The Role of International Human Rights and the Law of Diplomatic Protection in Resolving Zimbabwe’s Land Crisis

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THE ROLE OF INTERNATIONAL HUMAN RIGHTS AND THE LAW OF DIPLOMATIC PROTECTION IN RESOLVING ZIMBABWE'S LAND CRISIS

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Abstract: Zimbabwe's most recent land reform program has targeted thousands of commercial farms for compulsory acquisition. This Note analyzes what protections and remedies reside in international human rights law and the law of diplomatic protection for commercial farmers deprived of their property as a result of this program.

INTRODUCTION

Over the past three years, Zimbabwe has implemented an aggressive program to redistribute its farming lands, which, as a legacy of colonial rule, had been predominantly owned by white commercial farmers. Although real land reform has been on Zimbabwe’s agenda since its independence in 1980, this most recent “fast track” plan is widely viewed as a tactic by President Robert Mugabe to bolster his political support and enrich his cronies. In the process, commercial farmers have been driven from their land by government sanctioned violence and deprived of their livelihood without fair compensation. This Note analyzes Zimbabwe’s land reform program in the context of international law. Specifically, it explores what principles, if any, exist in international law to protect the property rights of Zimbabwe’s commercial farmers. This Note concludes that the only relevant principles, human rights and diplomatic protection, are inadequate or unavailable as recourses in international law in this situation.

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2 See id. at 739–41.
3 See id. at 755–60.
I. BACKGROUND

A. The Roots of Zimbabwe’s Land Crisis

Zimbabwe has a total population of more than twelve million people and a land area of approximately thirty-nine hectares.\(^4\) Zimbabwe’s black population represents ninety-seven percent of the total population, whereas whites represent less than two percent.\(^5\) Despite the overwhelming black majority, ownership of farm lands in Zimbabwe is unevenly distributed.\(^6\) At the turn of this century, there were approximately 4800 large scale commercial farms located on eleven million hectares of land.\(^7\) Of these commercial farms, 4500 were white-owned.\(^8\) In contrast, one million black families had been confined to farming in exclusively black communal areas covering sixteen million hectares.\(^9\) Only a small percentage of this communal land, however, was arable enough to farm.\(^10\)

The disparity between black and white land ownership in Zimbabwe is the direct result of its colonial heritage.\(^11\) Under British rule, racially discriminatory laws reserved the most fertile farming land to the white minority.\(^12\) This inequitable distribution largely fueled Zimbabwe’s civil war in the 1970s.\(^13\) It was also a prominent issue in the peace talks that led to the Lancaster House Agreement, the landmark accord establishing Zimbabwe’s independence in 1980.\(^14\)

After independence Zimbabwe struggled to realize true land reform.\(^15\) Concerned for the plight of white farmers in a majority-ruled independent Zimbabwe, the British government mandated a clause in the new constitution that protected land ownership from compulsory acquisition for a ten year period.\(^16\) Upon the expiration of that mora-

\(^5\) Id.
\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
\(^9\) Mitchell, supra note 4, at 592.
\(^10\) See id.
\(^12\) See id.
\(^14\) See id.
\(^15\) See id. § 7.4–10.
\(^16\) See Boyle, supra note 11, at 687.
torium, Zimbabwe’s Parliament amended the constitution to allow compulsory acquisition of land by the government subject to payment of fair compensation.\textsuperscript{17} By 1999, Zimbabwe had purchased 3.8 million hectares of farming land and resettled 71,000 black families.\textsuperscript{18}

B. Politics and “Farm Invasions”

President Robert Mugabe has governed Zimbabwe since its independence in 1980.\textsuperscript{19} Moreover, his ruling party, the Zimbabwe African National Union-Patriotic Front (ZANU-PF), has largely dominated the country’s political landscape.\textsuperscript{20} In 1999, however, the Movement for Democratic Change (MDC) emerged as a viable opposition party.\textsuperscript{21} Campaigning on a platform of reforms,\textsuperscript{22} the MDC garnered significant support from both black and white voters.\textsuperscript{23} Indeed, in the June 2000 parliamentary elections, the MDC won fifty-seven out of the one hundred twenty seats available.\textsuperscript{24}

Even before the parliamentary elections, Mugabe recognized that the MDC’s rising popularity threatened his hegemony.\textsuperscript{25} In response, he embarked on his own campaign to break the MDC and destroy its political base.\textsuperscript{26} Perceiving white commercial farmers as part of that base,\textsuperscript{27} Mugabe sought to hasten the land reform program, thereby eliminating commercial farmers as a voting bloc and winning back rural support with the promise of land resettlement.\textsuperscript{28} To that end, Parliament passed a constitutional amendment and legislative act in the spring of 2000\textsuperscript{29} that enabled the Mugabe government to implement an accelerated agricultural acquisition program known as the “fast track” plan.\textsuperscript{30} Within two years, this plan targeted 3000 commer-

\textsuperscript{17} See Zimbabwe Report, supra note 13, § 7.6.
\textsuperscript{18} Id. § 7.7.
\textsuperscript{19} Id. § 2.3.
\textsuperscript{20} Id.
\textsuperscript{21} See id. § 2.7.
\textsuperscript{23} See id.
\textsuperscript{24} Zimbabwe Report, supra note 13, § 2.7.
\textsuperscript{25} See id. § 7.16.
\textsuperscript{26} See id.
\textsuperscript{27} See Gourevitch, supra note 22.
\textsuperscript{28} See Zimbabwe Report, supra note 13, § 7.16.
\textsuperscript{29} See Mitchell, supra note 4, at 596. These legislative acts occurred under the ZANU-PF dominated parliament that had existed prior to the June 2000 elections. Id.
\textsuperscript{30} Id.
cial farms for acquisition. Unlike previous land reform programs, however, the plan only compensated farmers for improvements to the land, not for the value of the land itself. Moreover, compensation was set off by any previous subsidies the government may have paid to the land owners.

At the same time the "fast track" plan was implemented, groups alleging to be veterans of the 1970s civil war descended on white-owned commercial farms and claimed plots of land for themselves. Although the Mugabe government rejected allegations that it incited these events, it refused to intervene and impose the rule of law. Rather, it called the farm invasions a "mere peaceful demonstration" by Zimbabweans frustrated by the slow pace of land reform. The invasions, however, were anything but peaceful. A survey conducted by the Commercial Farmers' Union reported that the invasions often resulted in abductions, assaults, death threats, and rape against the farmers and their workers. By 2002, the invasions had also caused the deaths of ten commercial farmers.

As of today, Mugabe's "fast track" plan is nearly complete. Of the 4500 white commercial farms in Zimbabwe at the turn of the century, only 400 remain. Many farmers are appealing the acquisitions in Zimbabwe's courts. Relief is unlikely, however, since Zimbabwe's judiciary is also under attack from the Mugabe government and its war veterans. Accused of being sympathetic to white farmers, lower court

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31 Id. at 597.
32 Id. at 596–97.
33 Mitchell, supra note 4, at 596 n.70.
35 See Zimbabwe Report, supra note 13, § 7.18.
36 Id. § 7.19. Eyewitness accounts, however, suggest that Mugabe's government was indeed involved in orchestrating these invasions. See id. § 7.16. Witness reported seeing government vehicles transport the war veterans to farms they intended to occupy. See id. In addition, the government was reportedly paying daily stipends to the occupiers. See id.
37 Ford, supra note 34, at 242.
38 Id.
41 Id.
judges have been threatened with violence while the Supreme Court Chief Justice has been forced to resign.\footnote{See id.} As for the land acquired under the “fast track” plan intended for needy families, much of it has ended up in the hands of Mugabe’s cronies.\footnote{See BBC News, Zimbabweans Suffer, supra note 40.} Furthermore, the disruption to the farming industry caused by land reform has decimated crop production and brought the country to the brink of famine.\footnote{See id.}

**II. Analysis**

Zimbabwe’s “fast track” plan has dispossessed commercial farmers of their property while denying them fair compensation and effective legal recourse.\footnote{See Zimbabwe Report, supra note 13, §§ 7, 9.} Since Zimbabwe municipal law appears to be failing the commercial farmers, the only hope for justice resides in international law.\footnote{See generally id. § 9.} But what principles of international law, if any, protect individuals’ property rights? This question implicates two principles: human rights and diplomatic protection.

**A. Private Property Ownership as an International Human Right**

The development of human rights as a modern principle of international law began over fifty years ago with the United Nations’ Universal Declaration of Human Rights (Universal Declaration).\footnote{Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].} Since then, the United Nations and other organizations of states have assembled conventions to further articulate global and regional conceptions of human rights.\footnote{See Emily Bourdeaux Smith, Note, South Africa’s Land Reform Policy and International Human Rights Law, 19 Wis. Int’l L.J. 267, 274-75 (2001).} Although private property ownership is expressed as a human right in two of the documents relevant to this analysis, the notion is far too vaguely stated to provide any substantive protection for Zimbabwe’s commercial farmers.\footnote{See id. at 274.}
1. The United Nations and Private Property Ownership Rights

During the mid-twentieth century, the United Nations endeavored to create a core body of international human rights.\(^{52}\) The documents crafted to express these rights, however, were very much products of Cold War ideological tensions.\(^{53}\) These tensions are manifestly apparent in the U.N.'s articulation of private property ownership rights.\(^{54}\)

The United Nations Commission on Human Rights drafted the Universal Declaration as an initial step towards promulgating a bill of international human rights.\(^{55}\) Although adopted as a nonbinding resolution in 1948, the Universal Declaration has over time attained the status of customary international law.\(^{56}\)

The Universal Declaration addresses the right to private property ownership in Article 17, which states that "[e]veryone has the right to own property alone as well as in association with others" and that "[n]o one shall be arbitrarily deprived of his property."\(^{57}\) The language in Article 17 appears on its face to fashion an inalienable right to private property ownership.\(^{58}\) The Universal Declaration, however, does not define what constitutes "arbitrary deprivation."\(^{59}\) Consequently, the extent of protection afforded by the Universal Declaration in relation to private property ownership is vague at best.\(^{60}\)

In 1966, the United Nations General Assembly adopted the International Covenant on Economic, Social and Cultural Rights\(^{61}\) and the International Covenant on Civil and Political Rights.\(^{62}\) These Covenants were drafted in order to further define the scope and extent of many of the rights established in the Universal Declaration.\(^{63}\)


\(^{53}\) See *id.*

\(^{54}\) See *id.*

\(^{55}\) See Smith, supra note 50, at 273.


\(^{57}\) Universal Declaration, supra note 49, art. 17.

\(^{58}\) See *id.*

\(^{59}\) See *id.*

\(^{60}\) See Smith, supra note 50, at 274.


\(^{63}\) Compare Universal Declaration, supra note 49, with CESCR, supra note 61, and CCPR, supra note 62.
Conspicuously absent from either of the Covenants, however, is any elaboration on the right to private property ownership. This absence is attributed to the Cold War ideological disparity between eastern Soviet bloc states and western democracies with regard to private property ownership. Consequently, in an effort to forge consensus on other human rights issues and encourage wide adoption of the Covenants during the Cold War, the United Nations chose to avoid the divisive issue of property rights.

Because a clear articulation by the United Nations of a human right to private property ownership was impeded by Cold War ideological wrangling, few conclusions can be drawn from applying the United Nations’ articulation of property rights to the plight of Zimbabwe’s commercial farmers. Since the “fast track” plan was implemented through a constitutional amendment and legislative act, it operates under a guise of due process of law. Without further elaboration on the meaning of “arbitrary deprivation,” such symbolic due process may be all that is necessary to satisfy the Universal Declaration’s requirement that property not be arbitrarily deprived.

2. The Banjul Charter on Human and Peoples’ Rights


The Charter articulates human rights owing to the individuals, citizens, and “peoples” of Africa. Although the Charter does not

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64 See CCPR, supra note 62; CESC, supra note 61.
65 Van Der Vyver, supra note 52, at 129.
66 See id.
67 See id.
68 See Universal Declaration, supra note 49, art. 17.
69 See Nading, supra note 1, at 755.
70 See Banjul Charter, supra note 72, arts. 10–17.
73 See Banjul Charter, supra note 72, arts. 10–17.
define the meaning of "peoples' rights," the term suggests a form of collective rights that may be exercised or claimed by a state on behalf of its inhabitants.75

The Charter addresses property rights in Article 14,76 which begins by plainly stating that "[t]he right to property shall be guaranteed."77 The phrase itself is curious since, unlike the surrounding articles, it does not specify whether the right flows to individuals, citizens, or peoples.78 This inconsistency, however, is overshadowed by the Article's final clause, which allows property rights to be encroached "in the interest of public need . . . and in accordance with the provisions of appropriate laws."79 Critics of the Charter have labeled this language a "claw-back" clause because it permits states, in their nearly unrestrained discretion, to restrict the rights guaranteed by the Charter.80 Hence, by subordinating Charter rights to states' laws, the clause emasculates the Charter's effectiveness.81

Therefore, the language in Article 14 provides little, if any, real protection to Zimbabwe's commercial farmers.82 As noted earlier, the "fast track" plan was implemented through a constitutional amendment and legislative act.83 Thus, because the taking of commercial farmers' land is proscribed by Zimbabwe's municipal law, it conforms with the Charter according to a plain reading of Article 14.84

Another aspect of the Charter is equally concerning for Zimbabwe's commercial farmers.85 Article 21 states, in part, that "[i]n case of spoliation86 the dispossessed people shall have the right to the lawful recovery of its property."87 Considering the history of the African continent, the Charter's use of the term "spoliation" is arguably a reference to the exploitation of African lands and resources by colonial imperial-

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76 Banjul Charter, supra note 72, art. 14.
77 Id.
78 See id.
79 Id.
80 Bondzie-Simpson, supra note 75, at 660.
81 Id. at 661.
82 See id.
83 Mitchell, supra note 4, at 596.
84 See Bondzie-Simpson, supra note 75, at 661.
85 Banjul Charter, supra note 72, art. 21.
86 Spoliation is "[t]he seizure of personal or real property by violent means; the act of pillaging." BLACK'S LAW DICTIONARY 1133 (7th abr. ed. 2000).
87 Banjul Charter, supra note 72, art. 21.
ists. With this historical context in mind, Article 21 may be interpreted as bestowing upon African peoples dispossessed of their property under colonial rule a right to recovery. Consequently, rather than condemning the “fast track” plan, the Charter appears to legitimize it. The program is justified under Article 21 because it takes land that had been apportioned under colonial rule (to the benefit of commercial farmers) and returns it to its rightful owners—native Zimbabweans.

Ultimately, like the Universal Declaration, the Charter provides no real protection for the property rights of Zimbabwe’s commercial farmers. Although it guarantees the right to own property, the Charter subordinates that right to a state’s municipal laws. Moreover, the Charter seems as concerned with eradicating the vestiges of colonial rule as it does with promoting human rights. As such, it appears to target Zimbabwe’s commercial farmers more than protect them.

B. Diplomatic Protection

An alternative recourse in international law may be found in the principle of diplomatic protection. Under this principle, a state may seek reparations on behalf of its nationals injured by acts contrary to international law committed by another state. For an individual to seek diplomatic protection, three elements must exist: (1) the individual must be harmed as a result of a state’s violation of international law; (2) the individual must exhaust all local remedies in that state’s domestic courts; and (3) the individual must be a national of another state at the time harm occurred. Although the situation in Zimbabwe will likely satisfy the first two elements for diplomatic protection, establishing Zimbabwe’s commercial farmers as nationals of another state is a significant obstacle.

88 See Nading, supra note 1, at 742–47.
89 Banjul Charter, supra note 72, art. 21.
90 See Bondzie-Simpson, supra note 75, at 661.
91 Banjul Charter, supra note 72, art. 21.
92 See Bondzie-Simpson, supra note 75, at 661.
93 See id. at 660.
94 See Banjul Charter, supra note 72, art. 21.
95 See id.
97 See id.
98 See id. at 1–8.
99 Assuming a foreign national’s land is acquired under the “fast track” plan, Zimbabwe will arguably violate the customary international law of expropriation because it does not pay just compensation for the land. See Hans W. Baade, Permanent Sovereignty over
1. Determining Nationality

At one time, African citizens of former British colonies were recognized as British subjects, and the British government afforded them diplomatic protection.\(^{100}\) However, this practice vanished soon after the Second World War.\(^{101}\) Therefore, Zimbabwe's commercial farmers may no longer rely on their colonial heritage to establish themselves as British nationals.\(^{102}\)

Notwithstanding the demise of this practice, Zimbabwean commercial farmers possessing dual British citizenship may potentially access diplomatic protection.\(^{103}\) To do so, however, these dual citizens must demonstrate that their dominant and effective nationality is that of United Kingdom, not Zimbabwe.\(^{104}\) Determining the dominant and effective nationality of a dual citizen was most recently considered by the Iran-United States Claims Tribunal (Tribunal).\(^{105}\)

In Case A/18, the Tribunal was presented with the question of whether individuals possessing dual Iranian/U.S. citizenship were entitled to bring claims against the Iranian government for its expropriation of property.\(^{106}\) Under the 1930 Hague Convention on Nationality, "a [s]tate may not afford diplomatic protection to one of its nationals against a [s]tate whose nationality such person also possesses."\(^{107}\) Thus, dual citizens were traditionally precluded from seeking diplomatic protection against a state of which they were a citizen.\(^{108}\) The Tribunal, however, analyzed the development of international law with respect to nationality after the Second World War.\(^{109}\) Noting two key decisions, the Tribunal held that claimants must be

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\(^{100}\) Joseph, supra note 96, at 239.

\(^{101}\) See id.

\(^{102}\) See id.

\(^{103}\) It is estimated that 20,000 Zimbabwean citizens have British passports. See Michael Evans, MoD Watches for Any Risk to Britons, Times (London), June 26, 2000, available at LEXIS, News Library, UPI File. Although unknown, it is conceivable that some of these individuals are commercial farmers. Id.


\(^{105}\) Id.

\(^{106}\) See id. at 253.

\(^{107}\) Joseph, supra note 96, at 9.

\(^{108}\) See id.

\(^{109}\) See 5 Iran-U.S. C.T.R. at 263.
evaluated on a case-by-case basis to determine their "dominant and effective nationality."\textsuperscript{110} Under this test, the Tribunal would evaluate several factors to determine the nationality of claimants, including their habitual residence, the center of their interests, their family ties, their participation in public life, and attachment shown by them for a given country and inculcated in their children.\textsuperscript{111}

Unfortunately, under this test, most commercial farmers with dual citizenship will probably be found to have their dominant and effective nationality tied to Zimbabwe.\textsuperscript{112} Since farming is a land-intensive occupation, most commercial farmers have likely established their center of interests and family ties in Zimbabwe.\textsuperscript{113} Although colonial heritage at one time may have been significant, it is no longer a factor considered when determining one's nationality.\textsuperscript{114} Thus, diplomatic protection will largely be unavailable as a recourse in international law for Zimbabwe's commercial farmers.\textsuperscript{115}

**Conclusion**

The "fast track" land reform plan has stripped thousands of commercial farmers of their land and livelihoods. The failure of Zimbabwe's municipal law to protect private property rights leaves international law as the final arbiter of justice. Unfortunately, the only two applicable principles of international law offer little in the way of protection or remedy. Although some international human rights documents recognize private property ownership, factors such as Cold War ideological tensions and "claw-back" clauses have left the right vaguely articulated and substantively meaningless. Conversely, even those commercial farmers lucky enough to have dual British/Zimbabwean citizenship will likely not be able to seek diplomatic protection. Commercial farming is an occupation so intrinsically tied to Zimbabwe's land that establishing a dominant and effective nationality of another state is nearly impossible.

\textsuperscript{110} *Id.* at 263–65.
\textsuperscript{111} *Id.* at 263.
\textsuperscript{113} See *id*.
\textsuperscript{114} *JosepH*, supra note 96, at 239.
\textsuperscript{115} See *id*.