (2009) *Compulsory Acquisition of Land and Compensation*, Food and Agriculture Organisation, Land Tenure Studies: 10 <<ftp://ftp.fao.org/docrep/fao/011/i0506e/i0506e00.pdf>>

- Against the compensation offered by challenging the principles, methods, process or date of evaluation.

The acquisition programme should be regarded as abandoned if the process is not completed by the acquiring agency within a specified period.

2. ZIMBABWE'S LAND ACQUISITION LAWS

Zimbabwe's 1980 'Lancaster House' Constitution provided for land acquisition based on the willing buyer – willing seller principle; that is, the market value of the land. When this constitutional provision expired after 10 years, Section 16(1) of the Constitution, which protected citizens from the deprivation of their property, conformed to international law. It required compulsory acquisition to be reasonably necessary; for the government to give reasonable notice of its intention to acquire property; and to pay adequate compensation promptly. The government had to apply to the High Court for an order confirming the acquisition if it was contested. If the acquisition was not confirmed, the owner could apply to the High Court for the prompt return of the property. Any owner could apply to the High Court to determine any question relating to compensation and, if necessary, appeal to the Supreme Court.

CONSTITUTIONAL AMENDMENTS

The first change came with Constitutional Amendment 11 in 1990 which allowed government to compulsorily acquire land by paying 'fair' compensation within a 'reasonable time', rather than promptly.⁷ But, contrary to the principle of natural justice and the rule of law, it denied landowners the right to a fair hearing in a court of law. It ousted the jurisdiction of the courts to hear owners' appeal against the government's determination of what was considered to be 'fair compensation' and a 'reasonable time'. These changes presaged the introduction of the Land Acquisition Act [Chapter 20:10] in 1992. Fair compensation would no longer be based on the land's market value, but administratively determined using a Schedule of 19 valuation principles. According to the FAO, this method of inspecting each parcel of land to determine its value leads to unjust compensation.⁸ Not only do unskilled valuers take an inordinately long time to reach easily contestable compensation offers, but governments seldom have sufficient budgets to fund this costly valuation method. As Zimbabwe's new law and its methods inevitably exposed the government to a deluge of litigation by commercial farmers, the government simply amended the Constitution again. In 1993, Constitutional Amendment 13 denied landowners the

⁷ Constitutional Amendment No. 11, Section 6 of Act 30 of 1990 which substituted Section 16(2)

⁸ FAO (2009) *ibid.* Box 7 (p.25)

opportunity to apply to the High Court for the determination of *any* question relating to compensation or to appeal to the Supreme Court.⁹

After 2000, constitutional and statutory amendments saw the Land Acquisition Act develop along two quite divergent processes: one for the compulsory acquisition of agricultural land acquired for resettlement, and another for land acquired for other purposes. While laws to acquire land for other purposes continued to meet most international standards, virtually all legal constraints and procedures to acquire land for resettlement were stripped away. This division is most starkly evident in the new draft constitution where Property Rights (Section 71) governing other land are manifestly different from Rights to Agricultural Land (Section 72).

Following the first wave of farm invasions, Constitutional Amendment No. 16 was passed in April 2000. It purported to confer on Britain the obligation to pay compensation for land acquired for resettlement.¹⁰ Zimbabwe claimed that it had the responsibility for paying compensation for improvements on the land only. The President, using his emergency powers, immediately gave legislative force to the amendment.¹¹

LAND ACQUISITION AMENDMENT ACTS

At the same time, the President made wide-ranging changes to the Land Acquisition Act, sweeping aside farmers' rights governing the acquisition of land for resettlement and for compensation. The Act ousted the Court's ability to determine whether the acquisition was 'reasonably necessary'. Acquisition was deemed to be reasonably necessary purely by its identification as land for resettlement and its publication in the *Gazette*. The compensation fixed by a Compensation Committee was—by definition—deemed to be 'fair'. Any appeal challenging this definition of fairness was expunged from the law books. Nor would there be any right to compensation for disturbances that resulted in losses suffered by the owner. The right to the payment of compensation within a 'reasonable time' was defined – contrary to the meaning of the phrase – as a quarter payable on acquisition; another quarter payable within 2 years; and the remaining half payable within 5 years. All or part of the compensation was payable in cash *or* in Government bonds and securities.

With every attempt by farmers to have a fair hearing in a court of law, came new laws to dispossess them of the protection of the law and their properties. In May 2001, the Rural

⁹ Constitutional Amendment 13, section 3 of Act 9 of 1993, inserted section 16(1)(f) of the Constitution

¹⁰ Constitutional Amendment 16 was incorporated as section 16A of the Constitution

¹¹ Presidential Power (Temporary Measures) (Land Acquisition) Regulations (SI 148A of 2000, 23 May 2000) added Part VA to the Land Acquisition Act; subsequently ratified by Parliament (Act No. 15 of 2000).

Land Occupiers (Protection from Eviction) Act prevented owners from evicting those who had invaded their farms illegally or to hold them accountable for the damage they had caused. This was followed by further amendments to the Land Acquisition Act, which allowed the government to re-issue lapsed notices of acquisition and for owners to pay court costs if their appeals failed.¹² Later in the year, the President again used his emergency powers to amend the Land Acquisition Act.¹³ No written notice or compensation was required to take possession of the farm. Immediately an acquisition notice was issued, the government could “exercise any right of ownership, including the right to survey, demarcate and *allocate* the land.” Farmers were given 3 months notice to leave their farms.

A second amendment to the Land Acquisition Act, in September 2002, made the owner bear the brunt of government’s failure to follow due process. If an acquisition order was contested by the owner because the government had failed to give proper notice or had not applied for a confirmation order from the Administrative Court, the owner was to be given just *seven days* to leave his or her farm after the government had re-issued an acquisition order.¹⁴

The legal onslaught against farmers resumed in 2004. The first was the passage of the Acquisition of Farm Equipment and Materials Act to compulsorily and immediately acquire their movable assets. The second was yet another sweeping amendment to the Land Acquisition Act.¹⁵ It not only allowed the government to acquire any amount of land it wanted – including plantations, conservancies, agro-industrial properties and export processing zones – but it could acquire an owner’s last remaining farm.

NATIONALISATION OF COMMERCIAL FARMLAND

In 2005 the government’s *coup de grâce* finally came. It dispensed with a plethora of complicated and convoluted amendments to amendments to the Land Acquisition Act. It simply nationalised commercial farms. Its blunt instrument was Constitutional Amendment No. 17, inserted as Section 16B to the Constitution. Any land previously published in the *Gazette* immediately vested in the State with full title. Section 16B(3) abrogated the constitutional right to the protection of the law and the constitutional right to a fair hearing by an independent and impartial court (s.18(1) and s.18(9)). It specifically forbade owners to

¹² Land Acquisition Amendment Act 14 of 2001 (12 June) amended section 5(4) and added subsection 5(9) of the principal Act.

¹³ Presidential Power (Temporary Measures) (Land Acquisition) (No.2) Regulations (SI 338, 9 November 2001) to amend Section 8 and substitute Section 9 of the Land Acquisition Act; subsequently ratified as Land Acquisition Amendment Act No.6 of 2002

¹⁴ Section 9(2) of the Land Acquisition Amendment (No.2) Act of 2002

¹⁵ The Land Acquisition Amendment Act (No. 1 of 2004)

challenge the acquisition in a court of law by ousting the jurisdiction of the courts to entertain any such challenge.

The following year the Gazetted Land (Consequential Provisions) Act gave effect to Constitutional Amendment No.17. The government needed only to publish the names of owners and their property in the *Gazette* to acquire their farms. No planning, no reasonable necessity, no notice, no claims, no valuation, no appeal, and no compensation need be agreed upon, fixed or paid for ownership to vest immediately in the State with full rights and possession. For the government to transfer one citizen's lifetime of toil and investment to another, it need only sign an 'offer letter'. These laws have now been written into Article 72 of Zimbabwe's draft Constitution.

3. THE PROCESS OF LAND ACQUISITION AND COMPENSATION

JAMBANJA

The turning point in Zimbabwe's history came with the rejection of the government's draft constitution in a referendum held in February 2000. Fearing defeat in the June 2000 elections, the government organised thousands of party-sponsored settlers, spearheaded by war veterans, to invade commercial farms. It was a campaign marked by chaos and violence – colloquially known as *jambanja* – in which the army and state intelligence services played a decisive role.¹⁶ The invasions marked the beginning of the *Third Chimurenga*: the State's war against its own citizens. Contrary to claims that the land invasions were part of a spontaneous social protest movement by land-hungry peasants,¹⁷ they were a systematically planned and executed military operation: code-named *Operation Tsuru*. It had three main objectives. The first was 'command and control' over farms, coordinated by the police, the CIO, war veterans, and government publicity officials who provided direction to the farm invasions. The second was to identify 'operational zones'. Loyal zones were to be rewarded, while opposition zones were to be punished. The third objective was the mobilisation by war veterans of the 'ground troops' of peasants who wanted land.¹⁸

Alongside the seizures of farms, the campaign and its attendant violence was justified in ideological terms by the state media. In a reworked narrative on nationalism, veterans were

¹⁶ Marongwe, N. (2003) Farm occupation and occupiers in the new politics of land in Zimbabwe. In A. Hammer, B. Raftopoulos and S. Jensen. *Zimbabwe's Unfinished Business*. Weaver Press: Harare

¹⁷ See, for example, Scoones (2011) *Zimbabwe's Land Reform: Myths and Realities*. Jacana

¹⁸ Sachikonye, L. (2011) *When the State turns on its Citizens: Institutionalized Violence and Political Culture*. Jacana. (p.35)

cast as the heroic liberators, regaining lost lands from white usurpers, who were portrayed as unreconstructed racists.¹⁹ The political strategic objective was clear:

“Violence during this phase of the reform had a dual role. It was deployed to seize land from 4,500 white farmers and to destroy the political base of MDC amongst farm-workers whose households had a population of about two million.”²⁰

This entire process of land acquisition was a far cry from the requirements of good faith, proper planning and due process. Court appeals inevitably followed.

COURT APPEALS

Immediately *Operation Tsuru* was launched, the Commercial Farmers Union appealed to the courts. In March 2000, the High Court gave occupiers just a day to leave the farms. Nothing illustrates the government's lack of good faith more than its agreement to carry out the court order and remove illegal settlers while, at the same time, it was planning further invasions. Of course, nothing happened. When the farmers again appealed to the courts the following month, the Commissioner of Police, who was complicit in the invasions, lamely claimed that he had insufficient manpower to carry out the court order. The High Court confirmed its earlier ruling, declaring the occupations illegal, and ordered their removal from the farms. But land seizures continued relentlessly. By July 2000 over 1,600 farms had been occupied.²¹ In yet another application by the Commercial Farmers Union, the Supreme Court declared – again with the consent of Government – that the farm invasions had contravened the fundamental right to protection against the deprivation of property in terms of section 16(1) of the Constitution.²² It therefore ordered various Ministers, Provincial Governors, and the Commission of Police in particular, to remove illegal settlers and prevent any further invasions.

The omens were not good. Before the Commercial Farmers Union brought its constitutional application before the Supreme Court in December 2000, the President, speaking at his party's congress, declared that, “The courts can do what they want. They are not courts for our people and we shall not even be defending ourselves in these courts.” He told his audience, “We must continue to strike fear into the heart of the white man, our real enemy.” When the Supreme Court considered the farmers' application it did not mince its

¹⁹ Jocelyn Alexander (2006) *The Unsettled Land*. James Curry: Oxford (p.185)

²⁰ Sachikonye, *ibid.* (p.33-4)

²¹ ICG (2004) *Blood and Soil*. International Crisis Group: Brussels

²² Commercial Farmers Union vs Minister of Lands, Agriculture and Rural Resettlement and Others, Case No. SC 314/20

words. “Common law crimes have been, and are being, committed with impunity. Laws made by parliament have been flouted by the government.” It went on to say:

*“The settling of people on farms has been entirely haphazard and unlawful. A network of organisations, operating with complete disregard for the law, has been allowed to take over from government. War veterans, villagers and unemployed townspeople, have simply moved onto farms. They have been supported, encouraged, transported and financed, by party officials, public servants, the CIO and the army. The rule of law has been overthrown in the commercial farming areas and farmers and farm workers on occupied farms have been denied the protection of the law”.*²³

The Supreme Court ruled that there was no “programme of land reform” as the term had been used in Section 16A of the Constitution. It therefore ordered Ministers, the Commissioner of Police, and the President to comply immediately with the consent order of the High Court of March 2000 and with the Supreme Court consent order of November 2000 to remove all unlawful invaders from commercial farms and prevent further invasions.

THE LAND REFORM PROGRAMME

Unwilling to abide by its own laws and courts, the government decided to reconstitute the Supreme Court. Once it had purged the bench of most independently minded judges, including the Chief Justice, and appointed more compliant judges, the President could rely on a bench that was more amenable to his executive decisions. The Supreme Court’s first major decision was to condone and confirm the Rural Occupiers (Prevention from Eviction) Act, which legalised the deprivation of fundamental rights as enshrined in 17(1) and 18(1) of the Constitution. In December 2001 it ruled that the ‘land reform programme’ was constitutional and in accordance with the rule of law, and it exonerated the Commissioner of Police of any contempt of court charges. This view was not shared by the United Nation Development Programme. Its report noted that the government’s use of *post hoc* legislation and other changes were “openly at variance with the doctrine of natural justice.”²⁴

Yet, while the government rushed headlong to seize virtually all white commercial farms, it paid not the slightest heed to meet *its* obligations under *its* own laws. It brushed aside the legal requirement for the Administrative Court to confirm acquisitions. “We have resolved to go ahead and allocate people land on all gazetted properties, even before court

²³ Supreme Court ruling quoted by Zimbabwe’s former Chief Justice Anthony R. Gubbay (2009) *The Progressive Erosion of the Rule of Law in Independent Zimbabwe*. Third International Rule of Law Lecture, Bar of England and Wales: London (p.15)

²⁴ UNDP (2002) *Zimbabwe: Land Reform and Resettlement: Assessment and Suggested Framework for the Future*. Interim Mission Report: New York. (p.40)

confirmation,” the Minister of Agriculture breezily declared.²⁵ The government made no effort to value farms ‘as soon as possible’ or pay compensation ‘without delay’ as required by the Land Acquisition Act. Instead the Minister insisted that, “We will be suspending compensation for the white farmers for us to be able to support the new farmer projects and other programmes.”²⁶

Having removed the requirement of ‘reasonable necessity’ from its law books, the government voraciously acquired the last remaining white farms, even while vast tracks of farming land lay idle. By 2003, as estimated 2.8 million hectares of land had been “acquired for resettlement, but has not yet been taken up by those allocated plots.”²⁷ While the government took over the remaining fragments of white commercial farms,²⁸ politicians, senior military officers and other elite party loyalists grabbed multiple full-scale farms.²⁹ According to one investigation, the President and his wife own 14 farms, while the Vice-President and her late husband owned 25 farms covering 105,000 hectares.³⁰ The Speaker of the Senate reportedly took over 6 farms, while 16 Supreme and High Court judges, including the Chief Justice, were all beneficiaries of seized farms. By contrast, 800 dispossessed white commercial farmers who had officially applied for leases or offer letters to remain on their own farms never even received the courtesy of a reply.³¹

4. THE LITMUS TEST OF INTERNATIONAL LAW

Despite dire warnings directed against those commercial farmers who dared pursue their claims through the courts, Mike Campbell and others mounted a constitutional challenge in the Supreme Court against Constitutional Amendment No. 17. They argued that the Amendment – which revoked their fundamental rights to protection of their property (s.16), to protection of the law and access to the courts (s.18), and protection from discrimination based on race (s.23) – were unconstitutional.

²⁵ Statement by Minister of Agriculture, Lands and Rural Resettlement reported in *The Herald*, 19 April 2001.

²⁶ Statement by Minister of Agriculture, Lands and Rural Resettlement reported in *The Daily News*, 25 May 2002.

²⁷ Presidential Land Review Committee under the chairmanship of Dr. Charles Utete, Table 5 (p.42)

²⁸ Before the enactment of the Land Acquisition Amendment Act of 2004, white farmers were allowed to keep that portion of their farm that fell within the maximum farm sizes permitted by the Rural Land (Farm Sizes) (Amendment) Regulations, 2000 (No.1) [Statutory Instrument 288 of 2000] made in terms of Section 15 of the Rural Land Act [20:18].

²⁹ Appendix to the report on a land audit in 2003 by Flora Buka, the Minister of State for the Land Reform Programme, but suppressed by the Zimbabwe Government. See also <www.zanupfcrime.com/multifarms_Results.php>

³⁰ ZimOnline, “Zimbabwe’s new land barons”, 30 November 2010 <www.zimonline.co.za/>

³¹ *Zimbabwe Independent*, 29 October 2009: Reporting on Commercial Farmers Union statement.

THE SUPREME COURT

In January 2008, the Supreme Court sat and heard their application.³² At the outset the Court accepted the Minister's obtuse claim that Constitutional Amendment 17 was necessary because the owners' lawful objections were considered 'obstructive litigation' aimed at reversing the land reform programme. It then turned to consider the three main constitutional challenges. The Court first considered whether Amendment 17 had unlawfully infringed the farmers' rights to fair compensation payable within a reasonable time in terms of Section 16(1) of the Constitution. The Supreme Court's argument is difficult to comprehend. It reasoned that land acquisition conferred on owners' such an absolute, legally binding right to fair compensation, it made the acquisition of their land irreversible – even if the government *failed* to meet its legal obligation to pay compensation within the 'reasonable time' of *five* years! Clearly, the Court's reasoning directly contradicted the principle that a programme of land acquisition should be abandoned if the process is not completed within a reasonable period. Yet it went on to argue, in deference to the Executive, that failure to pay compensation was a judicial question which could not be allowed to defeat the *political* intention of the legislature to acquire land for resettlement.

The Supreme Court then considered whether Parliament, in passing Amendment 17, had the power to revoke fundamental rights under Section 18, which afforded citizens the protection of the law and the right to a fair hearing in a court of law. The Supreme held that since the Constitution empowers the Legislature to enact *any* law, it could ouster the jurisdiction of the court and revoke any fundamental rights – so long as the proper Parliamentary procedures were followed. It therefore dismissed the farmers' claim that Amendment 17 had unconstitutionally infringed their fundamental rights. As to whether the Amendment had discriminated against the farmers on the basis of their race, the Court dismissed this claim out of hand. It held that since the Amendment made no reference to race or colour, there was no question that the Amendment violated Section 23 of the Constitution. It conveniently ignored that fact that Section 23 also outlaws the *treatment* of a person in a discriminatory manner. In any event, it came as no surprise that the Court dismissed the farmers' claims in their entirety.

THE SADC TRIBUNAL

The very fact that the Supreme Court upheld the provisions of Constitutional Amendment 17 to exclude Campbell and others from appealing to a court of law provided the SADC Tribunal with the rationale to arbitrate in the dispute.³³ It is important to note that the

³² Mike Campbell (Pvt.) Ltd and other vs Minister of National Security and Other (Supreme Court Judgment No. SC 49/07, 22 January 2008)

³³ Mike Campbell (Pvt) Ltd. and Others vs The Republic of Zimbabwe, SADC (T) Case No. 2/2007

Tribunal was established by the SADC Treaty – binding Zimbabwe to international law on treaties. Furthermore, the Tribunal was mandated to develop its own jurisprudence based on applicable treaties and the general principles of international law. Its decisions were final and binding on member states, including Zimbabwe.

Campbell and others asked the Tribunal to declare that the Zimbabwe Government was, by enacting and implementing Constitutional Amendment 17, in breach of its SADC Treaty obligations. The farmers made the same claims at the Tribunal as they had to the Supreme Court. First they claimed that Amendment 17 breached Article 4(c) of the Treaty, which obliges member states to uphold rule of law, which includes the right to a fair hearing and access to the courts. Second, they claimed that the Amendment breached Article 6(2) of the Treaty, which obliges member states not to discriminate against any person on the grounds of race or ethnic origin. And, third, the farmers claimed that the Amendment denied them just compensation for their lands.

The Tribunal reached precisely the opposite conclusions to the Supreme Court on all counts. First, it declared that the Zimbabwe government was in breach of its Treaty obligations under Articles 4(c) because Amendment 17 denied Campbell and his co-applicants access to the courts in Zimbabwe. The Tribunal held that legislation that deprives the courts of their powers to protect the rights of citizen is inimical to the principle of the rule of law. “It is a function of the judiciary to determine the lawfulness of the act ... and to afford protection to the rights of the citizen.”³⁴ Second, it found that Amendment 17 was in breach of article 6(2) because the farmers had been discriminated against on the grounds of race. The Tribunal noted, like the Supreme Court, that Amendment 17 made no mention of race or colour. It nevertheless found that the aim of the Amendment was clearly discriminatory because it specifically targeted white farmers, regardless of any other factor other than the colour of their skin. And, third, the Tribunal dismissed the claim that Britain was obliged to pay compensation for expropriated land. This responsibility lay squarely with the Zimbabwe government:

“It is difficult for us to understand the rationale behind excluding compensation for such land, given the clear legal position in international law. It is the right of the Applicants [the farmers] under international law to be paid, and the correlative duty of the Respondent [Zimbabwe] to pay, fair compensation.”

The Tribunal then went on to invoke the Vienna Convention on the Law of Treaties:

“Moreover, the Respondent [Zimbabwe] cannot rely on its national law, its Constitution, to avoid an international law obligation to pay compensation. The Respondent cannot rely on Amendment 17 to avoid payment of compensation to the

³⁴ Tribunal quoting from De Smith (2007) *Judicial Review* (para. 4-015)

Applicants [the farmers] for their expropriated farms. This is regardless of how the farms were acquired in the first place, provided that the Applicants have a clear legal title to them.”

The simple reason that Zimbabwe cannot rely on Constitutional Amendment 17 to avoid its legal obligations under the SADC Treaty is because, “Any other situation would permit international law to be evaded by the simple method of domestic legislation.”³⁵

THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

The International Centre for Settlement of Investment Disputes (ICSID) heard the case of 11 Dutch farmers whose farms were seized but protected by a bilateral investment treaty between Zimbabwe and The Netherlands.³⁶ The main purpose of the case was to settle the compensation payable by Zimbabwe to the Dutch farmers. As a signatory to the ICSID Convention, Zimbabwe accepted the Tribunal’s jurisdiction and that international law would prevail over domestic law.

Article 6(c) of the Treaty states that measures taken by Zimbabwe to acquire the properties must be “accompanied by provision for just compensation. Such compensation shall represent the genuine value of the investments.” The Tribunal noted that:

“the genuine value of the properties does not correspond to the value of the arable land plus the estimated value of the various buildings and equipments which are necessary for the operation of the farms. Genuine value must be determined on the basis of the market value of the whole farm at the time of expropriation. Thus the figures advanced by Zimbabwe are not computed properly according to law and arrive at computations of value that are obviously too low.” [para.130]

The Tribunal also rejected Zimbabwe’s notion – derived from its Schedule of principles under the Land Acquisition Act – that valuation must take account of the date and the profit of the initial investment. Nor did it accept that the market value for compensation should be discounted in cases of large scale nationalisations. The Tribunal observed that, under general international law as well as under the Treaty, investors have a right to compensation that corresponds to the value of their investment, independently of the origin and past success of their investment, as well as of the number and aim of the expropriations. It therefore proceeded to evaluate the damages suffered in each case on the basis of the market value on the date of dispossession. These damages also included disturbances as the Tribunal rejected Zimbabwe’s claim that these were ‘not justified’.

³⁵ Malcolm Shaw, *International Law* (pp.104-105), quoted by the SADC Tribunal.

³⁶ Bernardus Henricus Funnekotter and Others vs Republic of Zimbabwe, ICSID Case No. Arb/05/6, 22 April 2009

In the end, the Tribunal's figure for just compensation was over *six times* higher than the 'fair' compensation calculated by the Zimbabwe government. Whereas Zimbabwe's estimate of compensation payable was €1,343,000, the Tribunal ordered Zimbabwe to pay the Dutch farmers €8,220,000 compensation within 3 months, plus compound interest payable at the rate of 10 percent per annum.

5. THE FAMILIAR RESPONSES

DISMISSAL OF THE SADC TRIBUNAL

The Zimbabwe government had sent its own senior judge to sit on the SADC Tribunal; it had responded to the application presented by the farmers to the Tribunal; it sent its counsel, represented by the Attorney General's Office, to challenge the farmers' claim made before the Tribunal; and its counsel specifically recognised the jurisdiction of the Tribunal when the case was being heard. Crucially, the High Court in Zimbabwe subsequently found that:

*"The Protocol of the Tribunal constituted an integral part of the Treaty and became binding on all Member States without the need for its further ratification by them. It also follows that the Republic of Zimbabwe thereupon became subject to the jurisdiction of the Tribunal and that the jurisdictional competence of the Tribunal in the Campbell case, which was heard and determined in 2008, cannot now be disputed."*³⁷

But when the Tribunal ruled in favour of the farmers, the President's contempt for the court, for its ruling, and for international law was swift and forthright. "Some farmers went to the SADC", he said, "but that's nonsense, absolute nonsense, no-one will follow that. Our land issues are not subject to the SADC Tribunal." And, as if to vindicate the Tribunal's ruling on discrimination based on race and colour, the President added that, "The few remaining white farmers should quickly vacate their farms as they have no place there."³⁸ The President then set his mind to dismantling and emasculating the Tribunal.

The first step was to question the Tribunal's jurisdiction and powers at the SADC Summit of regional leaders. When it met in August 2010, the Tribunal was suspended pending a review and report on its role and functions.³⁹ Although the report's recommendations to strengthen the Tribunal were unanimously endorsed by SADC Ministers of Justice and their

³⁷ Gramara (Pvt.) Ltd and Other vs Government of the Republic of Zimbabwe and Others. HC33/09. 26 January 2010.

³⁸ *SW Radio Africa*, 2 March 2009.

³⁹ Lorand Bartels (2011) *Recommendations Aimed at Improving the Legal Framework in which the Tribunal Operates*, Cambridge University / World Trade Institute.

Attorney-Generals, the Summit decided to scrap the Tribunal and to dismiss its judges. The final communiqué issued after the Summit of August 2012 stated that the SADC leaders had “Resolved that a new Protocol on the Tribunal should be negotiated and its mandate confined to the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.”⁴⁰ Henceforth, it would extinguish the right of redress for SADC citizens suffering human rights injustices at the hands of their own governments.

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It was warily characteristic of the Zimbabwe government to have reneged on its treaty obligations to pay the Dutch claimants. But, unable to bully the ICSID – as it had the SADC Tribunal – Zimbabwe acknowledged its debt. Oddly, but not surprisingly, the admission came from a report by ZANU(PF)’s Central Committee which was presented at its party conference in December 2012. Yet, the Dutch claims pale into insignificance when compared with proceedings instituted in 2010 by a German family and others with the ICSID.⁴¹ The von Pezolds are claiming US\$600 million in compensation for Zimbabwe’s invasion and damage caused on their Makandi Tea and Coffee Estate, Border Timbers and Forrester Estate.⁴²

The party’s conference report also revealed the extent to which the Zimbabwe government had flouted its treaty obligations with other governments. Out of 153 farms covered by bilateral treaties, 116 had been expropriated. One of the most recent and high-profile breaches was the invasion of the 340,000 hectare Save Valley wildlife conservancy covered by a bilateral treaty with Germany. The EU Ambassador to Zimbabwe called this land-grab a “major blow to the credibility of the country and its image worldwide.”⁴³ Above all, it is the government’s continual seizures of land without the slightest intention of meeting its obligations to pay compensation that demonstrates its *mala fides* and contempt for both international law and its own laws.

WHAT’S YOURS IS MINE

After more than a decade of acquiring mostly white commercial farms, only 215 farmers have been fully compensated out of a total of 6,214 farms that were gazetted.⁴⁴ Of these,

⁴⁰ *SW Radio Africa*, “SADC leaders clamp down on human rights court”, 20 August 2012

⁴¹ *ZimOnline*, “ICSID appoints tribunal to hear land case”, 20 December 2010 <<http://www.zimonline.co.za/>>

⁴² International Centre for Settlement of Disputes: Case Number ARB/10/15

⁴³ *New Zimbabwe*, “EU threatens to withdraw UN meeting funding”, 30 August 2012

⁴⁴ Minister of Finance, Budget Statement: 2013 (para. 358)

nearly 5,000 farms are still to be valued.⁴⁵ Various party officials and supporters helped themselves to farm equipment and materials with abandon, but the government has not presented any figures to show how much it acquired, from whom, or how much it owes. It probably neither knows nor cares. Even as large swathes of agricultural land lie idle, and having failed to pay compensation to thousands who have lost their farms, the government relentlessly continues to seize one farm after another. White-owned farms continue to be targeted, but so too are black-owned farms and settlers in prime areas. Having removed all legal constraints, one person's land and property can be transferred to another at the stroke of a pen. In July it was reported that military officers had been issued with offer letters to take over part of Glenara Estates owned by CFI Holdings Ltd.⁴⁶ Also in Mazowe, the Provincial Governor (appointed by the President) recommended that 1,600 hectares of land belonging to Interfresh Holdings Ltd be allocated to the First Lady to extend her 'orphanage'. The matter of compensation simply did not arise.

6. CONCLUSIONS

The Zimbabwe Government has demonstrably failed to abide by its treaties under international law. It failed to observe any of the internationally acceptable principles of compulsory acquisition and compensation in its legislation and in its process of acquisition. Above all, it has failed to exhibit good faith, which is a *sine qua non* under the international law of treaties and a fundamental pre-requisite for compulsory acquisition. Zimbabwe has relentlessly derogated constitutional rights, abandoned natural justice and the rule of law, and deliberately used punitive laws as weapons to dispossess its own citizens – identified only by their race and colour – without compensation. This has all been done, as one editorial put it, “without batting an eyelid”.⁴⁷

Zimbabwe's compulsory acquisition and compensation laws, methods and processes are self-evidently unjust. So the question really becomes whether the entire process of acquisition has been so wholly compromised that it must be seen for what it is: the wrongful seizure of citizens' property. This was certainly the view of the SADC Tribunal. Constitutional Amendment No. 17 wrongfully excluded citizens from a fair hearing in a court of law, wrongfully targeted citizens on the basis of their race, and wrongfully denied farmers their just compensation. The spokesperson for the Prime Minister's party was equally unequivocal: “Our position in MDC has not changed. The invasion of farms during the land reform programme was done through illegal means and there is no way we will embrace

⁴⁵ Rukuni M. (2012) *The significance of land compensation for rehabilitation of Zimbabwe's land sector*. Sokwanele

⁴⁶ *SW Radio Africa*, “Army and lands officials invade poultry giant Glenara Estates”, 30 July 2011 <<http://www.swradioafrica.com/>>

⁴⁷ *The Independent*, “Land grabs: The new ‘hard work’,” 18 January 2013, <www.theindependent.co.zw/>

lawlessness.”⁴⁸ The challenge to such lawlessness and injustice is likely to come before an international court sooner or later. Although the ICSID Tribunal was not required to rule on the matter, the Dutch farmers asked it to find the Zimbabwe government responsible for an international wrongful act.⁴⁹

Litigation under international law can only escalate. The von Pezolt’s claim will be heard in Singapore next month. The German government has already signalled its displeasure regarding the Save Valley Conservancy acquisitions, and the conservancy’s Vice Chairman could well follow the von Pezolt’s example. In September 2012, South Africa’s Supreme Court of Appeal upheld the North Gauteng High Court’s registration and enforcement of the SADC Tribunal rulings in the *Campbell case*, and the attachment of Zimbabwe’s government-owned property in Cape Town. In one of the most audacious cases in African legal history, two dispossessed farmers, Ben Freeth and Luke Tembani, have approached the African Court on Human and Peoples Rights seeking an order for the SADC Tribunal to continue functioning and protect the human rights of SADC citizens in accordance with Article 16 of the SADC Treaty.⁵⁰ They accuse the SADC Summit – the 14 Heads of State, including the Zimbabwe President – of acting in bad faith and *ultra vires* when it irregularly and arbitrarily suspended the SADC Tribunal.

Are these dire implications of Zimbabwe’s radical and misconceived programme of land acquisition slowing sinking into its collective conscience? The Minister of Lands and Rural Resettlement announced that, “in view of the ongoing litigation in the ISCID, Government has taken the decision not to settle persons on farms covered by BIPPA for now.”⁵¹ The decision immediately prompted the Governor (who had allocated Interfresh properties to the President’s wife) to order the eviction of settlers from Tavydale farm which is covered by a bilateral treaty with Belgium. Even more recently, the High Court ruled against an MP who had tried to muscle out his neighbour. The Court required the Minister to “create a land allocation regime that is clear, transparent and accountable, and susceptible to judicial scrutiny.”⁵²

⁴⁸ *The Zimbabwean*, “Mutinhiri on collision course with MDC-T over land invasions”, 14 November 2012

⁴⁹ In terms of Article 8 on State Responsibility for International Wrongful Acts, the farmers claimed that the government must be held accountable for its own wrongful acts and for those of ZANU(PF), war veterans and occupiers of the farms.

⁵⁰ The [Protocol to the African Charter on Human and Peoples Rights on the establishment of an African Court on Human and Peoples Rights](#) was signed by Zimbabwe in June 1998.

⁵¹ *SW Radio Africa*, “Government criticised for ‘empty’ pledge to stop farm seizures”, 3 January 2013

⁵² *The Zimbabwe Mail*, “Court blasts Zanu PF land allocations” covering High Court case heard on 22 January 2013

On the compensation side of the equation, the Zimbabwe Government has found itself trapped in a *cul-de-sac* of its own making. It cannot afford to keep paying for new farmers' inputs – but new farmers can only negotiate loans for inputs if they have secure title to the property. However, they can only secure title once compensation has been paid. But, compensation can only be paid once valuations for compensation have been completed and agreed. But, because the government does not have the funds, qualified staff, or sufficient time, it cannot carry out the valuations. Even if the government could achieve this Herculean feat, it would still fall far short of just compensation under international law. The only veritable conclusion is that the government simply cannot pay compensation – at least in the short term.

What *is* to be done?

7. FINDING OUR WAY BACK HOME

At the outset it must be recognised that Zimbabwe has lost its way. Its government created a beguiling narrative to justify the deliberate and systematic seizure of citizens' property without paying compensation. In the process it destroyed the livelihoods of thousands upon thousands of black farm workers. Its dehumanising rhetoric extinguished the last vestiges of sympathy for its victims: black or white. Its sense of values has now become so disoriented and it behaves with such impunity that it has become a law unto itself: unable to distinguish good faith from bad. It has broken its covenant with the people and the international community, and betrayed their trust.

Zimbabweans have been urged to be pragmatic and realistic, recognising that it is 'not a perfect world', that 'politics is the art of the possible', or that 'we have no other option'. I have argued that we should be guided by international law, human rights, and best international practice. Unless we adhere firmly to universal ethical principles, there is the ever present danger of first being drawn into negotiations, then into compromises, then into collusion with those who act in bad faith; and, finally, into accepting the unacceptable. This is certainly true of Article 72 of the draft constitution. Even as I stand accused of idealism – for which I bear no shame – I believe the journey home begins along the narrow, rocky path towards democracy, human rights and the rule of law. It may be slow and arduous, but by following this road less travelled we will find our way back home.

And where is home? It is to be at home with the international community of nations, holding proudly to our shared ideals of democracy and human rights under international law. It is to be at home with one another, exercising our full human, economic and political rights without fear or favour, and going about our lives and livelihoods in freedom and

peace. It is to be at home with ourselves and our consciences in the knowledge that in our heart of hearts we done what is right. Above all, we are at home when the state respects, protects, and serves its citizens in good faith. The first steps on the way back home must be taken by the Government of Zimbabwe to demonstrate its good faith by:

- Abiding by the rulings of the SADC Tribunal and the ICSID Tribunal in keeping with its international treaty obligations and international law.
- Abrogate Article 72 of the draft constitution, whose provisions are so abhorrent and discriminatory they “should never be in any modern democratic constitution.”⁵³
- Place a moratorium on any further acquisitions of agricultural land for resettlement purposes and the issuance of offer letters.

The government should then invite those organisation representing dispossessed farmers and other stakeholders to enter into negotiations in good faith. The purpose of negotiations would be to establish a new policy and regulatory framework based on the tenets of compulsory acquisition and just compensation and in accordance with international law. Only then can we reflect honestly about our tragic past and take just and honourable measures to bring the land question to closure: peacefully, fairly, and in good faith.

⁵³ David Coltart replies to Ben Freeth, *Sokwanele*, 31 July 2012, <www.sokwanele.com/thisiszimbabwe/archives/7936>