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Defending human rights and the rule of law by the SADC Tribunal: *Campbell* and beyond

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Summary

On 28 November 2008, the Southern African Development Community Tribunal handed down judgment directing Zimbabwe to cease its racially discriminatory land reform programme and to compensate farmers whose land had been compulsorily acquired as a result. Apart from confirming and extending the Tribunal's groundbreaking findings in Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe, the article argues that the sorry state of the Tribunal's superficial reasoning on jurisdiction could have been enhanced by considering the approach of other international institutions. Drawing inspiration from international law and the jurisprudence of the South African Constitutional Court, the article argues that racial discrimination cannot solely be established by having regard to the impact of a contested law on a particular racial group. Much depends on the historical context and the fairness of the remedial mechanisms adopted to address prevailing socio-economic disparities between racial groups. The article concludes that the observance of human rights and the rule of law in the region, and the future relevance of the Tribunal, will be determined by the Summit's response to Zimbabwe's disregard of the legal process.

1 Introduction

Established under article 9(g) of the Southern African Development Community (SADC) Treaty as one of the institutions of SADC, the

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SADC Tribunal became operational only in 2005. Although the Treaty was signed in 1992, the Tribunal could not be operationalised due to budgetary constraints.¹ Pursuant to article 4 of the Protocol on the Tribunal, the Summit of Heads of State and Government, on 18 August 2005, appointed the members of the Tribunal in Gaborone, Botswana. On 18 November 2005 the inauguration of the Tribunal and the swearing in of its members took place in Windhoek, Namibia.

In what was to be the Tribunal's first landmark decision, Mike Campbell (Pvt) Limited and William Michael Campbell on 11 October 2007 filed an application with the Tribunal contesting the acquisition (by the Zimbabwean government) of a farm called Mount Carmell in Chegutu, Zimbabwe. They applied simultaneously for interim relief restraining the Zimbabwean government from removing or allowing the removal of the applicants from their land and mandating the respondent to take all necessary steps to protect the applicants' occupation of their land until the final adjudication of the dispute. In *Mike Campbell (Pvt) Limited and Another v The Republic of Zimbabwe (Interim)*,² the applicants argued that the Tribunal had to consider the following criteria: (a) a *prima facie* right; (b) a threatened interference with that right; (c) the absence of an alternative remedy; and (d) the balance of convenience or a discretionary decision in favour of the applicants. The respondent argued that the applicants had not exhausted local remedies.

On 13 December 2007 the Tribunal held that the exhaustion of local remedies was only relevant to the main case and could not be considered in the application for interim relief.³ Confirming the criteria advanced by the applicants' agent, the Tribunal held that the test for granting an interdict tilted the balance of convenience in the applicants' favour.⁴ The respondent was rightly ordered to take no steps and to permit no steps to be taken to evict from or interfere with the peaceful residence of Mount Carmell farm, pending the final settlement of the dispute on the merits.⁵ When proceedings in the main application started, 77 other applicants who also contested the acquisition of their farms were joined as parties to the dispute. On 28 November 2008, the Tribunal handed down judgment in *Campbell (Merits)* in which it found in favour of the applicants.⁶

While occasional reference will be made to the Tribunal's findings in *Campbell (Interim)*, the main focus of this article is to offer a criti-

¹ Statement of the Executive Secretary of SADC, Windhoek Namibia, 18 November 2005 <http://www.sadc.int/archives/read/news/612> (accessed 22 September 2008).

² Case SADC (T) 2/07, 13 December 2007; <http://www.saflii.org/sa/cases/SADCT/2007> (accessed 30 September 2009).

³ n 2 above, 7.

⁴ As above.

⁵ As above.

⁶ SADC (T) Case 02/2008, 28 November 2008; <http://www.saflii.org/sa/cases/SADC/2008/2.html> (accessed 30 September 2009).

cal evaluation of the Tribunal's findings on issues that were raised for determination in *Campbell* (Merits). Part two of the article is a brief description of the background, powers and functions of the Tribunal as well as the laws it should apply. Part three briefly paraphrases the facts and issues raised. It restates the Tribunal's holding that its jurisdiction was founded on principles of human rights, democracy and the rule of law, and that Zimbabwe's land reform programme amounted to racial discrimination in violation of article 6(2) of the Treaty. Apart from confirming these findings, part four contends that the sorry state of the Tribunal's superficial reasoning on jurisdiction could have been enhanced by borrowing from the practice of other international institutions. Contrary to the Tribunal's reasoning, it is insisted that the fact that a law has negative effects on a particular racial group does not necessarily mean that that law automatically unfairly discriminates against that group. Much depends on the historical context and the fairness of the remedial mechanisms adopted to address prevailing socio-economic disparities between racial groups. Challenges surrounding the implementation of decisions at the regional level and implications of the decision for human rights, the rule of law and regional integration are considered in part five. Part six of the article concludes the discussion.

2 The SADC Tribunal

2.1 Establishment, operationalisation, powers and functions

Although it was established in 1992, the Tribunal became operational only in 2005 and started delivering judgments in 2007. Article 16(1) of the Treaty states that the 'Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon disputes ... referred to it'. The Tribunal has jurisdiction over all disputes 'arising from the interpretation and application of the [SADC] Treaty; the application or validity of Protocols or other subsidiary instruments made under [the] Treaty'.⁷ Article 14 describes the basis of the Tribunal's jurisdiction;⁸ article 15 covers the scope of jurisdiction;⁹ and articles 16 to 20 point out areas in which the Tribunal exercises discretionary or exclusive

⁷ See arts 32 of the Treaty; art 14 of the Protocol on the Tribunal.

⁸ Arts 14(1) & (2) of the Protocol read: 'The Tribunal shall have jurisdiction over all disputes and all applications ... which relate to: (a) the interpretation and application of the Treaty; (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the community, and acts of the institutions of the Community ...'

⁹ Art 15 states: '(1) The Tribunal shall have jurisdiction over disputes between states, and between natural or legal persons and states. (2) No natural or legal person shall bring an action against a state unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.'

jurisdiction. Unlike the African Commission on Human and Peoples' Rights (African Commission), which acts as a quasi-judicial body,¹⁰ the procedure in the Tribunal is highly judicialised and its decisions are final and binding.¹¹ When a dispute is referred to the Tribunal, the consent of other parties to the dispute is not required.¹² The Tribunal is the final and competent arbiter in disputes within its jurisdiction.

2.2 Applicable laws

Article 21 of the Protocol states that the Tribunal is under an obligation to apply the provisions of the Treaty, the Protocol itself, all subsidiary instruments adopted by the Summit or the Council or other institutions or organs of the SADC, pursuant to the Treaty or Protocol. It is not clear what documents would qualify as 'subsidiary instruments', but it is suggested this ranges from decisions and resolutions made by SADC structures to any communiqué made by SADC institutions under the Treaty and the Protocol. The phrase 'subsidiary instruments' should therefore be given the widest possible interpretation with the *caveat* that the 'instrument' should have been adopted under the Treaty and the Protocol. Further, the Tribunal should develop its own Community jurisprudence in light of 'applicable treaties, general principles and rules of public international law and principles of the law of states'.¹³ This provision was most likely designed to broaden the sources from which the Tribunal can draw authority and to ensure that our regional jurisprudence is consistent with that of other international bodies.

3 The Campbell case

3.1 Facts and issues

Mike Campbell (Pvt) Limited and William Michael Campbell filed an application with the Tribunal contesting the acquisition of their farm in Chegutu, Zimbabwe. Pursuant to article 30 of the Protocol on the Tribunal,¹⁴ 77 other persons (whose farms had been designated for compulsory acquisition) applied and were allowed to intervene in the proceedings. These applications were then consolidated into one case: *Campbell (Merits)*.

¹⁰ F Viljoen 'Communications under the African Charter: Procedure and admissibility' in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008) 76 77.

¹¹ Art 16(5) of the Treaty and art 24 of the Protocol.

¹² Art 15(3) of the Protocol.

¹³ Art 21 of the Protocol.

¹⁴ Art 30 permits other persons or states to apply to be joined as parties if they have legal interests in the dispute.

The respondent submitted that the Tribunal had no jurisdiction because the SADC Treaty did not spell out benchmarks against which member states' conduct could be assessed and that if the Tribunal were to borrow these benchmarks from other treaties, it would be legislating on behalf of member states. The respondent also contended that, in the absence of a regional Protocol on human rights and agrarian reform, the objectives and principles of the Treaty were not binding on member states. The applicants submitted that the Tribunal had competence to determine the matter because they (the respondent) were unable to 'proceed under the domestic jurisdiction' as required by article 15(2) of the Protocol.

The applicants also argued that the decision as to whether or not agricultural land was to be expropriated was determined by the race or country of origin of the registered owner; that Amendment 17 was the ultimate legislative tool used by the respondent to seize all white-owned farms;¹⁵ and that land reform was directed at persons who owned land because they were white, regardless of whether they acquired the land during or after the colonial period.¹⁶ The applicants argued that, although Amendment 17 made no reference to the race and colour of the farm owners whose land was acquired, it struck only at white farmers and no other rational categorisation could be made in the circumstances. Hence, the respondent was in breach of article 6(2) of the Treaty which prohibits discrimination based on, among other grounds, race and ethnic origin.¹⁷ The respondent argued that its land reform programme was for the benefit of those historically disadvantaged under colonialism; that, given the history of land ownership, it was inevitable that land reform would adversely affect white farmers and thus the respondent had not breached article 6(2) of the Treaty.

Accordingly, the Tribunal was called upon to determine whether it had jurisdiction to entertain the matter, whether the applicants had been denied access to courts in Zimbabwe; whether the applicants had been discriminated against on the grounds of race; and whether compensation was payable for the lands compulsorily acquired from the applicants by the respondent.¹⁸

3.2 Decision of the Tribunal

On jurisdiction the Tribunal observed that it had already held in *Campbell* (Interim) that it has jurisdiction, based on articles 14(a) and 15 of the Protocol.¹⁹ The Tribunal held that Amendment 17, particularly the

¹⁵ Para 128 applicants' heads of argument.

¹⁶ Para 175 applicants' heads of argument.

¹⁷ Art 6(2) of the Treaty prohibits discrimination on grounds of 'gender, political views, race, ethnic origin...'

¹⁸ 16-17 of the judgment.

¹⁹ 18.

provision stating that ‘a person having any right or interest in the land shall not apply to a court to challenge the acquisition of the land by the state, and no court shall entertain any such challenge’,²⁰ ousted the jurisdiction of the local courts and the applicants were therefore ‘unable to proceed under the domestic jurisdiction’ within the meaning of article 15(2) of the Protocol.²¹ Moreover, the Zimbabwe Supreme Court’s holding that the legislature had lawfully ousted the jurisdiction of the courts of law,²² confirmed that the applicants were unable to proceed under the domestic jurisdiction.²³

The Tribunal observed that it was a fundamental requirement of the rule of law that those who are affected by the law be heard before they are deprived of a right, interest or legitimate expectation.²⁴ It further observed that the provisions of sections 18(1) and (9) – provisions which guarantee the right to equal protection of the law and to a fair hearing – had been taken away regarding land acquired in terms of section 16B(2)(a) of the Zimbabwean Constitution.²⁵ The Tribunal held that section 16B(3) of the Constitution²⁶ barred farmers from challenging the validity of land acquisitions implemented under section 16B(2)(a)(i) and (ii), and ousted the local court’s jurisdiction to entertain any such challenge. Since judicial review did not lie at all in respect of land acquired under section 16B(2)(a) (a section in terms of which applicants’ land had been acquired), the applicants had been denied the opportunity to seek redress in courts of law.²⁷

On racial discrimination the Tribunal held that, since the effects of Amendment 17 of the Constitution would ‘be felt by white Zimbabwean farmers *only*, its implementation affect[ed] white farmers *only* and consequently constituted indirect discrimination or substantive inequality’.²⁸ Given that Amendment 17 had an unjustifiable and disproportionate impact upon persons distinguished by race, the respondent had discriminated against the applicants on the basis of race in violation of article 6(2) of the Treaty.²⁹ According to the Tribunal, if (1) the criteria for land reform had not been arbitrary but reasonable and objective; (2) fair compensation had been paid for land

²⁰ Sec 16(3)(a) of the Zimbabwean Constitution.

²¹ 21.

²² See *Mike Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* SC 49/07 28-29.

²³ *Campbell* (Merits) (n 6 above) 21.

²⁴ 35.

²⁵ 37.

²⁶ Sec 16B(3) states that ‘... a person having any right or an interest in the land – (a) shall not apply to a court to challenge the acquisition of land by the state, and no court shall entertain any such challenge; (b) may ... challenge the amount of compensation payable for any improvements ...’

²⁷ 40-41.

²⁸ 53.

²⁹ 53-4.

compulsorily acquired; and (3) the acquired lands had been distributed to poor, landless and marginalised individuals or groups, *making the purpose of land reform legitimate*, the differential treatment afforded to the applicants would not constitute racial discrimination.³⁰

To remedy the contravention, the Tribunal unanimously directed the respondent to take all necessary measures to ensure the applicants' peaceful occupation and ownership of their lands, and to pay 'fair compensation', on or before 30 June 2009, to three of the applicants whose land had already been seized under Amendment 17. Below is a critical analysis of the findings of the Tribunal on each of the issues that were raised for determination.

4 *Campbell*: A critique

4.1 Admissibility

A complaint is admissible if it fulfils the requirements set out in articles 14 and 15 of the Protocol on the Tribunal. The key requirements are that it should be lodged only if an applicant has 'exhausted available local remedies or is unable to proceed under domestic jurisdiction'.³¹

4.1.1 Exhaustion of internal remedies

Under international law, the general rule is that international courts lack the competence to entertain cases involving the application of national law unless the applicant has taken the case through the national court system.³² The duty to exhaust all internal remedies, noted the Tribunal, was fashioned to enable domestic courts to deal with legal issues arising from national law because they are better placed to apply national law.³³ The local remedies rule is intended to serve as a screening or filtering mechanism between national and international institutions, and to limit the number of cases entertained by international bodies. That way, the regional Tribunal would not be flooded with cases which could easily have been dealt with in the national courts.³⁴

The *raison d'être* for the local remedies rule derives from the consensual nature of public international law³⁵ and the belief that a state must be afforded an opportunity to remedy breaches of its human rights obligations through domestic channels before any of the parties

³⁰ 54.

³¹ Art 15(2) of the Protocol.

³² See, generally, NJ Udombana 'So far, so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *American Journal of International Law* 1.

³³ 20.

³⁴ As above.

³⁵ Viljoen (n 10 above) 111.

seeks relief from an international supervisory organ.³⁶ According to the African Commission, this requirement is based 'on the principle that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation before [being] called before an international body'.³⁷ The need to exhaust local remedies confirms the principle that international law does not replace but supplements national law. Seeking relief in local courts saves the parties huge costs in terms of time, resources, effort and the effectiveness of enforcement mechanisms.³⁸ That said, the chief motivation behind the rule appears to be the recognition of the respondent state's sovereignty and freedom from unwelcome interference in relationships between the state in question and other persons or states.³⁹

Reference to 'all available local remedies' implies that, if upon proven facts a particular remedy is unavailable, ineffective or insufficient, the applicant will not be required to comply with the local remedies rule.⁴⁰ Even then, the complainant bears the onus to prove that no local remedies exist or that those available are ineffective. If a complaint lacks 'concrete evidence' or a sufficient factual basis 'to cast doubt about the effectiveness of domestic remedies', and relies on 'isolated or past incidences',⁴¹ the complaint would be declared inadmissible. If a complaint is pending before domestic courts, local remedies would not have been exhausted.⁴² This explains why the Tribunal proceeded with the main suit only after the judgment, on 22 January 2008, of Zimbabwe's Supreme Court.⁴³ In *Campbell* (Interim), the applicants succeeded in interdicting the respondent before the conclusion of proceedings in the Supreme Court because anything less could have defeated the purpose of instituting action. Further, the respondent still had a chance to defend herself in the main suit.

Ankumah argues that it is not necessary to comply with the requirement to exhaust local remedies if the complainant has been denied access to them, or if the domestic laws impede due access to legal procedures.⁴⁴ A close reading of article 15(2) of the Protocol allows such an interpretation. In terms of this article, the Tribunal has competence to

³⁶ EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 67.

³⁷ *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

³⁸ *Anuak Justice Council v Ethiopia* (2006) AHRLR 97 (ACHPR 2006) para 48.

³⁹ See, generally, CF Amerasinghe *Local remedies in international law* (2004) 56-59.

⁴⁰ *Campbell* (Merits) (n 6 above) 21.

⁴¹ Viljoen (n 10 above).

⁴² n 38 above, para 62.

⁴³ *Mike Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* (n 22 above). There is some confusion about the date of the decision. In the SADC Tribunal judgment on the merits (n 6 above), 22 February is mentioned as the date on which the Supreme Court delivered its judgment (21 of SADC Tribunal decision).

⁴⁴ Ankumah (n 36 above) 68.

exempt parties from proving that they have exhausted 'local remedies' if they show they were 'unable to proceed under the domestic jurisdiction'. Whatever meaning the Tribunal will give to the phrase 'unable to proceed under the domestic jurisdiction', it arguably covers many factors (including undue delay or the unavailability or ineffectiveness of local remedies) impeding a complainant's meaningful access to local courts. In *Campbell* (Merits), the clause ousting the jurisdiction of the local courts justified the Tribunal's finding that the applicants were 'unable to proceed under domestic jurisdiction'. However, the local remedies rule became a non-issue in light of the Supreme Court's decision.

4.1.2 Subject matter jurisdiction

The respondent argued that the listed principles and objectives of SADC were non-binding in the absence of a separate Protocol on human rights and land reform.⁴⁵ The Tribunal found that it was charged (by article 21(b) of the Protocol) 'to develop its own jurisprudence, "having regard to applicable treaties, general principles and rules of public international law" which are sources of law for the Tribunal'.⁴⁶ That settled the question whether the Tribunal could draw inspiration from other instruments where the Treaty is silent.⁴⁷ Given that the principles of 'human rights, democracy and the rule of law' are codified under article 4(c) of the Treaty, held the Tribunal, it was unnecessary to have a separate Protocol on human rights in order to give effect to these principles. The Tribunal held that it clearly had 'jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in the present application'.⁴⁸

Member states are enjoined to 'conclude such Protocols as may be necessary in each area of co-operation, which shall spell out the objectives and scope of ... co-operation and integration'.⁴⁹ Areas of co-operation include, among others, 'food security, land and agriculture; natural resources and environment; peace and security'.⁵⁰ Human rights and agrarian reform are not specifically mentioned as areas of co-operation in the Treaty. Whether the items 'food security, land and agriculture' were intended to embrace 'agrarian reform and human rights' as specific areas of co-operation remains unclear. Surely the respondent's argument on the relationship between the principles and objectives of the Treaty deserved a better response. The question of why general principles, in the absence of specific objectives or obli-

⁴⁵ See p 23 of the judgment.

⁴⁶ See p 24 of the judgment.

⁴⁷ As above.

⁴⁸ See p 25 of the judgment.

⁴⁹ Art 22(1) of the Treaty.

⁵⁰ Art 21(3) of the Treaty.

gations crafted in similar terms, should be deemed to burden states with positive obligations was not answered in the judgment. Below are some of the reasons the Tribunal could have considered in answering this question.

First, comparative literature on the subject reveals that the Tribunal's approach is consistent with that of other international bodies. For instance, article 4(g) of the Economic Community for West African States (ECOWAS) Treaty codifies in broad terms the protection of human rights as a fundamental principle. In *Hadijatou Mani Koraou v Republic of Niger*,⁵¹ the ECOWAS Court of Justice observed that SADC's article 4(g) mandate to protect human rights charged the Court with the obligation to ensure the protection of human rights 'even in the absence of other ECOWAS legal instruments relating to human rights'.⁵² The International Court of Justice (ICJ) and the European Court of Justice have also followed a similar path.⁵³

Second, the Tribunal's decision is consistent with the teleological approach to the interpretation of international treaties. This finds support from article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention) which promotes an interpretation which is consistent with the overall object and purpose of the treaty. In the *South West Africa* cases, the ICJ preferred a teleological approach by interpreting contradictions in the Mandate for South West Africa, the League of Nations Covenant and the United Nations (UN) Charter in a way consistent with the object of the mandates system.⁵⁴ To the extent the principles of a treaty provide the overall framework within which states' obligations must be understood, they are justiciable.

Third, a close textual reading of the provisions of the Treaty suggests that its general principles create positive obligations on member states. Under article 6(1), parties positively 'undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and [to] refrain from taking any measure likely to jeopardise the *sustenance of its principles*, the achievement of its objectives and the implementation of the provisions of this Treaty'. This translates into promoting human rights and the rule of law as some of the minimum democratic ideals all member states should comply with even in the absence of a protocol to that effect. Human rights are fundamental in every democracy. It will be absurd to suggest that in the absence of a protocol on human rights, states are entitled to violate their international obligations to respect and protect human rights. Repeated references to 'regional integration' 'co-ordination', 'co-operation' and harmonisation' in

⁵¹ ECW/CCJ/JUD/O6.

⁵² Paras 41-42.

⁵³ See GJ Naldi 'Mike Campbell (Pvt) Ltd et al v The Republic of Zimbabwe: Zimbabwe's land reform programme held in breach of the SADC Treaty' (2009) 53 *Journal of African Law* 305 310-313.

⁵⁴ South West Africa Cases, Preliminary Objections *ICJ Reports* (1962) 318.

articles 5, 21 and 22 of the Treaty register an enduring collective desire to foster regional development by respecting the Treaty in its entirety.

The Tribunal's willingness to deny Zimbabwe the opportunity to invoke its national laws to evade international treaty obligations brings our regional jurisprudence in conformity with settled principles of public international law. Drawing inspiration from article 27 of the Vienna Convention,⁵⁵ the Tribunal found that the respondent could not rely on the infamous Amendment 17. Malcolm's treatise, also referred to in the judgment, is quite instructive on this matter. Malcolm observes that 'it is no defence to a breach of an international obligation to argue that the state[s] actions were consistent with "the dictates of its own municipal laws" as states would evade international law by the simple method of domestic legislation'.⁵⁶ The implication is that national legislation and policy should be consistent with the Treaty and other international instruments.⁵⁷

4.2 The merits

Writing about the African Charter, Viljoen observes that 'consideration of the merits is aimed at establishing whether the state against which the complaint has been brought has violated a Charter provision'.⁵⁸ Establishing a violation of a treaty demands a cautious deliberation based on facts and arguments submitted by the parties to the dispute.⁵⁹

4.2.1 The right of access to courts

The Tribunal considered whether the applicants had been denied access to courts and whether they had been deprived of a fair hearing by Amendment 17. For purposes of the judgment, the Tribunal confined the rule of law (arguably an elusive concept) to the rights of access to court and a fair hearing.⁶⁰ To the Tribunal, the most important provisions in this regard were articles 4(c) and 6(1) of the Treaty. Article 4(c) binds states to respect principles of 'human rights, democracy and the rule of law'. Article 6(1) of the Treaty enjoins states to undertake to 'refrain from taking any measure likely to jeopardise the sustenance of

⁵⁵ Art 27 of the Vienna Convention states that 'a party may not invoke provisions of its own internal law as justification for failure to carry out an international agreement'.

⁵⁶ MN Shaw *International law* (2003) 104-105.

⁵⁷ See M Dube & R Midgley 'Land reform in Zimbabwe: Context, process, legal and constitutional issues and implications for the SADC region' in A Bösl *et al* (eds) *Monitoring regional integration in Southern Africa* (2008) 303-325.

⁵⁸ Viljoen (n 10 above) 78.

⁵⁹ See VOO Nmehielle *The African human rights system: Its laws, practice and institutions* (2001) 230-231.

⁶⁰ Pages 26-27 of the judgment.

its principles, the achievement of its objectives and the implementation of the provisions of the Treaty'.⁶¹

Relying heavily on the judgment of the Zimbabwe Supreme Court,⁶² the respondent argued that in ousting the jurisdiction of the local courts, section 16B(3) of the Zimbabwean Constitution had not taken away for the future the right of access to the remedy of judicial review in cases where expropriation was not in terms of section 16B(2)(a). The applicants argued that the court's review powers were confined to determining whether the facts on which section 16B(2)(a) provided that the acquisition of agricultural land must depend, existed. This formulation essentially meant that courts were entitled to review not the constitutionality of the provisions of Amendment 17, but simply whether land acquisitions were done in terms of section 16B(2)(a) – the very section the applicants were challenging as unconstitutional in the first place.

The respondent's argument that the legislature had the competence to water down the review powers of courts by stating those occasions in which the courts' jurisdiction was ousted was rightly not allowed to stand. Surely the inquiry should go beyond the respondent's narrow construction of the question that confronted the Tribunal. The question was not, as argued by the respondent, whether compulsory land expropriations were done in terms of section 16B(2)(a) of the Constitution and therefore lawful acquisitions within the meaning of that section. If it were to be so, the inquiry would be limited to whether compulsory acquisition of property was carried out in terms a law (Amendment 17) the constitutionality of which was in issue. The impugned provision would then have provided the very legitimacy it lacked as its constitutionality was being contested. The real question that confronted the Tribunal was whether it was permissible under national law for the legislature to spell out the facts upon which the compulsory expropriation of land could be based, in circumstances where the courts' jurisdiction to review the lawfulness of the expropriation is ousted by the very law authorising the expropriation. Given the importance of the right of access to courts and the right to a fair hearing, this question would then have been answered in the negative.

The Tribunal was therefore right in holding that the applicants had been expressly denied the right of access to courts and the right to a fair hearing, which are essential ingredients of the rule of law. It is difficult to understand how a citizen whose rights to due process have been statutorily taken away can nevertheless be said to have the right to a fair hearing. The Zimbabwean government was thus correctly found to have breached article 4(c) of the Treaty.

⁶¹ As above.

⁶² See 28-29 and 38 of the Zimbabwe Supreme Court judgment.

4.2.2 Racial discrimination

After referring to a number of international human rights instruments outlawing discrimination on the basis of race,⁶³ the Tribunal found that, since the implementation of Amendment 17 affected white farmers *only*, it constituted indirect discrimination or substantive inequality. Thus, the Tribunal relied heavily on the effect of Zimbabwe's land reform policy and concluded that the Amendment racially discriminated against white farmers. In other words, although the government contended that land reform was a legitimate measure to address historical imbalances between whites and blacks, the fact that it targeted white-owned farms meant that it indirectly discriminated against white farmers. Indirect discrimination recognises that conduct or law which may appear to be neutral may nevertheless result in discrimination based on any of the prohibited grounds.⁶⁴ This is because indirect discrimination almost always has a legitimate government purpose other than a discriminatory purpose in the conduct or the law to which the objection is made.⁶⁵

Surely, the impact of any law or conduct should not, under normal circumstances, affect a significant segment of a particular social group. However, the use of the phrase 'since the effects will be felt by the Zimbabwean white farmers *only*' wrongly implies that if there had been one black farmer or a handful of black farmers — and I am sure there were — who lost their lands during 'fast track' land reform, Zimbabwe's use of force to regain control of white-owned farms thereby would have been justified. The Tribunal failed to observe that, even if land reform had overwhelmingly (but not exclusively) affected white farmers, it could still have amounted to racial discrimination against white farmers who, in large numbers, stood to lose their farms.

Further, the fact that the implementation of Amendment 17 affected white persons *only* does not necessarily mean that it *automatically unfairly* discriminated against whites on racial grounds.⁶⁶ In Zimbabwe and in every other country that has a colonial history, race and land ownership are so inextricably linked that legislative and other measures designed to promote the rights of persons belonging to historically disadvantaged communities will invariably adversely affect those previously advantaged by systematic patterns of racial segregation. Sachikonye records that at independence, about 6 000 white commercial farmers owned 15,5 million hectares of land and 8 500 small-scale African farmers had 1,4 million hectares. The rest, an esti-

⁶³ See 44-50 of the judgment.

⁶⁴ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) para 31.

⁶⁵ *Walker* (n 64 above) para 43.

⁶⁶ The Tribunal has to borrow from the jurisprudence of the South African Constitutional Court in this regard. Sec 9 of the South African Constitution of 1996 prohibits unfair discrimination (not just discrimination) but, even then, unfair discrimination can be justified in terms of sec 36 (the limitation clause).

mated 700 000 indigenous communal farming households, subsisted on 16,4 million hectares.⁶⁷ Seventy five per cent of the land owned by communal farmers was in agro-ecological regions IV and V, which are dry and barren.⁶⁸

Considered in its historical context, land reform would inevitably adversely affect white farmers who benefited from colonial seizures of native land on grounds of race. This is not to say that expropriation of property without paying compensation is fair, but to demonstrate that there are circumstances under which discrimination may not be determined solely by reference to the impact of government action on a particular social group. Historical patterns of institutionalised advantage and disadvantage overtly implemented by the colonial administration for over nine decades show why every piece of legislation and virtually every kind of government action will differentially impact on various social groups. Dissenting, Sachs J in *Walker* holds that⁶⁹

differential treatment that happens to coincide with race *in the way that poverty and civic marginalisation coincide with race*, should [not] be regarded as presumptively unfair discrimination when it relates to measures taken to overcome such poverty and marginalisation.

As a matter of principle, it will be wrong in law to hold that all government actions which coincidentally benefit the great majority of one racial group at the expense of another are *automatically unfairly* discriminatory. As noted by the UN Human Rights Committee, the equal enjoyment of rights and freedoms does not mean identical treatment in every instance.⁷⁰ Equality may require states to adopt specific affirmative steps to eliminate or dismantle structures and practices perpetuating patterns of disadvantage.⁷¹ States may grant preferential treatment to disadvantaged groups in society.⁷² To overcome patterns of prejudice, persons who became affluent through state-sponsored privileges and accumulated discrimination should be barred from de-contextualising and de-historicising inequalities. Differential treatment is unfairly discriminatory if the governmental action being objected to serves no legitimate purpose or nullifies the exercise of human rights.⁷³ In *Campbell*, the fact that the loss of land (designated for compulsory acquisition) coincided with race (white) in the same way landlessness coincided with race (black) did not in itself imply that farmers who

⁶⁷ LM Sachikonye 'From "growth with equity" to "fast-track" reform: Zimbabwe's land question' (2003) 30 *Review of African Political Economy* 227 228-229.

⁶⁸ As above.

⁶⁹ *Walker* (n 64 above) para 118.

⁷⁰ United Nations Human Rights Committee 'CCPR General Comment 18: Non-discrimination' <http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument> (accessed 10 April 2008) para 8.

⁷¹ n 70 above, para 10. See Langa DP for the majority in *Walker* (n 64 above) para 33.

⁷² General Comment 18 (n 70 above).

⁷³ n 70 above, paras 6 & 10.

were white as a consequence of history had been discriminated against on the basis of race.⁷⁴

Equally confusing is the Tribunal's observation that land redistribution along racial lines constitutes substantive inequality. Substantive equality requires that the actual social, economic and historical context in which different social groups find themselves be duly considered when determining whether the achievement of equality is being promoted or not. In the Zimbabwean context, substantive equality therefore envisages preferential treatment of historically disadvantaged groups, if needs be, to heal the deep wounds of decades of systematic racial segregation against blacks. In this respect, the South African Constitutional Court observes:⁷⁵

[A]lthough a society which affords each human being equal treatment on the basis of equal worth is our goal, *we cannot achieve that goal by insisting upon the identical treatment* in all circumstances before that goal is achieved ... A classification which is unfair in one context may not necessarily be unfair in another.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,⁷⁶ the Constitutional Court notes:⁷⁷

Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past ... Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and indefinitely ... One could refer to such equality as remedial [or substantive] equality.

Unlike formal equality, which requires uniform treatment of persons according to the same 'neutral' norm, substantive equality requires that persons in unequal circumstances be treated unequally in order to address the imbalance. In light of Zimbabwe's history of forced removals of blacks from their land, substantive equality therefore requires that affirmative action measures be taken to acquire land from white farmers and re-allocate such land among landless peasants. In authorising land acquisitions, land reform legislation and policy may not be strictly based on identical treatment between different racial categories because, as a result of history, land owners are predominantly white and the landless are predominantly black. While in accord with the Tribunal's observation that land reform in Zimbabwe has had an unjustifiable and disproportionate impact upon a group of individuals

⁷⁴ This observation does not mean that the laws in terms of and the manner in which land reform was implemented in Zimbabwe were constitutional. It just means that the concept of racial discrimination goes beyond the Tribunal's skin-deep understanding of the subject.

⁷⁵ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41.

⁷⁶ 1999 1 SA 6 (CC).

⁷⁷ Paras 60-1.

distinguished by race, my view is that redistributive reform will always adversely affect those previously advantaged on grounds of their membership to a particular group.⁷⁸ Land reform was therefore consistent with the meaning of substantive equality since it benefited historically disadvantaged persons (blacks). Once again, the jurisprudence of the South African Constitutional Court is very informative in this regard: 'The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from previously advantaged communities.'⁷⁹

Whether the beneficiaries were politically connected to the ruling party or not does not say anything on whether the land reform programme benefited the black majority or not. Even ZANU PF supporters are, broadly speaking, members of the historically disadvantaged black population, but it would be unfair, arbitrary and discriminatory, both in terms of national and international law, for any government to select its target beneficiaries based on their political affiliation. The correlation between victimhood and political orientation was never explored in the Tribunal's decision. The broader purpose of the deployment of war veterans on white-owned farms was to crush support for the opposition in rural areas in the run-up to the 2000 elections.⁸⁰ Could not the correlation between victimhood and political affiliation have proven an ulterior motive in the sense of a desire to win a political advantage over the opposition? If so, would not that have demonstrated that the alleged 'public purpose' — addressing historical disparities in land ownership — was an excuse for unfair or reverse discrimination?

Despite President Mugabe's claim that the noble aim of the invasions remained the re-allocation of land to the landless majority, it became patently clear that land reform was a smokescreen for a crude political campaign against the opposition.⁸¹ Discrimination also appears to have been evident from the criteria and procedure that was used to designate land for compulsory acquisition. The Tribunal observed that if (1) the criteria for land reform had not been arbitrary but reasonable and objective, (2) fair compensation had been paid for land compulsorily acquired, and (3) the acquired lands had been distributed to poor and landless individuals, the differential treatment afforded to the applicants would not have constituted racial discrimination.⁸² While

⁷⁸ This is not to say that land should be expropriated unlawfully and without compensation.

⁷⁹ *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 4 (SA) 490 (CC) para 74.

⁸⁰ See J Chaumba *et al* 'From *jambanja* to planning: The reassertion of technocracy in land reform in South-Eastern Zimbabwe?' (2003) 41 *Journal of Modern African Studies* 533-534.

⁸¹ *The Daily News* 11 June 2001.

⁸² p 54.

the first observation undoubtedly points to racial discrimination, the last two require some qualification.

It is evident from the facts that the criteria for designating land for compulsory acquisition had nothing to do with the current use of the land – acquisition was arbitrary and unreasonable in that even commercial farms that were ‘going concerns’ were designated for acquisition. The UN Human Rights Committee has stated that if the criteria for differentiation are unreasonable and unobjective and the aim is to achieve an illegitimate objective, such differentiation will constitute unfair discrimination.⁸³ Moreover, compulsory acquisition of land was arbitrary and unreasonable in the sense that no compensation was paid for all agricultural lands acquired,⁸⁴ but holding that the decision not to compensate white farmers necessarily constituted racial discrimination wrongly implies that black farmers who also lost their lands were compensated for the loss. Non-payment of compensation would affect everyone (black and white) owning land if vast tracts of land were not owned almost solely by white Zimbabweans. However, the fact that non-payment of compensation could have equally affected black and white farmers (if vast tracts of land were not owned solely by whites) does not mean that non-payment ceases to be discriminatory, but it demonstrates that the discrimination could have been motivated by factors other than race. In this case, one such factor was political affiliation.

Similarly unfortunate is the Tribunal’s third observation that the fact that acquired land was given to ZANU PF supporters rendered the purpose illegitimate. If anything, this amounted to discrimination based on the beneficiary’s political orientation rather than (or and) the landowner’s race. In fact, a significant number of white farmers retained their farms because they were politically connected to ZANU PF and some few black farmers lost their farms because they were politically connected to MDC. Further, while some productive lands were seized and given to ZANU PF loyalists, by far the largest portion of ‘invaded’ lands in Matebeleland and Midlands (traditional MDC support bases) was given to the landless masses regardless of their political affiliation. To hold that if land was distributed among the poor, landless and marginalised groups, land reform would not have been discriminatory, wrongly implies that if seized farms were distributed among the poor from both sides of the ethno-political divide, then the fact that land was seized without compensation or based on unreasonable criteria would not have elicited findings of racial discrimination. The existence of a legitimate government purpose for land seizures does not necessarily make discriminatory governmental action non-discriminatory.

⁸³ General Comment 18 (n 70 above) para 13.

⁸⁴ Secs 16B(2)(a) & (b) of the Zimbabwean Constitution read together.

However, such a purpose justifies the differential treatment (or discrimination) by showing the existence of more pressing social goals. A legitimate government purpose thus distinguishes unfair discrimination from mere differentiation or fair discrimination. Part of the problem to the growth of our equality jurisprudence may be that article 6(2) of the Treaty merely prohibits discrimination, not unfair discrimination. Thus, the Tribunal has two options: to find that there is discrimination (which is prohibited) or that there is no discrimination. This all-or-nothing approach, as already shown by the Tribunal's over-simplistic analysis of racial discrimination, hampers the development of our regional equality jurisprudence.

4.3 Remedies

The Tribunal ordered the respondent to take all necessary measures to protect the possession; occupation and ownership of the lands of all the applicants save for three applicants who had already been evicted from their lands.⁸⁵ The respondent was ordered to take appropriate steps to ensure that no action is taken, pursuant to Amendment 17, to evict applicants from or interfere with their peaceful residence on their farms.⁸⁶ The Tribunal also directed the respondent to pay, on or before 30 June 2009, 'fair compensation' to three applicants whose lands had already been expropriated.⁸⁷ The inclusion of the date by which the respondent had to comply with the judgment suggests that the Tribunal may exercise supervisory jurisdiction on the implementation of the decision and the use of the word 'fair' rightly implies that the three applicants may contest the amount of compensation awarded. The respondent had unsuccessfully invoked the provisions of the 1978 Lancaster House agreement which shouldered the duty to pay compensation on the former colonial power, Britain.

The Tribunal observed that in terms of international law, the respondent as the expropriating state should shoulder the responsibility to pay compensation.⁸⁸ The Resolution on Permanent Sovereignty over Natural Resources 1803 (XVII) of 1962 permits 'nationalisation, expropriation or requisitioning for reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign'.⁸⁹ 'Appropriate compensation [should then] be paid in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law.'⁹⁰ The Charter of Economic Rights

⁸⁵ pp 58-59.

⁸⁶ p 59.

⁸⁷ As above.

⁸⁸ pp 56-7.

⁸⁹ Para 4.

⁹⁰ As above.

and Duties of States (Charter), contained in Resolution 3281 (XXIX) of 1974, also entitles states 'to nationalise, expropriate or transfer foreign property in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances which the state considers pertinent'.⁹¹ States implementing coercive measures are economically responsible to the peoples affected for the restitution and full compensation for the exploitation of and damages to resources of those peoples.⁹² In *Texaco v Libya*,⁹³ the arbitrator held that the voting on Resolution 1803 (XVII) reflected that it was supported by the 'majority of states belonging to the various representative groups' and largely symbolised 'the expression of a real general will' and that the relevant part of Resolution 3281 (XXIX) 'must be analysed as a political rather than a legal declaration concerned with the ideological strategy of development and, as such, only by non-industrialised states'.⁹⁴ Therefore, Resolution 1803 (XVII) has persuasive or binding authority as a source of international law governing the expropriation of private property.

The validity of land reform in Zimbabwe should be considered in light of the requirements laid down in Resolution 1803 (XVII). First, there is consensus that expropriation must be done for a public purpose or in the public interest but, as was held in *US v Iran*,⁹⁵ 'it is clear that, as a result of the modern acceptance of the right to nationalise, this term is broadly interpreted, and that states, in practice, are granted extensive discretion'.⁹⁶ Second, the prohibition on racial discrimination seemingly remains an integral ingredient of customary international law.⁹⁷ Third, international law requires states to pay compensation for expropriated property although the standard to be applied for calculating compensation is everything but established.⁹⁸ Dugard demonstrates, on good authority, that the standard of 'prompt, adequate and fair compensation' is no longer part of international law and that the standard of 'appropriate' compensation is gaining impetus in international law.⁹⁹ This is because the word 'appropriate' is so flexible that all the circumstances of each case will be considered in determining the amount of compensation payable.

⁹¹ Art 2(c) of the Charter.

⁹² Art 16(1) of the Charter.

⁹³ (1978) 17 *ILM* 1; (1997) 53 *ILR* 389.

⁹⁴ Paras 87-88.

⁹⁵ (1988) 27 *ILM* 1314.

⁹⁶ Para 145.

⁹⁷ See *Libyan American Oil Company v Libya* (1981) 20 *ILM* 1, paras 58-59; *US V Iran* (n 95 above) paras 140-42.

⁹⁸ Former colonial powers maintain that an 'international standard' should govern expropriation while decolonised states insist that expropriation be governed by rules of national law.

⁹⁹ J Dugard *International law: A South African perspective* (2005) 301-302.

Thus, states are not allowed to legislate themselves out of their obligations under international law just because land reform is purportedly intended to address historical injustice. Historical injustice is one thing and the requirements for lawful expropriation another. Although the history of acquisition and current use of property usually feature prominently in calculating the amount of compensation payable, compensation should be paid regardless of how land was acquired in the first place. Clarity abounds in international law that the legitimacy of the purpose of expropriation does not exonerate the concerned state of its duty to pay compensation. Consequently, international guarantees of national sovereignty cannot be used to justify the passing into law of arbitrary rules permitting the expropriation of private property without compensation. In the circumstances of the case, Zimbabwe was rightly denied the opportunity to rely on its oppressive legislation to evade peremptory obligations under international law.

5 Beyond *Campbell*

5.1 The implementation question

It is worthwhile considering the regional mechanisms for enforcing compliance with the Tribunal's decision if a member state chooses not to do so. Decisions of the Tribunal are binding upon parties to the dispute and enforceable within the territory of the state concerned.¹⁰⁰ One of the principles governing the conduct of member states is the peaceful settlement of disputes.¹⁰¹ States and institutions are duty bound to take all measures necessary to ensure the execution of the decisions of the Tribunal.¹⁰² Any party to the dispute may refer (to the Tribunal) any failure by a state party to comply with the Tribunal's decision.¹⁰³ If the Tribunal establishes such failure, it must report its findings to the Summit, which is under a legal obligation to take appropriate action.¹⁰⁴ The regional commitment echoed in the provisions cited above suggests that the Tribunal's jurisprudence is an integral part of its institutional mandate. Member states should therefore co-operate with and assist the Tribunal in the performance of its duties. However, there are no mechanisms through which the Tribunal can supervise the implementation of its decisions. Thus, political leadership and good

¹⁰⁰ Art 32(3) of the Protocol.

¹⁰¹ Art 4 of the Treaty.

¹⁰² Art 32(2) of the Protocol.

¹⁰³ Art 32(4) of the Protocol.

¹⁰⁴ Art 32(5) of the Protocol.

faith are needed at the Summit level if the Tribunal's judgments are to be worth the paper they are written on.¹⁰⁵

This is because when it comes to the enforcement of judgments against defiant states, decision making is deferred to the executive branch of the regional block. The Summit consists of the Heads of State and Government and it is the *supreme* policy-making institution of SADC.¹⁰⁶ Thus, the head of state of a member that elects not to comply with the Tribunal's decision may (the Treaty is silent on the matter) also be part of the Summit that decides whether or how to enforce the judgment. Given that the decisions of the Summit are taken by consensus,¹⁰⁷ the head of a transgressor state may easily block that consensus if the decision is against his or her government. Legally, the Summit is not bound to punish a transgressor state and there is no guarantee it will do so. Article 33(1) provides that sanctions be imposed on a state that persistently fails, without good cause, to fulfil obligations assumed under the Treaty or implements policies which undermine the principles and objectives of SADC. There are no guidelines on the nature of sanctions that may be imposed and the bonds that anti-imperialism creates among countries in the region make this a less likely route to take.

Yet, this may be over-thinking the matter. The bottom line is that the enforcement of judgments of international bodies is an age-old problem as these bodies have to rely on the goodwill of the very states against which they find. This is one of the inherent flaws of international law and states are inclined to disregard the decision if non-compliance bears no imminent threat to peace and security.¹⁰⁸ Shaw observes that 'once the court has found that a state has entered into a commitment concerning its future conduct, it is not the court's function to contemplate that it will not comply with it'.¹⁰⁹

On more than one occasion, Zimbabwe has indicated that it will not reverse land reform because the Tribunal decided the matter outside its historical context.¹¹⁰ Zimbabwe treats the Tribunal's rulings with contempt, as demonstrated by the then Minister of Lands, Mr Didymus Mutasa's remarks that the Tribunal had no jurisdiction over the matter and that farmers who dared return to their farms would be prosecuted.¹¹¹ This problem is not new, given that Zimbabwe also refused to comply with the interim ruling. What is more, farm seizures and the

¹⁰⁵ See OC Ruppel & FX Bangamwabo 'The SADC Tribunal: A legal analysis of its mandate and role in regional integration' in Bösl *et al* (n 57 above) 179 199-201.

¹⁰⁶ Art 10(1) of the Treaty.

¹⁰⁷ Art 10(9) of the Treaty.

¹⁰⁸ Dube & Midgley (n 57 above) 24.

¹⁰⁹ The *Nuclear Test* case, ICJ Reports 996.

¹¹⁰ See 'No land changes: Govt' *The Herald* 1 December 2008.

¹¹¹ 'Zimbabwe: Govt violated rule of law — SADC Tribunal' *The Standard* 29 November 2008.

onslaught of violence and intimidation against farm owners continue to this day.¹¹² More recently, Zimbabwe's Justice Minister, Patrick Chinamasa, announced, in a letter dated 7 August and delivered to the Tribunal on 10 August this year, that the purported application of the provisions of the Protocol violates international law as the Protocol was not ratified by the required two-thirds of SADC countries.¹¹³ Cropping up eight months after the ruling, Zimbabwe's purported withdrawal from the Tribunal's jurisdiction will be dealt with below, as an 'afterthought'.

Thus, the decision appears to be largely a ceremonial victory for the applicants who now, after long legal battles at home and abroad, find themselves holding a court judgment which they cannot easily, if at all, enforce. Yet, all problems which the applicants may face in enforcing the decision must be construed more as a reflection of the degree to which the political terrain is heated in Zimbabwe than as a manifestation of the inadequacy of the applicable law or the challenges the Tribunal will confront in every other case. Though it resonates with the members' commitment to upholding the values of human rights and equal access to justice, the decision will remain paper law if, as is likely, the SADC Summit pays no attention to recent developments in Zimbabwe. Much depends on how the Summit will respond to these developments, but it is evident that if Zimbabwe, meaning ZANU (PF), is allowed to go scot-free with its irresponsible position on the role of the Tribunal, this will send a signal to landless peasants in Southern Africa that they can take the law into their own hands without having to account. This may be the beginning of another dark chapter, characterised by violence, intimidation and unlawful detentions, in race and political relations in Zimbabwe.

5.2 Globalisation and the fading concept of sovereignty

Both the creation of the Tribunal and its decision in *Campbell* highlight the impact of globalisation on regional perceptions and values. In examining whether the Tribunal drew the lines of sovereignty in the right place, we need to consider two aspects of the order it gave. First, the Tribunal unanimously ordered the respondent to take all necessary measures to protect the applicants' possession, occupation and ownership of their lands without spelling out the actual steps to be taken. Thus, the Tribunal rightly observed that it could have usurped the

¹¹² 'Tsvangirai orders arrest of farm invaders' *New Zimbabwe.com* <http://www.newzimbabwe.com/pages/farm86.19589.html> (accessed 27 March 2009); 'Mutambara leads probe into fresh farm invasions' <http://www.newzimbabwe.com/pages/farm89.19685.html> (accessed 16 April 2009).

¹¹³ 'Chinamasa pulls Zim out of Tribunal without Cabinet approval' *The Zimbabwean* <http://www.thezimbabwean.co.uk/2009090324142/weekday-top-stories/chinamasa-pulls-zim-out-of-sadc-tribunal-without-cabinet-approval.html> (accessed 24 September 2009).

functions of the respondent to regulate her relationship with her own nationals. Surely, this would have intruded even on Zimbabwe's sovereign equality with other member states and the cost of enforcing such a decision would have been prohibitive. When Mutasa indicated that Zimbabwe would not reverse land reform, he appears to have thought that the Tribunal had declared that every farmer should recover their land regardless of when that land was seized. Yet, the Tribunal barred the respondent from evicting more farmers and seizing more lands under Amendment 17.

Second, the Tribunal ordered the respondent to pay compensation to three applicants who had already lost their farms. Regardless of the provisions of Amendment 17, the respondent was forced to pay compensation pursuant to her obligations under international law. Obviously, not only three but hundreds of farmers have lost their land since 'fast track' reform started at the close of the twentieth century, but the Tribunal confined itself to cases emanating from the 2005 Amendment 17. To the extent that the decision overruled domestic law and national policies, it was conveniently and purposively intrusive. The decision blurred the lines of sovereignty, and elevated international treaties to the stature of a regional constitution. Member states may slowly realise that legal issues, once perceived as domestic, are now governed by a growing body of international law and tribunals. Initially thought of as the ugly side of globalisation, the competence of international tribunals to alter domestic policies or laws has emerged as a major drive in resolving human rights disputes and shaping legal practice in many regions of the globe.¹¹⁴ While *Campbell* (Merits) does not mean that Zimbabwe's sovereignty has been submerged into some kind of regional federalism, it does reflect on the Tribunal's inclination toward transnationalism. Effectively, it implies that national policy decisions must be reflective of some neutral transnational agenda and regional value system. This means that where national human rights standards are poor, the evolution of internal value systems will increasingly be shaped by external conditions.

Central to the evolution of supranationalism in Southern Africa, as the Tribunal has implicitly shown, is the changing concept of sovereignty. Initially seen as an absolute impediment to external interference in the domestic sphere of member states, national sovereignty now recedes to the background when human rights and the rule of law are under threat. The violent nature of land reform in Zimbabwe, the historic levels of repression in Southern Africa and the need to globalise human rights norms and the rule of law called the Tribunal to observe that national sovereignty is not illimitable. By regionally judicialising intra-national relations between governments and their citizens, the jurisprudence of the Tribunal indeed confirms that globalisation has

¹¹⁴ See JF Stack Jr & ML Volcansek *Courts crossing borders: Blurring the lines of sovereignty* (2005) 5.

taken its toll on the traditional nation-state and its historical claim to sovereign authority. In this respect, *Campbell* (Merits) does not only set our regional jurisprudence in the right direction, but also reflects the Tribunal's attentiveness to its competence to promote a supranational mandate broader than the national interests or priorities of individual states.

5.3 Afterthought

Minister Chinamasa's letter to the Tribunal does not only cast doubt over the human rights record of Zimbabwe and Southern Africa, but also seriously implicates the future relevance of our regional court. To the Minister, the Tribunal lacked jurisdiction because the required two-thirds of SADC membership had not ratified the Protocol. The Minister insisted that Zimbabwe would neither appear before nor respond to any suit instituted in the Tribunal and that any prior or future decisions (of the Tribunal) against Zimbabwe 'are null and void'.¹¹⁵ The Minister's submissions are more political than legal, but the Summit's failure to condemn Zimbabwe's contemptuous attitude¹¹⁶ gives her the drive to ridicule both the regional Tribunal and the legal process.

Legally, Zimbabwe is bound by the judgments. Article 16(2) of the Treaty provides that the Protocol is an *integral* part of the Treaty, rendering ratification thereof unnecessary. Article 16(2) exempts the Protocol from the provisions (of article 22) which require the two-thirds ratification referred to by the Minister. In this context, the purported withdrawal from the jurisdiction of the Tribunal is null and void. Besides, Harare is bound by the judgments because her leaders, at all material times, knew the Protocol's ratification status. Political intervention is needed if the region's human rights record is to improve; otherwise landless peasants in South Africa and Namibia – which inherited similar land disparities – will resort to self-help. Currently, Zimbabwe is relying heavily on SADC mediation to resolve its decade-old political impasse, yet she is allowed to systematically disregard judgments from SADC's judicial institution. This ambivalence must cease if Zimbabwe and Southern Africa are to prevent another violent agrarian revolution. For human rights and the rule of law, the picture is tremendously bleak.

6 Conclusion

Land reform is a contested terrain in Africa and it impedes consensus (on human rights) between the north and the south. Traditionally, the controversy embodies the contradiction between countries' sovereignty to address uneven distribution of land, on the one hand, and

¹¹⁵ *The Zimbabwean* (n 113 above).

¹¹⁶ See SADC Communiqué: Kinshasa, DRC.

the requirements for lawful expropriation on the other. The Tribunal's findings are groundbreaking save that the effect of political affiliation on the designation of farms for redistribution appears to have been inadequately considered. Despite the Tribunal's resolve to uphold the rule of law, the respondent's refusal to implement the decision ridicules the legal process and raises concerns about the effectiveness of our regional enforcement mechanisms. If SADC tacitly condones Zimbabwe's refusal to respect the order of the Tribunal, the *Campbell* decision would have created a bad and dangerous precedent. The decision will be a 'bad' precedent in that it will send a signal to other states that they may in future choose not to obey the decisions of SADC institutions and 'dangerous' in that it tempts the landless masses in the region to terrorise white farmers to 'recover stolen ancestral land'. This will not only hamper regional integration, but may further perpetuate racial discrimination and racism.

If SADC compels Zimbabwe to comply with the decision, then this will give member states an incentive to respect decisions of its institutions and heighten prospects of meaningful regional integration. The Tribunal's reliance on international law to deny member states the opportunity to rely on their municipal laws is a great leap toward defending human rights and the rule of law at the regional level. The *Campbell* decision is a landmark ruling, one that paves the way for regional integration, transnationalism and a culture of responsibility. National sovereignty, being a limitable concept, should not be a bar to positive developments in a region that has been unfairly burdened by the contagious, multiplier effect of the collapse of Zimbabwe's state apparatus. The SADC, its Tribunal and the *Campbell* decision are likely to apply more influence than any international tribunal would, because in a regional context, the spirit of brotherhood nurtures greater interdependence between countries. Further, similar socio-cultural, historical and political identities easily translate into respect for regional institutions. However, all these factors mean nothing to Zimbabwe and the success of the Tribunal in asserting its influence over regional developments and maintaining its future relevance will largely depend on how the Summit responds to Zimbabwe's refusal to comply with the *Campbell* decision.