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Compensation for Expropriation in South Africa, and International Law: The Leeway and the Limits

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ABSTRACT: The 2018 motion adopted by Parliament's National Assembly to embark on a process to determine if the Constitution should be amended to make provision for 'expropriation without compensation' raised interesting legal questions. This article examines one of those questions, namely whether a Constitutional amendment that provides for 'expropriation without compensation' or 'expropriation at nil compensation' is in line with international law. The protection of private property has various roots in international law, such as traditional international law rules concerning the treatment of foreign nationals, and specifically the property they own in host countries. Another is international investment law, particularly Bilateral Investment Treaties (BITs), which greatly substitute the traditional international law rules in practice. In this regard, a constantly growing body of case law has developed and clarified major issues such as the conditions under which a state may lawfully expropriate property; the scope of measures affecting the enjoyment of property rights amounting to an expropriation; and the question of compensation or damages arising from expropriation. These will be addressed in the third part of this discussion. Lastly, property rights are to some extent protected by human rights law.

KEYWORDS: 18th Constitutional amendment bill, expropriation without compensation, just and equitable compensation

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I INTRODUCTION

In 2018, the National Assembly of Parliament adopted a motion to 'review section 25 of the Constitution and other clauses' and propose amendments to the Constitution if needed.[1] This emanated from the African National Congress's (ANC's) resolution at the 54th conference of the party to consider 'expropriation without compensation'[2] as one of the mechanisms to give effect to land reform.[3] Three years later, on 9 September 2021 the Constitutional Eighteenth Amendment Bill (B18-20921) was introduced into the National Assembly for consideration in November 2021.[4] At the time this article was published, it seemed unlikely that the amendment would succeed although the question remains relevant also for the interpretation of section 25.[5]

During this process, many questions were raised about whether amending the Constitution to make provision for 'expropriation without compensation' aligned with international law. The question we seek to answer is set against this backdrop of discussions to amend the Constitution.

The expropriation of property by the South African government, and the question of compensation, is not exempt from the prescripts of international law. This is because the Constitution compels a court, tribunal or forum to consider international law when it interprets the property clause.[6] The Constitution further compels the courts to follow an interpretation of legislation that gives effect to this constitutional provision that is consistent with international law.[7] Due to these clear mandates, the discussion to follow will commence with an appreciation of the prominent place international law enjoys in the South African legal order. As a member state of the African Union and, having ratified regional instruments such as the African Charter on Human and Peoples' Rights, South Africa also has to observe its obligations arising from these instruments. Although not mandated by the Constitution,

1 Minutes of the Proceedings of National Assembly (27 February 2018) 10, available at https://static.pmg.org.za/180320motion.pdf.

2 It is perhaps from the outset important to talk about terminology. 'Expropriation without compensation' is the terminology used in the ANC conference documents, and in the motion set before Parliament, but it is not properly defined anywhere. Expropriation without compensation is confiscation. Expropriation with nil compensation refers to the circumstances in which the factors and interests listed for consideration in in s 25(3) of the Constitution have been weighed up and the state concludes that 'compensation at R0' is just and equitable. The obligation to pay compensation therefore remains, but it is acknowledged that it can be R0. We also accept that 'expropriation without compensation' in the public discourse is sometimes shorthand for a range of other conversations pertaining to land reform and reparations. We will, however, as far as possible, stick to 'nil compensation' and the legal meaning. See also B Slade 'Towards a Clearer Understanding of the Difference Between the Obligation to Pay Compensation and the Validity Requirements for an Expropriation' (2019) 33(1) *Speculum Juris* 1, 3. He argues that there should be a distinction between the *obligation* to pay compensation, and the *consequences* of a valid expropriation. His argument is that the validity of an expropriation does not depend on whether compensation is paid – but rather, on whether the validity requirements have been met. These requirements are that the expropriation must not be arbitrary; that it must be done in terms of a law of general application; and for a public purpose/public interest. Once they are met, an obligation rests on the state to pay compensation.

3 The process is discussed more comprehensively in part I6 below.

4 M Merten 'Parliament Closes Shop for MPs to Hit Municipal Election Campaign Trail, Pausing Key Work' *Daily Maverick* (6 September 2021), available at https://www.dailymaverick.co.za/article/2021-09-06-parliament-closes-shop-for-mps-to-hit-municipal-election-campaign-trail-pausing-key-work/.

5 Likewise, the Expropriation Bill B23 of 2020 clarified in clause 12(3) that compensation can be 'nil'.

6 Constitution s 39(1)(b).

7 Constitution s 233.

foreign law may also be included for consideration because, among other justifications, the Bill of Rights was heavily influenced by the constitutions of other countries.[8]

This article will examine whether a Constitutional amendment that provides for 'expropriation without compensation' or 'expropriation at nil compensation' is in line with international law. The question is also relevant in light of the inclusion and clarification in the Expropriation Bill[9] that compensation can be nil. The protection of private property has various roots in international law, such as traditional international law rules concerning the treatment of foreign nationals, and specifically the property they own in host countries. These rules are colloquially referred to as the 'international minimum standard' and will be explored in the second part of this discussion. Another is international investment law, particularly Bilateral Investment Treaties (BITs), which greatly substitute the traditional international law rules in practice. In this regard, a constantly growing body of case law has developed and has clarified major issues such as the conditions under which a state may lawfully expropriate property; the scope of measures affecting the enjoyment of property rights amounting to an expropriation; and the question of compensation or damages arising from expropriation. These will be addressed in the third part of this article. Lastly, property rights are to some extent protected by human rights law. The argument that the right to own property is a fundamental human right, and that an encroachment on such a right entitles its owner to indemnification, will be considered in the last part of this article. Although there is no binding treaty governing the protection of property at the global level, it is protected by regional human rights treaties such as the African Charter on Human and Peoples' Rights.[10] The African Court on Human and Peoples' Rights (ACtHPR) has not yet decided any case concerning property, and therefore this article makes recourse other regional systems for guidance. These include the European Court of Human Rights (ECtHR), which is by far the most developed, and the Inter-American Court of Human Rights (IACtHR), which has handed down important judgments regarding the property rights of indigenous peoples.

What will hopefully transpire from this discussion is that, under international law, South Africa enjoys sovereignty, which allows the Republic to exercise its legislative, executive and judicial competencies within its territory and to the exclusion of others. This implies that South Africa is free to embark on its land reform initiatives within its National Development Plan, and to expropriate property as a means to achieve its goal. However, this must take place within the parameters of the applicable international, regional and domestic legal frameworks. The aim of this part of the article is to establish what these frameworks are, and in particular to understand what is required in terms of compensation. Ultimately, the article establishes that states enjoy a generous amount of discretion when it comes to the standard and method of compensation, but that a failure to consider compensation[11] will fall short of what is regarded as lawful by all standards evaluated in this article. The acceptable standard seems to be 'appropriate' compensation, which can in some instances be less than market value and, in

[8] Constitution s 39(1)(c). J De Ville *Constitutional and Statutory Interpretation* (2000) 241.

[9] Expropriation Bill B23-2020 clause 12(3).

[10] African Charter on Human and Peoples' Rights (1986) art 14, available at https://www.achpr.org/legalinstruments/detail?id=49.

[11] In other words, 'expropriation without compensation' where the duty to consider compensation is removed, but not 'expropriation at nil', where the duty remains, but the possibility that it may be R0 is clarified. See note 2 for explanation.

exceptional circumstances, 'nil compensation' could be justified after a due process has been followed and relevant criteria considered.

What follows deals mainly with international and regional laws that are binding on South Africa, as well as non-binding standards, systems and procedures within the domain of property rights, expropriation and forms of compensation. We draw attention to the non-binding standards because we are of the firm view that if the Republic wants to retain its rightful place in the family of nations, as the preamble to the Constitution requires, the government should handle the issue of expropriation and compensation in line with principles broadly adopted worldwide, even though they are not legally binding upon South Africa.

With a view to achieving this, we start by placing South Africa's obligations to adhere to international law into context. Thereafter we discuss an interpretation of section 25 of the Constitution which will provide the context for the history of the 18th Constitutional Amendment that led to the final Constitutional Amendment Act. Once this is completed, we will delve into international law. The article will conclude by answering the question of whether such an amendment is in line with international law.

II THE PLACE OF INTERNATIONAL, REGIONAL AND FOREIGN LAW IN THE SOUTH AFRICAN LEGAL ORDER

Previous South African constitutions were silent on the place of international law in the South African legal order.[12] This was attributable to the defensive role South Africa played as a result of its racial policies, especially when the National Party came to power in 1948, with apartheid as its official policy. International law condemned discrimination, racial segregation, oppression, human rights violations and violent conflict, which were the order of the day. Apartheid was ironically implemented even though South Africa played a prominent part in the creation of the United Nations (UN) in 1945,[13] and the preamble to the Charter of the UN, written in part by General Smuts, which reaffirms 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women'.[14]

The 1993 and 1996 Constitutions remedied the above and ensured that, as the Constitutional Court in the *Glenister* case noted, international law was to occupy 'a special place in our law which is carefully defined by the Constitution'.[15] According to its preamble, the Constitution, as supreme law of the Republic,[16] was adopted to build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations, among others. Reference to a 'sovereign state' and 'family of nations' indicate the Republic's commitment to being a member of the UN, as well as other international organisations, and to abide by the rules and principles of international law.

International law is essentially made up of treaties reflecting the express agreement of states and custom, the latter which comprises those rules of international conduct to which states

[12] J Dugard, M du Plessis, D Tladi & T Maluwa T Maluwa *Dugard's International Law: A South African Perspective* (5th Ed, 2019) 66.

[13] Ibid.

[14] Charter of the United Nations (1945) Preamble, available at https://www.un.org/en/about-us/un-charter/preamble.

[15] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) 347 (CC)('*Glenister*') at para 97.

[16] Constitution s 2.

have given their tacit consent.[17] To this end, section 231 of the Constitution determines that a treaty binds the Republic after it has been approved by Parliament,[18] and becomes law in the Republic when it is enacted into law by national legislation.[19] With regard to custom, section 232 of the Constitution determines that customary international law is to be applied directly as part of the common law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament. This section compels the court to establish what the relevant custom is in relation to the issue before the court, and to determine if the custom is consistent with the Constitution or an Act of Parliament.[20] As will be established in this article,[21] this does, however, not automatically entitle South Africa to invoke provisions of its domestic law as justification for failure to comply with an international obligation, especially not where peremptory norms such as the prohibition on discrimination are concerned.

As mentioned, section 39(1)(b) mandates a court, tribunal or forum to consider international law[22] when the Bill of Rights is in question in the interpretation phase. The Constitutional Court in *S v Makwanyane* held that, for the purpose of interpreting the Bill of Rights, public international law includes non-binding as well as binding law.

> In the context of section 35(1) [section 39(1) of the 1996 Constitution], public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three [Chapter 2 of the 1996 Constitution] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three [Chapter 2 of the 1996 Constitution].[23]

This clearly denotes the Constitutional Court's conviction that, by considering the rules and principles that are broadly adopted worldwide (legally binding or not), the Republic can benefit from the experiences of others to shape its own future as a responsible, forward-thinking and respected state in the family of nations. When interpreting any legislation, section 233 provides that any reasonable interpretation of the legislation that is consistent with international law must be preferred over any alternative interpretation that is inconsistent with international law. This position was confirmed by the Constitutional Court in, amongst others, *S v Okah*.[24]

Foreign law is not the same as international law. Foreign law is the law of an individual foreign country, whereas the legal rules that a group of foreign countries such as the European

[17] Statute of the International Court of Justice art 38(1). Also see Duggard et al (note 12 above) at 61–62.

[18] Constitution s 231(2).

[19] Ibid s 231(4).

[20] Dugard et al (note 12 above) at 67–68.

[21] See the discussion on the *Campbell* case at part IIB4 below.

[22] The Constitutional Court in *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) at para 35, as further confirmed in *Glenister* (note 15 above) at para 39, that this provision included international laws that are binding as well as those that are not binding on South Africa.

[23] *Makwanyane* (note 22 above) at para 35.

[24] *S v Okah* [2018] ZACC 3, 2018 (1) SACR 492 (CC) at para 38.

Union or African Union agree to abide by constitute international law.[25] The use of foreign law by South African courts is specifically sanctioned by the Constitution in section 39(1)(c) but, unlike international law, the consideration of foreign law is permissive. The influence of foreign law may even extend beyond the role played by the introduction of foreign law via section 39(1)(c). Section section 39(2) also provides that 'when interpreting any legislation, and when developing the common law or customary law,' the courts 'must promote the spirit, purpose and objects of the Bill of Rights'.[26] A strict following of this provision virtually guarantees that jurisprudence will be developed and used to address legal issues that are not directly germane to the Bill of Rights. In *Carmichele v Minister of Safety and Security*, for example, the Constitutional Court invoked decisions of the European Court of Human Rights, among others, to develop a new rule of common law.[27]

The admission of foreign law into a South African court is a factual question and evidence on any aspect of the foreign law is necessary. Several authors have explained why the Constitution authorises South African courts to consider foreign law as a source of law. For instance, Devenish explains that South Africa was considered to have too few local precedents 'to resolve jurisprudential issues precipitated by the justiciability of provisions of the Bill of Rights'.[28] Additionally, South Africa's past as an *apartheid* state made it especially difficult to locate domestic jurisprudence to support the interpretation of the Constitution.[29] The authorisation was also justified by the fact that the Bill of Rights was heavily influenced by the constitutions of other countries, including those of Canada, Germany and Namibia.[30]

The consideration of international or foreign law for purposes of comparative interpretation by a South African court under section 39(1)(b) and (c) does, however, not make foreign law binding in South Africa. What must be enforced are rights contained in the Bill of Rights. In *S v Makwanyane*, the Constitutional Court stated 'we can derive assistance from public international law and foreign case law, but we are in no way bound to follow it'.[31] With regard to legislation giving effect to section 25, international law also fulfils the role of an interpretative aid under section 233 in respect of all forms of South African legislation, in the sense that a court must prefer any reasonable interpretation of legislation that is consistent with international law. The interpretative process could, however, result in international law rules and principles being adopted into the domestic law of South Africa.[32]

In conclusion, international law played a prominent role in the struggle to abolish apartheid and dismantle its grip on South Africa. As a result, it occupies a special place in the South African legal system, since the transition to democracy as evidenced by various provisions of the Constitution. Given this, international law cannot be regarded as a completely separate or irrelevant legal system that the South African government can ignore to suit its political

[25] T Moorhead 'European Union Law as International Law' (2012) 5 *European Journal of Legal Studies* 126–143.

[26] GE Devenish *A Commentary on the South African Bill of Rights* (2nd Ed, 1999) 620.

[27] *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC) at paras 45–48.

[28] Devenish (note 26 above) at 1, 202.

[29] A Lollini 'Legal Argumentation Based on Foreign Law: An Example from Case Law of the South African Constitutional Court' (2007) 3 *Utrecht Law Review* 60, 65.

[30] De Ville (note 8 above) at 241.

[31] *Makwanyane* (note 22 above) at para 35. See also *Glenister* (note 15 above) at para 39.

[32] G Ferreira & A Ferreira-Snyman 'The Incorporation of Public International Law into Municipal Law and Regional Law Against the Background of the Dichotomy between Monism and Dualism' (2017) 17 *Potchefstroom Electronic Law Journal* 1471, 1447.

interests. Instead, the government is required to seriously consider its international (and regional) commitments when it exercises its sovereignty. This is an international law principle that will be discussed more fully below.

To understand the amendment process and the final suggested wording, what follows is an oversight of how section 25 works. This will enable a more nuanced discussion on the leeway and limits in international law. The discussion will explain a single system of law as a framework in which section 25 should be understood, first, before moving to the contents of section 25.

III COMPENSATION FOR EXPROPRIATION

A The larger constitutional framework

The Constitution declares itself the supreme law of the Republic,[33] calling for all law and conduct to be consistent with it. It therefore provides a framework for conversations around compensation for expropriation. By declaring it supreme law, the Constitution established one system of law,[34] there to develop an 'algorithm of post-apartheid South African law'.[35] In this thinking, problems do not have quick fixes, and the answers are not simple or easy. Rather, every change should be approached tentatively and requires a great deal of reflection when things do not go according to plan. We are arguably at such a moment regarding compensation for expropriation, which forms part of the complexity of land reform.

The Constitution brought a single-system-of-law, shaped by it.[36] It requires not only those existing rights be protected, but also certain reform measures. When it comes to transforming matters, the Constitution requires that the existing rights and the reforms promote the spirit, purport and objects of the Bill of Rights, in line with section 39(2). Existing rights can only be protected insofar as they are consistent with the Bill of Rights.[37] If the protection of existing rights conflicts with reformation, then the Constitution requires balancing these rights. This is also true for property.

In *Port Elizabeth Municipality v Various Occupiers*[38] the court noted:

> In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. […] The judicial function in these circumstances is […] to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.[39]

This shows that protection of vested rights and transformation-orientated reforms do not have to stand opposite each other, but rather that respecting existing rights and promoting transformation are interlinked and 'form part of one single legal constitutional goal'.[40]

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[33] Constitution s 2.

[34] See part IIIB below. This is based on *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC) at para 44.

[35] AJ van der Walt *Property and Constitution* (2012) 23–24.

[36] Ibid at 20, quoting *Pharmaceutical Manufacturers* (note 34 above) at para 44.

[37] Van der Walt (note 35 above) at 21.

[38] [2004] ZACC 7, 2005 (1) SA 217 (CC).

[39] Ibid at para 23.

[40] Van der Walt (note 35 above) at 22.

What is important about this understanding of property law is that vested rights are not protected by private law or new rights promoted by the Constitution. The private law notion of property (and therefore ownership) is part and parcel of this new constitutional concept of 'property'.[41] The law, such as pre-1994 legislation including the Expropriation Act 63 of 1975 and common law that protect vested rights are still valid, but only insofar as they are reconcilable with the Constitution.[42]

One of the effects of the Constitution on existing private property is that

> property rights that were acquired prior to the new constitutional dispensation may be subjected legitimately to new or more stringent restrictions under the Constitution, even to the extent that the scope and nature of the private right may be affected quite dramatically.[43]

This has important implications for the payment of compensation for expropriation and speaks to the dismantling of hierarchies of rights where ownership will always trump others. Property rights can be limited in circumstances also provided for in the Constitution to attain our constitutional goals. However, this also implies that any limitation of property rights must be carried out in terms of the Constitution.

The Constitution requires a move away from the common-law reasoning that ownership is the most complete real right a person can have in a thing, which requires as a rule full market value compensation at expropriation. The Constitution requires a goal-orientated approach with a purposive and contextual logic. The determination and the payment of compensation are regarded as part of a larger constitutional and democratic goal. Constitutional reasoning requires us to start with the Constitution and interpret the law, including the payment of compensation, through the lens of the Constitution. That lens is the constitutional compensation standard of 'just and equitable'.

The bulk of justifications for the payment of compensation[44] place 'property' in the centre of the inquiry, without focussing much on the competing claims. Despite the focus

[41] Ibid at 120.

[42] Ibid at 121.

[43] Ibid at 125.

[44] This process of moving away from the pre-constitutional reasoning has been slow, and case law seems to be stuck in the pre-constitutional rationale for the payment of compensation. In *Du Toit v Minister van Transport* [2005] ZACC 9, 2006 (1) SA 297 (CC) at para 22 it was held that the expropriatee must be put in the same position he would have been in, but for the expropriation. In *City of Cape Town v Helderberg Park Development (Pty) Ltd* [2008] ZASCA 79, 2007 (1) SA 1 (SCA) at para 21 it was held that an owner may not be better or worse off because of the expropriation and that a monetary award must restore the *status quo ante. Khumalo v Potgieter* [2002] 2 All SA, 2002 (2) All SA 456 (LCC) at para 22 stated that compensation is paid to ensure that the expropriatee is justly and equitably compensated for his loss, while *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood* 2001 (1) SA 1030 (LCC) at para 15 ruled that the expropriatee is compensated for the loss of the property. This sentiment was echoed in *Ex Parte Former Highlands Residents* [2000] 2 All SA 26 (LCC) at paras 34–35 where it was found that the interest of the expropriatee requires full indemnity when expropriated, and therefore it is possible to pay *more* than market value. In *Haakdoornbult Boerdery CC v Mphela* [2008] ZACC 5, 2007 (5) SA 596 (SCA) at para 48 the court ruled that for compensation to be fair it must recompense. To the court, compensation must put the dispossessed, insofar as money can do it, in the same position the person would have been in had the land not been taken. This compensation might not always be equal to market value, but might be something *more*: '[b]ecause of important structural and politico-cultural reasons indigenous people suffer disproportionately when displaced and Western concepts of expropriation and compensation are not always suitable when dealing with community-held tribal land. A wider range of socially relevant factors should consequently be taken into account, such as resettlement costs and, in appropriate circumstances, solace for emotional distress.' More recently, the court in *Mhlanganisweni Community*

on recompensing the individual, the central principle should remain that the amount of compensation should reflect an equitable balance between the public interest and the interests of those affected. This balance must be established with reference to the relevant circumstances. It should focus on democratic ideals, rather than the property itself, and without disregarding the role that property rights can play in achieving democratic ideals. It requires a careful balancing of interests to determine what is just and equitable.

This requires looking at each case individually with regard to the individual property interest that might, or might not, stem from the pre-constitutional era and the constitutional framework with its legitimate reform efforts. A decision on what is just and equitable cannot be made in the abstract without due regard to the context of the expropriation. However, it should take into account the broader scheme of the Constitution.[45] It is within this broader scheme that the specific rules operate. With this broader scheme and balancing competing interests in mind, the specific rules will be discussed next.

B Section 25

Section 25 of the Constitution (the 'property clause') protects holders of rights in property (section 25(1)–(3)) from arbitrary and unlawful state interference and initiates reformist imperatives (section 25(5)–(8)). In the one-system-of-law view, the two parts do not stand opposite each other, but form part of the same constitutional goal, and should be read together.

Section 25(1) requires that a deprivation occurs in terms of a law of general application and that no law may permit arbitrary deprivation.[46] Deprivation does not require compensation. Section 25(2) allows for expropriation in terms of the law of general application, for a public purpose (or in the public interest, most notably reform interests) and subject to compensation.[47]

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v Minister of Rural Development and Land Reform [2012] ZALCC 7 relied on several foreign dicta to show that the purpose of compensation is to recompense. The court regarded market value as an important circumstance to take into account when determining compensation. In *Florence v Government of the Republic of South Africa* [2014] ZACC 22, 2014 (6) SA 456 (CC) the Constitutional Court, in the context of a restitution claim, opted for the 'generous construction [rather than] a merely textual or legalistic one to afford claimants the fullest possible protection of their constitutional guarantees'. The focus shifted from recompensing to constitutional guarantees. When calculating compensation, the court warned that the burden on the fiscus was an important consideration, as compensation claims are paid from taxpayer's money and therefore need to advance a public purpose. The court acknowledged the proportionality, or the balance, that is required between the interest of the individual and that of the public.

45 Van der Walt (note 35 above) at 509.

46 For a discussion on deprivation see G Muller, R Brits, Z Boggenpoel & M Pienaar *Silberberg and Schoeman's The Law of Property* (6th Ed, 2019) 626. There are various court cases that deal with what a deprivation entails, see for instance *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5, 2002 (4) SA 768 (CC)('*FNB*'); *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng, (Kwazulu-Natal Law Society & Msunduzi Municipality as Amici Curiae)* [2004] ZACC 9, 2005 (1) SA 530 (CC), and the note AJ van der Walt 'Retreating from the FNB Arbitrariness Test Already' *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*' (2005) 122(1) *South African Law Journal* 75; *Reflect-all 1025cc v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* [2009] ZACC 24, 2009 (6) SA 391 (CC); *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* [2010] ZACC 20, 2011 (1) SA 293 (CC).

47 Muller et al (note 46 above) at 647. Van der Walt (note 35 above) at chapter 4.

The reformist imperatives in section 25(5)–(8) allow the state to infringe on existing property rights.[48] The power to infringe on private property rights (as warranted by section 25(1) and (2)) developed from a specific historical context in South Africa and seeks to redress past injustices. This historical context and redress should be kept in mind when interpreting the property clause.

1 *What is property?*

The Constitution itself does not define property. In the *FNB* case the courts regarded it 'judicially unwise to attempt a comprehensive definition of property for purposes of section 25'.[49] For purposes of the Constitution, the definition of property is therefore wide. This is now echoed in the Expropriation Bill[50] that states that the definition of 'property' is 'property contemplated in section 25 of the Constitution'. Where property is limited to land in the Bill, it is indicated as such. In terms of the Constitution, property should also be understood in its specific historical land social framework.[51] The current conversation surrounding the amendment of the Constitution focuses mainly on land, presumably because the motion adopted by Parliament has a narrow focus on land.[52] The article will therefore be mostly limited to land as property.

2 *Deprivation*

Section 25(1) prohibits the state from depriving property except in terms of a law of general application. No law may permit arbitrary deprivation of property. Deprivation involves 'sacrifices that holders or private property rights may have to make without compensation'.[53]

Deprivation refers to uncompensated, regulatory restrictions on the use, enjoyment and exploitation of property.[54] This is the regulatory or the police power of the state. Most interferences will lead to some loss in the property's value, and some interferences can even lead to substantial loss.

Deprivation will not attract compensation if it serves important public purposes in protecting public health and safety, when landowners are more or less equally affected and when the benefits are reciprocal.[55] When deprivations are too burdensome on the property holder, either the Act authorising the deprivation or the act of deprivation itself may be declared unconstitutional.[56] In South Africa, we do not compensate for a deprivation.[57]

[48] E du Plessis *Compensation for Expropriation under the Constitution* (LLD thesis, University of Stellenbosch 2009) 78.

[49] *FNB* (note 46 above) at para 51. See also Muller et al (note 46 above) at 617 for a more thorough discussion on this.

[50] Expropriation Bill (note 9 above).

[51] *Reflect-all* (note 46 above) at para 32.

[52] See discussion at part IE.

[53] *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9, 2013 (4) SA 1 (CC)('*AgriSA*') at para 48.

[54] Van der Walt (note 35 above) at 192. See also Muller et al (note 46 above) at 622.

[55] Van der Walt ibid at 197.

[56] Ibid.

[57] H Mostert 'Does German Law Still Matter? A Few Remarks about the Relevance of Foreign Law in General and German Law in Particular in South African Legal Development with Regard to the Issue of Constructive Expropriation' (2002) 3(9) *German Law Journal*; AJ van der Walt 'Moving Towards Recognition of Constructive Expropriation' (2002) 65 *Journal of Contemporary Roman Dutch Law* 459; CJ Roederer 'Remedies for Regulatory

The *AgriSA* case[58] dealt with whether certain deprivations in rights in specific resources caused by a regime change amounted to an expropriation – a sort of no-person's land between deprivation and expropriation. This will be discussed in detail in the next paragraph. The matter is important, because if an interference is characterised as deprivation and not an expropriation, then there is no duty to compensation and does not as such fall in the ambit of the international law analysis.

3 *Regime changes that are deprivations not expropriations: when certain forms of property are placed under the custodianship of the state*

An aspect that often comes under the spotlight, is whether a state must compensate property owners affected by regime changes in property. Regime changes often happen in the context of reforms. For instance, section 27(2) of the Constitution places a duty on the state to ensure access to water. Section 24 ensures a right to a healthy environment. Section 25(4) speaks of land reform and of other natural resources. There is therefore a duty on the state to fulfil these rights. Added to this is section 25(8) that states that sections 25(1)–(3) may not impede the state from fulfilling these obligations. One can therefore summarise that the reforms will be either reform of natural resources (for conservation and management), or for reasons of human dignity and equality (a distributive aspect).[59] In South Africa, these regime changes took place mainly in the context of water[60] and mineral rights.[61] In these two instances the state promulgated new legislation that replaced the previous regime with a comprehensive and strict regulatory regime, transforming access to the resources from a right-based, to a regulation based system.[62] The question that is relevant for purposes of this article is when such a regime change will be permissible in the (current) constitutional framework, and if and when compensation will be due. To answer this question, a quick overview of the water regime.[63]

The Water Services Act 108 of 1997 and the National Water Act 36 of 1998 brought about institutional regime change in the water law. The Water Services Act sets up a regulatory framework with norms and standards for water service providers. In the preamble, the state is

Takings (Constructive Expropriations), Deprivations, Expropriations or Custodianship in South Africa and the USA' (2016) 2 *Howard Human & Civil Rights Law Review* 87; H Mostert 'The Distinction Between Deprivations and Expropriations and the Future of the 'Doctrine'of Constructive Expropriation in South Africa' (2003) 19(4) *South African Journal on Human Rights* 567. For a discussion on the possibility of compensating for an excessive, but otherwise lawful deprivation, see K Bezuidenhout *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD thesis, Stellenbosch University 2015).

58 *Agri SA* (note 53 above).

59 Van der Walt (note 35 above).

60 See also GJ Pienaar & E van der Schyff 'The Reform of Water Rights in South Africa' (2007) 3 *Law Environmental and Development Journal* 179; G Viljoen 'Critical Perspectives on South Africa's Groundwater Law: Established Practice and the Novel Concept of Public Trusteeship' (2020) 38(4) *Journal of Energy & Natural Resources Law* 391; G Viljoen 'The Transformed Property Regime of the National Water Act 36 of 1998: Comparative Reflections on South Africa's Water in the 'Public Space'' (2019) 52 *Verfassung und Recht in Übersee* 172; G Viljoen 'South Africa's Water Crisis: The Idea of Property as Both a Cause and Solution' (2017) 21 *Law, Democracy & Development* 176.

61 For instance E van der Schyff 'Constructive Appropriation – The Key to Constructive Expropriation? Guidelines from Canada' (2007) 40 *Comparative and International Law Journal of Southern Africa* 306.

62 Van der Walt (note 35 above).

63 Since this is discussed in detail in Van der Walt (note 35 above), it is only summarized here in order to explain how it works for purposes of this article.

the custodian of the nation's water resources. However, the National Water Act had a much more significant impact on water rights, where the old system of water rights was replaced with a new regime. Before the Act, water rights were regulated by common law and the 1956 Water Act, where it was possible to hold private property rights (including ownership) of water. The 1956 Act also distinguished between private and public water. In both instances, but more so in the private ownership instance, landowners enjoyed privileged access to water resources. It is this inequality that the Water Act of 1998 tried to address[64] by abolishing private ownership of water entirely and replacing it with use rights. This means that the acquisition, allocation and enjoyment of these rights are all subject to the Act and must be exercised in terms of the Act. Owners who were individually affected by this regime change are entitled in terms of section 22(6) to claim compensation for financial loss. In terms of property law, the question is whether such a regime change is a mere deprivation or if it amounts to a compensable expropriation. While the loss in section 22 is framed as compensation for financial loss, the question is whether this should be framed as compensation for expropriation. As will be shown later, the answer is probably no.

Section 24 of the Constitution places a similar obligation on the state regarding 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.[65] It is within this framework that the Mineral and Petroleum Resources Development Act 28 of 2002 was promulgated.

Mineral and mining rights have previously been held to be private property rights and, as such, protected by the Constitution.[66] In 2002, the extensively regulated scheme based on private ownership was replaced by a licence-based regime.[67] This implied that mineral and petroleum resources were declared to be part of the common heritage of all South Africans, and that the state is the custodian of the minerals to the benefit of all. It regulates, controls, and administers the issuing of these rights, but it does not reserve these rights for the state itself.[68] The state also does not own the rights. However, some commentators think that the effect is an implicit reservation of these rights to the state.[69]

The question in this regard is whether such a change is a deprivation or an expropriation of existing rights that can therefore be constitutionally challenged. The old system of private property holdings was replaced by a new system that recognised existing rights and interests and opened access to the same rights to others. It also subjected the new rights to more stringent regulation.[70] In these cases, there are institutional changes, a shift of emphasis from private

[64] The Act therefore brought about an overarching regime change to achieve the policy goals of control over and access to the use of water, in order to fulfil the state's constitutional obligation with regard to reform (in ss 25(8) and 27(1)(b)).

[65] Constitution s 24(a)(iii). See Van der Walt (note 35 above) at 403.

[66] B Hoops 'Expropriation without Compensation: A Yawning Gap in the Justification of Expropriation?' (2019) 136 *South African Law Journal* 261, 274.

[67] Van der Walt (note 35 above) at 404.

[68] Ibid.

[69] PJ Badenhorst & H Mostert 'Revisiting the Transitional Arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the Constitutional Property Clause: An Analysis in Two Parts. Part 1: Nature and Content of Rights Acknowledged by the Revised Transitional Provisions' (2003) 14 *Stellenbosch Law Review* 377, 383.

[70] Van der Walt (note 35 above) at 411.

property to state regulation that impact individual cases. The question is then raised as to whether a regime change on an institutional level is justified and legitimate.[71]

Institutionally, the question is whether one can abolish a whole system of existing private rights and replace it with a state-controlled system of rights in terms of the Constitution. Since the latter authorises, even orders, transformation of the old system of inequality and injustice, in line with the constitutional goals of ensuring equal sustainable use of scarce natural resources, such a change will be permissible as long as it happens in a manner that the Constitution permits. This includes that the scheme must be 'rationally legitimate and procedurally just'.[72] The underlying policy reasons that act as justifications for such a change then come into focus.

Viewed from a purely institutional level, the abolition of private property rights in a natural resource is not per definition unconstitutional if the reason for doing so is legitimate and convincing.[73] This will not amount to an expropriation. The legitimacy of such a change will depend on procedural-fairness provisions and whether compensation is provided for individual losses. In summary, an institutional change of a specific property regime (such as minerals or water) might be constitutional if (1) there are sound and legitimate policy reasons for such a change, (2) the Constitution or a law authorises it and (3) if it is implemented in a way that does not conflict with the principles of natural justice or just administrative action. The effect of such a regime change is another inquiry.[74]

Even if such a regime change is in line with the Constitution, it can still have disproportional effects on individuals. If the regulatory scheme unfairly places a disproportional burden on one individual or a small group of people, while not providing for some form of compensation (whether for damages or framed in terms of expropriation language), it will be unconstitutional in South Africa, since we do not compensate regulatory interferences.[75] In line with the state's normal regulatory powers, this regulation needs to be implemented for purposes of effecting control over scares and important or dangerous property or resources, and needs to be applied fairly and equally.[76]

Legislation that results in a regime change of a particular resource (such as water) should therefore pass Constitutional muster as a deprivation that does not require compensation if it sets out and delineates the rights appropriately, enjoys a legitimate aim in line with legislation and the Constitution that does not conflict with the principles of natural justice or just administrative action, while it provides for the payment of compensation (financial loss or otherwise) if it affects individuals harshly. In this sense, it does not really trigger the duty to compensate under international law.

[71] Ibid. On the individual level this raises questions about the impact that such a regime change has on individual property rights that might be lost or weaker as a result of such a change. This is an important distinction, as Van der Walt (note 35 above) at 404 explains: 'Constitutionally, the legitimacy and validity questions raised by the two issues are entirely different. Criticism of the institutional reform cannot be based on individual injustices, nor can criticism of individual injustices be based on rejection of the systemic, institutional reform.'

[72] Ibid at 413.

[73] Ibid at 416.

[74] Ibid at 418.

[75] Ibid at 419.

[76] Ibid at 421.

4 *Expropriation*

Expropriation is an original acquisition method, meaning it is brought about by unilateral state action and does not require the owner's cooperation or consent. It involves a loss of property for the former owner, whether it be total or partial, permanent or temporary. Expropriation, unlike deprivation, usually targets a specific property for the benefit of the public.[77]

Expropriation mainly implies that the state acquires something.[78] If it is carried out for a public purpose or in the public interest, the consequence is that compensation is due.[79] What sets an expropriation apart from a mere deprivation (including a confiscation) is that compensation must be paid. Compensation must be 'just and equitable'. Determining that which is 'just and equitable' is a contextual question that will depend on the facts relevant to a particular circumstance.

When it comes to evaluating the validity of an expropriation, it is important to distinguish between the validity of the expropriation and its consequences.[80] An expropriation is valid if it is carried out in terms of authorising legislation and undertaken for a public purpose or in the public interest. The consequence is that compensation is due. It can be argued that this consequence, or duty to pay compensation, is an integral part of expropriation.[81]

In the absence of authorising legislation, expropriation will not be valid. Since expropriation is such a great inference with rights, there needs to be an explicit authorisation for an expropriation and a clear indication of the public purpose that the expropriation aims to serve.

Nevertheless, the validity of the expropriation cannot be faulted purely if the compensation is not sufficient according to the owner. The validity of the expropriation can only be faulted if it is not authorised in legislation, if it does not comply with the procedures or if it is not in the public interest or for a public purpose. An owner who is dissatisfied with the amount of compensation is free to approach the court for relief in terms of section 25(2)(b) of the Constitution.

Expropriation is done in terms of a statute that authorises the expropriation, coupled with an Expropriation Act that sets out the procedures and method to calculate compensation. In land reform contexts, it is possible to transfer the land to a private beneficiary.[82] In this context, the following legislative measures provide explicitly for expropriation for land reform and housing purposes:

- Sections 10, 10A and 12 of the Land Reform: Provision of Land and Assistance Act 126 of 1993;
- Section 26 of the Extension of Security of tenure Act 62 of 1997;

[77] Ibid at 197.

[78] This is also reflected in the definition of an expropriation in the Expropriation Bill of 2020 (note 9 above) which clarifies that expropriation means an acquisition of property by the state.

[79] Slade (note 2 above).

[80] Ibid.

[81] D Iyer 'Is the Determination of Compensation a Pre-requisite for the Constitutional Validity of Expropriation? *Haffajee NO & Others v Ethekwini Municipality & Others*' (2012) 2 *Speculum Juris* 66.

[82] In the land reform context, it is not clear whether the property must first transfer to the state (as in all other expropriations), and then the state transfers it to the beneficiary, or whether it is possible to transfer the property directly from one private person to another, provided that it is done in terms of legislation. The first is legally purer, while the latter will be more practical. See BV Slade 'Public Purpose or Public Interest and Third Party Transfers' (2014) 17 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 167–207; B Slade *The Justification of Expropriation for Economic Development* (LLD thesis, Stellenbosch University 2012).

- Sections 22, 35, 42A, 42C and 42E of the Restitution of Land Rights Act 22 of 1994;
- Section 3 of the Land Reform (Labour Tenants) Act 3 of 1996;
- Section 9 of the Housing Act 107 of 1997;
- Clause 26 of the Regulation of Agricultural Land Holdings Bill of 2017.

Expropriation of property for land reform purposes, authorised by legislation, will be valid in terms of the Constitution's requirements.[83] However, section 25(8) specifically states that

> [n]o provision in this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that the departure of the provisions of this section is in accordance with the provisions of section 36(1).

This means that, in cases of land reform, deprivations, expropriations and the determination of compensation (or the compensation requirement itself), will warrant a more tolerant review in terms of the provisions in section 25(8). For instance, a deprivation in terms of section 25(1) that might ordinarily be arbitrary, might be subject to lesser scrutiny. However, it must still be reasonable and justifiable in terms of section 36(1). This brings into focus the importance of section 36(1) and its interaction with section 25.

In terms of section 25(8), the state must be able to show that sections 25(1) and (2) indeed impede land reform. This might be challenging in light of the damning Special Investigation Unit report[84] showing large scale corruption as well as the High-Level Panel report[85] that explicitly states that sections 25(1) and (2) are not impediments and various other reports[86] and court cases[87] that provide clear diagnoses of impediments to land reform.

5 *Compensation*

Section 25(2)(b) sets out the requirement that compensation is due upon expropriation. Section 25(3) determines that the compensation amount and the time and manner of payment must be just and equitable at the time of expropriation,[88] striking an equitable balance between the person whose property is expropriated and public interest.[89] All relevant circumstances must be considered, including the factors listed in section 25(3)(a)–(e). The *Harvey* case[90] ruled that compensation need not be determined at expropriation, but can be determined afterwards if it

[83] See various articles on this topic, such as S Viljoen 'Expropriation Without Compensation: Principled Decision-Making Instead of Arbitrariness in the Land Reform Context (Part 1)' (2020) 1 *Journal of South African Law* 35; S Viljoen 'Expropriation Without Compensation: Principled Decision-Making Instead of Arbitrariness in the Land Reform Context (Part 2)' (2020) 2 *Journal of South African Law* 259; Hoops (note 66 above).

[84] Special Investigation Unit *Report in Respect of the National Department of Rural Development and Land Reform* (2018).

[85] *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017), available at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf

[86] Genesis Analytics *Implementation evaluation of the Restitution Programme* (2014).

[87] *Mazizini Community v Minister for Rural Development and Land Reform* [2018] ZALCC 5.

[88] A Gildenhuys *Onteieningsreg* (2nd Ed, 2001) 163. Procedurally, this has been construed to mean that the plaintiff who relies on the Constitution must aver it the particulars of claims, as in *De Villiers v Stadsraad van Mamelodi* 1995 (4) SA 347 (T) 35.

[89] Constitution s 25(3).

[90] *Harvey v Umhlatuze Municipality* [2010] ZAKZPHC 86, 2011 (1) SA 601 (KZP).

is just and equitable to carry this out.[91] The compensation can be agreed to by those affected, or decided or approved by a court. When there is no agreement, the Constitution provides principles and factors in section 25(3) for calculating compensation.

The central principle is that the amount of compensation must reflect an equitable balance between the public interest and the interests of those affected. This balance must be established regarding the relevant circumstances including, but not restricted to, the list of factors in section 25(3). This requires contemplating each case individually with regard to the individual property interest that might stem from the pre-constitutional era and the constitutional framework and its legitimate land reform efforts. As indicated, a decision on what is just and equitable cannot be made in the abstract without due regard to the context of the expropriation. When it comes to determining compensation, due regard should be paid to the broader scheme of the Constitution.[92]

The latter aims to balance the public interest with the interest of those affected (the individual), and this might not always entail the payment of market value. Care should therefore be taken to ensure that the Expropriation Act[93] or the new bill[94] is interpreted in line with the Constitution, with caution so as to avoid over-emphasising market value because it is only one of the five factors in an open list to be taken into account when determining compensation.[95]

C Limitations on expropriation powers

Constitutional rights are not absolute, and can be justifiably limited, for instance around social concerns. The specific criteria that a limitation must comply with are set out in section 36(1) of the Constitution. If it is found that there indeed has been an infringement of a right (step one), the state moves to ask whether such an infringement can be justified in terms of section 36 (step two).[96] Should there be no payment of 'just and equitable' compensation, this would be a violation of section 25(2). Such a violation will only be possible if it complies with section 36(1).[97]

There is no clear judicial guideline in South Africa on how section 25, section 36 and administrative law (section 33) will influence the rationality of the expropriation itself – in other words, how expropriation will be judged as furthering an important reform purpose in terms of section 25(8) within the confines of the laws.[98] The reasonableness test in section 36

[91] In terms of clause 17(1) of the Expropriation Bill, the holder is entitled to payment of compensation 'by no later than the date on which the right to possession passes'. Clause 17(3), however, makes it clear that a dispute about the payment of compensation will not prevent the passing of the right to possession.

[92] Van der Walt (note 35 above) at 471.

[93] Expropriation Act 63 of 1975.

[94] Expropriation Bill (note 9 above) 23-20.

[95] Section 36 states: 'The rights in the Bill or Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the following: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and the extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.' This is a general limitation clause that applies to all the sections in the Bill of Rights. Our courts follow a two-step approach in determining whether a limitation on rights is justifiable. See Hoops (note 66 above).

[96] I Currie & J De Waal *The Bill of Rights Handbook* (6th Ed, 2013) 153.

[97] Ibid at 562.

[98] Hoops (note 66 above). See also Viljoen (note 83 above).

requires a proportionality analysis, balancing the relative importance of the project against the relative importance of the expropriated right.[99] In terms of section 33 and PAJA, the reasonableness standard is not fixed. The severity of the infringement will determine whether the inquiry involves a rationality or a proportionality requirement. Since expropriation is a severe limitation of a person's right, the test will probably be one of proportionality.[100] Suppose courts review a decision made by the expropriating authority in this regard. In that case, it will examine whether the decision crosses the boundaries of what can be regarded as reasonable. It is during this reasonableness inquiry that the payment of compensation can play a role.[101]

For example, it is possible that the absence of compensation, or substantially reduced compensation, will influence such a weighing process. If the owner's interest is substantially affected, a compelling reason or justification for the land reform measure is required. This is the case regardless of an amendment to section 25, since the administrative action of expropriation will still have to comply with PAJA and section 33 and the general limitation clause of section 36(1).

What does become important here is that an infringement of section 25(2) – in the case of land reform purposes, for example – when balanced, can be rescued from being too intrusive based on the compensation paid. If the compensation is zero, or absent, then the infringement on section 25(2) will be extensive, which will require the public interest in that specific land reform project to be significant. This is subject to the provisions of section 36 and section 33, which deals with just administrative action.

D Expropriation Bill

The Expropriation Bill 23 of 2020 will bring expropriation practices in line with the Constitution and the demands of administrative justice. The Bill in this sense ties the strings together and streamlines the laws applicable to expropriation. The legislature has been trying for almost 12 years to come up with expropriation legislation that is in line with section 25 of the Constitution, and on which some form of consensus could be reached.

For purposes of our discussion, it should be noted that clauses 12(3) and (4), inserted in the 2018 version of the Bill, were changed slightly, and the 2020 Bill now provides the following:

> (3) It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to—
>
> (a) where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;
>
> (b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;
>
> (c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;
>
> (d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and

[99] Hoops ibid.
[100] Ibid.
[101] Ibid.

(e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property.

(4) When a court or arbitrator determines the amount of compensation in terms of section 23 of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996), it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances.

There is, therefore, no large-scale or blanket expropriation of land without foreseeing compensation in the Expropriation Bill. As will be clarified below, the Bill refers to 'nil' and not 'without' compensation, which means that the obligation to pay the compensation is retained, but that it might be that in some instance paying R0 is 'just and equitable'.

E Constitutional amendment process

1 *54th Congress of the ANC: Expropriation without compensation on the table*

At the 54th Congress of the ANC in December 2017,[102] the party resolved to start using land reform and rural development as part of the programme of radical socio-economic transformation. To this end, the expropriation of land without compensation is envisioned as one of the key mechanisms available for the government to give effect to land reform and redistribution.

While directly stating its intention to expropriate without compensation, the ANC cautions that, with a view to determining implementation mechanisms, it must be ensured that future investment in the economy is not undermined; agricultural production and food security are not damaged; and harm is not caused to other sectors of the economy.

The document states that concrete interventions that effect land reform should focus on government-owned land and should be governed by the ANC's 'Ready to Govern' policy document,[103] which prioritises the redistribution of vacant, unused and under-utilised state land, as well as land held for speculation and hopelessly indebted land.[104] Acceleration of the programme must be done in an orderly manner, and action must be taken against people who occupy land unlawfully due to so-called 'land grabs'.

In addition, the report states that land reform must have clear targets and timeframes and must be guided by sound legal and economic principles, and all of this must happen within the country's overall objectives of job creation and investment.

In the land reform process measures such as land tax, support for black farmers and preferential allocation of black farmers' water rights and infrastructure provisions should be in place. Training and support should be part and parcel of effective programmes. Land reform must enhance and maintain food security and empower local governments to advance land reform in their areas. Title deeds should be rolled out to black South Africans, and control and administration of areas under communal land tenure should be democratised. This indicates that the ANC post-acquisition policy does not boil down to custodianship or nationalisation.

[102] African National Congress *54th National Conference: Report and Resolutions* (2017), available at https://cisp.cachefly.net/assets/articles/attachments/73640_54th_national_conference_report.pdf

[103] African National Congress *Ready to Govern: ANC Policy Guidelines for a Democratic Africa* (1992), available at https://www.anc1912.org.za/policy-documents-1992-ready-to-govern-anc-policy-guidelines-for-a-democratic-south-africa/

[104] Also included Expropriation Bill (note 9 above) cl 12(3).

In the conference, in summary, the ANC foresees expropriation of land without compensation as one of the mechanisms for government to give effect to land reform with various economic and legal caveats.

2 *Motion adopted in the National Assembly, 27 February 2018*

After the ANC's conference, the Economic Freedom Fighters (EFF) tabled a motion in Parliament in February 2018 calling for expropriation without compensation to enable the state to become 'the custodian of all land'. The ANC amended this motion drastically[105] to include the economic caveats of their 54th conference. The EFF's proposal for custodianship (sometimes also referred to as nationalisation) was rejected. The motion adopted is in line with the ANC's 54th Conference resolution.

This motion became the work of the Joint Constitutional Review Committee (CRC), whose mandate was to

> [r]eview Section 25 of the Constitution and other clauses where necessary, to make it possible for the state to expropriate land, in the public interest without compensation, and propose the necessary constitutional amendments where necessary. In doing so, the Committee is expected to engage in a public participation process in order to get the views of all stakeholders about the necessity of, and mechanisms for expropriating land without compensation.

3 *Joint Constitutional Review Committee process*

To fulfil its mandate, the CRC engaged in an extensive public participation process in which it was guided by whether it was necessary, and the mechanisms that would be needed, for expropriating land without compensation. The committee found that the majority of people were in favour of a constitutional amendment.

In the final report,[106] the committee noted two views regarding what is permissible in terms of the Constitution. These two views are listed in the final document of the CRC. The first view states that, in certain limited cases, weighing the factors can result in a compensation

[105] The motion is quoted in full here, with the parts that the ANC deleted, and the parts that they inserted in italics. (1) notes that South Africa has a unique history of brutal dispossession of land from black people by the settler colonial white minority; (2) further notes that land dispossession left an indelible mark on the social, political and economic landscape of the country, and has helped design a society based on exploitation of black people and sustenance of white domination; (3) acknowledges that the African majority was only confined to 13% of the land in South Africa while whites owned 87% at the end of the apartheid regime in 1994; (4) further acknowledges that the current land reform programme has been fraught with difficulties since its inception in 1994, and that the pace of land reform has been slow with only 8% of the land transferred back to black people since 1994; (5) acknowledges that the recent land audit claims that black people own less than 2% of rural land, and less than 7% of urban land; (6) *recognises that the current policy instruments, including the willing buyer willing seller policy, and other provisions of section 25 of the Constitution may be hindering effective land reform;* (7) notes that in his State of the Nation Address, President Cyril Ramaphosa *in recognising the original sin of land dispossession, made a commitment that Government would continue the land reform programme that entails expropriation of land without compensation, making use of all mechanisms at the disposal of the state, implemented in a manner that increases agricultural production, improve food security and ensures that the land is returned to those from whom it was taken under colonialism and apartheid and undertake a process of consultation to determine the modalities of the governing party resolution,* (8) further notes that any amendment to the Constitution to allow for land expropriation without compensation must go through a parliamentary process as Parliament is the only institution that can amend the Constitution; and (9) establishes an ad hoc committee, in terms of Rule 253, the committee to – *with the concurrence of the NCOP instructs the Constitutional Review Committee to* (a) *review section 25 of the Constitution and other clauses where necessary*; (b) propose the necessary constitutional amendments *where applicable* with regards to the kind of future land tenure regime needed (c) report to the Assembly by no later than 30 August 2018.

[106] *Report of the Joint Constitutional Review Committee on the Possible Review of Section 25 of the Constitution* (2018), available at https://pmg.org.za/tabled-committee-report/3607/.

amount of R0. This is already foreseeable within the Constitution under certain circumstances. The state would have to show why R0 is just and equitable in the specific case. It is also subject to review by the courts. However, it does not negate the duty of the state to pay compensation. An owner can still argue that R0 is not just and equitable. The other view simply states that the Constitution implies that land can be expropriated without compensation, but that this must be made explicit.

The problem is that these two views are not the same. The first view maintains the framework of section 25 and the Constitution as a whole, which requires a balancing of factors and interests. It leaves the possibility that, in some circumstances, R0 or nominal compensation is payable. Courts will always test this restriction against the general limitation clause of the Constitution (section 36).[107] It still respects the 'just and equitable' standard of compensation that our Constitution requires, and does amount to a constitutional interpretation of the provision.

The second view takes away the obligation to pay compensation. 'Without compensation' changes the legal nature of expropriation to either deprivation or confiscation (depending on the facts), and it relieves the state of the duty to compensate. An owner, therefore, does not have the option to argue that compensation must be paid.

Arguments that state that the first interpretation is not a possible interpretation and that therefore the Constitution should be changed might fall outside the committee's mandate, because it goes further than making the implicit explicit. It changes the meaning of the section. This, however, informed the mandate of the Ad Hoc Committee to Initiate and Introduce Legislation amending section 25 of the Constitution, without clarity of what it is that is implicit in the Constitution. If the second interpretation is followed, constitutional problems potentially arise in terms of international law, as we will see later.

The Committee's recommendations were as follows.

> Having taken all these into account, the Joint constitutional review Committee recommends:
> (a) That Section 25 of the Constitution must be amended to make explicit that which is implicit in the Constitution, with regards to Expropriation of Land without Compensation, as a legitimate option for Land Reform, so as to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs.
> (b) That Parliament must urgently establish a mechanism to effect the necessary amendment to the relevant part of Section 25 of the Constitution.
> (c) Parliament must table, process and pass a Constitutional Amendment Bill before the end of the 5th Democratic Parliament in order to allow for expropriation without compensation.

4 *Ad Hoc Committee to Initiate and Introduce Legislation amending section 25*

The Ad Hoc Committee to Initiate and Introduce Legislation amending section 25 of Constitution gazetted the 18th Constitutional Amendment in December 2019. The Parliamentary legal services proposed the wording after consolidating the inputs made to the

[107] See the discussion above in part IC above.

committee. The Bill had to be drafted in such a way as to get majority support[108] for the publication of the amendment.

It is important to remember that the committee's mandate was to make that which is implicit with regard to the expropriation of land without compensation for land reform purposes explicit.

The draft amendment that was published for comment[109] read as follows, where the amendment has been italicised by the author:

> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: *Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil.*

The Draft Bill further proposes the inclusion of a new subsection, 3A, which tasks national legislation with delineating the circumstances in which a court may determine the amount of compensation payable as R0. Notably, the draft amendment does not use the phrase 'without compensation', but rather 'nil compensation', indicating a preference for the suggestion that in certain circumstances, after a weighing up of different factors, it is possible that the amount of compensation that is just and equitable is R0.

The public participation process on the specific proposed wording was delayed with the onset of Covid-19, which rendered public participation problematic. The public participation process was finalised in March 2021. The Constitution Eighteenth Amendment Bill, with reference to amending section 25(2)(b) that states:

> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: *Provided that where land and any improvements thereon are expropriated for purposes of land reform as contemplated in subsection (8), the amount of compensation may be nil.* (italic inserted)

It adds (3A):

> (3A) *For the furtherance of land reform, national legislation must, subject to subsections (2) and (3), set out circumstances where the amount of compensation is nil.*

For purposes of this article is it also important to note that there was a suggested amendment to section 25(5):

> (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable *state custodianship of certain land in order for* citizens to gain access to land on an equitable basis.

At the time of submitting the article for publication there was a third proposal on the table that seeks to clarify 'custodianship' amongst other things. However, current opinion is that the ANC will not have the necessary support from the EFF in the National Assembly to obtain the requires 2/3 majority to vote the amendment into law.[110]

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[108] See the discussion in the committee at https://pmg.org.za/committee-meeting/29512/. The arguments made here was that the different political parties can then provide their own input into the draft amendment.

[109] Draft Bill amending s 25 of the Constitution: discussion & publishing for comment (19 December 2019), available at https://pmg.org.za/committee-meeting/29530/.

[110] M Merten 'Expropriation Without Compensation: ANC Numbers Gets its Way, But Effectively Scuppers Section 25 Constitutional Amendment' *Daily Maverick* (9 July 2021), available at https://www.dailymaverick.co.za/article/2021-07-09-expropriation-without-compensation-anc-numbers-get-its-way-but-effectively-scuppers-section-25-constitutional-amendment/.

Parallel to this process ran the process of adopting new expropriation legislation to replace the old, outdated 1975 Expropriation Act. As a signal to the public about *what* type of property the state envisages targeting for 'nil compensation', clause 12(3) was included. At the time of submitting the article, the public participation process was still ongoing. This Bill, unlike the Constitutional Amendment Bill, will likely be adopted before the end of the year. Unlike the Constitution, it does not need a two-thirds majority, meaning that on the ANC vote alone the Bill can pass. Moreover, the Expropriation Bill will 'make explicit what is implicit' – as legislation *should* do. Still, unlike a constitutional amendment, the Expropriation Bill once an Act will have to be read in line with the (unamended) Constitution.

It is with this legislative history in mind that we now turn to international law.

III A COMPARATIVE APPROACH TO COMPENSATION FOR EXPROPRIATION

A Introduction

The expropriation of property by the South African government and the question of compensation are not exempt from international law's prescripts. This is because the Constitution compels a court, tribunal or forum to consider international law when it interprets the property clause.[111] The Constitution further compels the court to interpret legislation by giving effect to this constitutional provision that is consistent with international law.[112] Due to these clear mandates, the discussion to follow will begin with an appreciation of international law's prominent place in the South African legal order. As a member state of the African Union, South Africa also has to observe its obligations arising from various regional instruments, such as the African Charter on Human and Peoples' Rights. Although not mandatory, foreign law may also be included for consideration because, among other justifications, the Bill of Rights was heavily influenced by the constitutions of other countries.[113]

The protection of private property has various roots in international law, such as traditional international law rules concerning the treatment of foreign nationals and, specifically, the property they own in host countries. These rules are colloquially referred to as the 'international minimum standard'. They will be explored in the second part of this discussion. Another is international investment law, particularly Bilateral Investment Treaties (BITs), which substitutes the traditional international law rules in practice. In this regard, a constantly growing body of case law has developed, entailing a clarification of significant issues, such as the conditions under which a state may lawfully expropriate property, the scope of measures affecting the enjoyment of property rights amounting to an expropriation and the question of compensation or damages arising from expropriation. These will be addressed in the third part of the present discussion. Lastly, property rights are, to some extent, protected by human rights law, embracing the argument that the right to own property is a fundamental human right. An encroachment of such a right entitles its owner to indemnification, which will be considered in the last part of this discussion. Although there is no binding treaty governing the protection of property at the global level, it is protected by regional human rights treaties such as the African Charter on Human and Peoples' Rights.[114] The ACtHPR has not yet decided any

[111] Constitution s 39(1)(b).
[112] Constitution s 233.
[113] Constitution s 39(1)(c); De Ville (note 8 above) at 241.
[114] African Charter on Human and Peoples' Rights art 14.

case concerning property. Therefore, recourse might be had to other regional systems such as the ECtHR, which is by far the most developed, and the IACtHR, which has made important judgments with regard to property rights of indigenous peoples.

What will hopefully transpire from this discussion is that, under international law, South Africa enjoys sovereignty, which allows the Republic to exercise its legislative, executive and judicial competencies within its territory and to the exclusion of others. This implies that South Africa is free to embark on its land reform initiatives within its National Development Plan[115] and to expropriate property as a means to achieve its goal. However, with this right comes considerable responsibility, notably to move forward with land reform within the legal frameworks within which it operates. This part of the article aims to establish the parameters that international, regional and foreign law set for the expropriation of property with a view to understanding what the compensation requirement entails. Ultimately, it will be established that 'without compensation' will fall short of South Africa's obligations, but that, in exceptional circumstances, 'nil compensation' can be justified after due process has been followed and relevant criteria considered.

B The expropriation of foreign-owned property and the international minimum standard

1 *Introduction*

It is a well-established principle in international law that states enjoy sovereignty[116] and, as a result, also enjoy sovereignty over their natural wealth and resources.[117] A 'basic corollary right' based on the principle of sovereignty is the right to expropriate foreign-owned property. This can, however, only be done in the public interest or for a public purpose, on a non-discriminatory basis, in conformity with due process and as accompanied by the payment of compensation.[118] Non-compliance with these conditions, that is, the international minimum standard, may be construed as unlawful taking, in which case the expropriating state will incur international responsibility for its internationally wrongful act.[119] As a result, the expropriating state will be obligated to make reparation,[120] and the appropriate remedy favoured by international tribunals for an unlawful expropriation under international law seems to be damages, not restitution.[121]

The distinction between lawful and unlawful expropriation is well established in international law, and the significance of such a distinction has been noticed and applied to the amount of compensation by international decision makers.[122] In the case of lawful

[115] National Planning Commission of South Africa *National Development Plan* (2011), available at https://www.gov.za/sites/default/files/gcis_document/201409/devplan2.pdf.

[116] Max Huber suggests that sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. See the *Island of Palmas* case (*The Netherlands v The United States of America*) 2 R.IA.A. (1928) 829, 838.

[117] Between 1952 and 1974, the UN adopted numerous resolutions on the issue of permanent sovereignty over natural resources, the latest of which is Resolution 3281 of 12 December 1974.

[118] These will be elaborated on in more detail below with emphasis on compensation.

[119] International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) ('*Draft Articles*') art 1, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[120] *Draft Articles* (note 1119 above) at art 31

[121] CD Gray *Judicial Remedies in International Law* (1990) 16–17.

[122] *Chorzow Factory Judgment, Germany v Poland* (1928) PCIJ Series A No. 17, and later confirmed in *The Government of Kuwait v American Independent Oil Company (Aminoil)*, Award of 24 March 1982, reprinted in

expropriation, compensation may be due, and it is limited to the value of the expropriated property (*damnum emergens*). With respect to unlawful expropriation, the appropriate remedy would be damages, which, in addition to the value of the expropriated property, may include lost profits (*lucrum cessans*). The latter may be awarded according to what the claimant concerned reasonably expects.

Turning to the conditions under which expropriation will be lawful, the exact meaning of 'public interest' or 'public purpose', albeit the first requirement, is not certain. The suggestion, however, is that it should be interpreted broadly, and that states should be granted extensive discretion to determine it.[123] The second requirement, namely that acts of expropriation are to be conducted in a non-discriminatory fashion, is held as prohibited by customary international law.[124] The standard of due process, the third requirement, demands an actual and substantive legal procedure where a claim can be raised. Due process further demands this legal procedure to be underpinned by certain basic guarantees, such as accessibility, a fair hearing and an independent and impartial adjudicator. This requires that there be a legal basis for expropriation, in other words, a law that orders the expropriation and recourse to courts, while the state cannot conduct itself in an abusive manner.[125]

2 *The duty to compensate*

The final and most contentious requirement is compensation. There seems to be little doubt that, in terms of international law, the state has a duty to compensate the dispossessed foreign owner, and it seems safe to assert that the doctrine of unjust enrichment can be considered as the legal basis for this contention.[126] However, pertaining to the question as to whether or not compensation is a condition of the legality of an expropriation, a patent lack of agreement exists among authors. Some support the approach of 'legality', while others advocate that of 'illegality'. Though the practice of capital-exporting states provides some support for the latter theory, the responses of their national tribunals are contradictory.[127] At the international level, the jurisprudence of the Iran-United States Tribunal does uphold the former theory. The Tribunal holds that there is a duty to compensate, while the non-satisfaction of the duty does not render the expropriation unlawful as such. It would appear appropriate to agree with the proposition that the payment of compensation cannot be characterised as a legal condition of the expropriation, similar to the instances of public purpose and non-discrimination requirements.

3 *The compensation standard*

If it is therefore accepted that the expropriating state has a duty to compensate the dispossessed foreign owner, the question is what the compensation standard should be. Since 1938, the Hull-formula of 'prompt, adequate and effective payment' was applied, but not without

21 LLM (1982) 976, 1032 para 143. Also see *Libyan American Oil Company (Liamco) v The Government of the Libyan Arab Republic*, Award of 12 April 1977, reprinted in 20 ILM (1981) 1, 137.

[123] See, for example, *James v United Kingdom* [1986] ECHR 2, (1986) 8 EHRR 123 at para 145.

[124] *Libyan American* (note 122 above) at 58–59; and *Amoco v Iran* (1988) 27 ILM 1314 at paras 140–142.

[125] U Kriebaum & A Reinisch 'Property, Right to, International Protection' in Max Plank *Encyclopedia of Public International Law* (2009) at paras 22–23.

[126] A Ghassemi *Expropriation of Foreign Property in International Law* (PhD thesis, University of Hull 1999) 273.

[127] Ibid at 113.

contestation by numerous developing countries, who pursued land reform in that period of time. Many of them demanded a largely unfettered right to expropriate foreign property at any time and pay compensation only if provided for by their respective national laws.

The issue of compensation was taken up by the UN General Assembly in the early 1960s under the rubric of Permanent Sovereignty over Natural Resources, and in 1962 the General Assembly adopted Resolution 1803 [XVII] with considerable support.[128] While it stressed the right to expropriate property as an emanation of state sovereignty, it also made it subject to the rules of international law:

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, 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. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted. However, upon agreement by sovereign states and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.[129]

In the early 1970s, a group of developing countries demanded the establishment of a New International Economic Order. One of the central issues on their agenda was a change to the traditional rules on expropriation and compensation. In 1973, the General Assembly adopted Resolution 3171 [XXVIII], which is also entitled 'Permanent Sovereignty over Natural Resources'. This resolution omitted any reference to international law and determines that 'each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures'.[130]

During the negotiations concerning a New International Economic Order in the context of Resolution 3281 [XXIX] of 12 December 1974 entitled Charter of Economic Rights and Duties of States, the question of compensation quickly became one of the most controversial issues. Ultimately, the mentioned Charter was not adopted by consensus, but by a divisive vote of 120 in favour, six against and ten abstentions. Article 2(2)(c) of Resolution 3281 [XXIX] provides that in the case of expropriation—

> appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled by the domestic law of the nationalising state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.

According to Kriebaum and Reinisch, it is unlikely that these resolutions have effectively changed the law in accordance with their terms.[131] However, the claims of developing countries for a lower standard of compensation as stipulated by these resolutions have, according to them, eroded the formerly established standard of 'prompt, adequate and effective' compensation.

[128] This resolution was adopted by 87 votes to two (France and South Africa) with 12 abstentions.
[129] Resolution 1803 [XVII] of 1962 at para 4.
[130] UNGA Res 3171 [XXVIII] (17 December 1973) art 3.
[131] Kriebaum & Reinisch (note 125 above) at para 27.

A number of arbitration awards have found that Resolution 1803 of 1962 accurately reflects customary international law, and not Resolution 3281 of 1974. In *Texaco v Libya,*[132] it was held that the voting on Resolution 1803 indicated that it was supported by a majority of states belonging to various representative groups, and that it was to a large extent the expression of a real general will. In contrast, it was held that Resolution 3281 had to be analysed as a political rather than legal declaration concerned with the ideological strategy of development and, as such, it was only supported by non-industrialised states. Moreover, the absence of any connection between the procedure of compensation and international law could not be regarded as a *de lege ferenda* formulation, and indeed it even appeared *contra legem* in the opinion of many developed countries.[133]

In sum, it seems clear that the Hull-formula is no longer accepted by international law, and 'appropriate compensation' seems to enjoy the greatest support and has been approved by several arbitral awards. Appropriate compensation has no fixed meaning, but will certainly be less than is suggested by the phrase 'prompt, adequate and effective'.[134] In *Kuwait v American Independent Oil Co*,[135] the arbitration tribunal found that it was necessary to have regard to all the circumstances of the case with special reference to the legitimate expectations of the parties.

4 *Global settlement agreements*

Another element contributing to the uncertainty of the level of compensation for expropriations has been the practice of entering into global settlement agreements, which has provided for lump sum payments, usually at considerably reduced value. While the lump sum payment settled the international claim, the actual compensation of the former property owners was regularly achieved by national distribution procedures based on the national legislation of their home states. Whether the reduced compensation payments according to lump sum agreements can be regarded as an expression of a change of customary international or considered as constituting a conscious departure from the customary standard law, remains controversial.[136]

The payment of compensation as one of the conditions of an expropriation to be in conformity with a state's international obligations was also confirmed by the SADC Tribunal in the *Campbell* case in 2007. This case concerned the expropriation of white-owned farms without compensation after a 2005 amendment of the Zimbabwean constitution made this possible. The Tribunal's ruling did not directly address the right to own property, but on the issue of expropriation and compensation, the Tribunal held that, within international law, the expropriating state has the duty to compensate. Also, that Zimbabwe could not rely on its national law (its Constitution) to avoid an international-law obligation to pay compensation.[137] This clear legal principle in international law[138] is also codified in the *Vienna Convention on the Law of Treaties*,[139] which provides in art 27 that a party 'may not invoke provisions of its own internal law as justification for failure to carry out an international agreement'.

[132] *Texaco v Libya* (1978) 17 ILM 1 (1977) 53 ILR 389 paras at 87–88.
[133] Dugard et al (note 12 above) at 434.
[134] Ibid at 435.
[135] *Kuwait v American Independent Oil Co* (1982) 21 ILM 976 at para 144–149.
[136] *Libyan American* (note 122 above); *Sedco Inc v National Iranian Oil Co & Iran* (Iran–United States Claims Tribunal)(1986) 25 ILM 629.
[137] *Zimbabwe* [2008] SADCT 2, 48(3) ILM (2009) 534, 547.
[138] MN Shaw *International Law* (7th Ed, 2013) 104–105.
[139] Vienna Convention on the Law of Treaties (1969).

It is therefore clear that, under international law, states are free to exercise their legislative, executive and judicial competencies to effect expropriation. However, when the exercise of this right affects foreign nationals, it cannot be performed in an unfettered manner. In this sense, international law lays down a minimum standard that is widely accepted by most states. As a member of the international community of states, South Africa has little choice in this regard; if it fails to adhere to this standard of treatment when it expropriates foreign owned property, it will commit an internationally wrongful act for which it will incur international responsibility. Apart from states taking action on behalf of their nationals, they could also consider applying diplomatic pressure on the government, and even institute sanctions as in the period prior to 1994.

C International investment law

Closely related to the international minimum standard described above is international investment law aimed at governing the relationships between states and foreign investors. Lacking a central treaty or institution, international investment law mainly consists of bilateral investment treaties (BITs).[140] These treaties aim to attract foreign investment to the host country with the aim of promoting economic development. In their turn, host countries grant investors full protection and security, fair and equitable treatment, protection against arbitrary treatment and a guarantee against discrimination. The protection against expropriation, or the payment of compensation in the event that expropriation takes place, also usually figures as a central provision of any BIT. The present section of the discussion aims to establish the possible impact of BITs on the standard of compensation.

Most BITs provide for a standard of 'prompt, adequate and effective'[141] compensation, and they frequently concretise the compensation obligation by stating that the amount of compensation should be equivalent to the 'fair market value'[142] of the expropriated investment immediately *before*[143] the expropriation took place. The plethora of arbitral decisions since the 1990s demonstrates that it is not so much the theoretical debate about 'adequate' versus 'appropriate' compensation that is important, but rather the actual valuation technique used. Some BITs provide guidelines but afford the arbitrators the discretion to choose a valuation method that will be appropriate in the circumstances.

Since re-entering international economic relations in 1994, South Africa has concluded a number of BITs with foreign investors. Over time, however, the Republic has taken issue with what it has considered to be limitations placed by BITs on its sovereign right to regulate public interest. Also, the execution of these treaties has led to several investment disputes,[144] and arguably resulted in the termination of several BITs, while this seems to be part of a

[140] It also includes investment chapters in preferential trade agreements. These treaties are supplemented by an unknown number of investment contracts between governments and foreign investors, as well as domestic investment legislation.

[141] Many BIT provisions further specify that 'prompt' means without delay plus interest until the date of actual payment, while 'effective' is usually understood as entailing fully realisable and in a freely convertible currency, as already laid down in the non-binding 1992 World Bank guidelines.

[142] This mainly boils down to the amount of compensation that a hypothetical able and willing buyer would pay for the property by comparing similar transactions in the market.

[143] This rule aims at avoiding losses to investors as a result of reductions in market value flowing from announcements of expropriations.

[144] Dugard et al (note 12 above) at 658 and further.

policy decision by the Department of Trade and Industry to phase out BITs and replace their guarantees with those found under the Protection of Investment Act 22 of 2015.

Concerning the transition phase, this Act determines that existing investments made under BITs will continue to be protected for the period and terms stipulated in the treaties. It is also important to note that, since most guarantees contained in BITs are based on general state practice, they can be regarded as part of the general principles of investment law and, as such, have relevance beyond the life of any individual treaty. The Act also makes provision for investments made after the termination of a BIT, but before promulgation of the Act. In this instance, the relationship between the host country and the investor will be governed by general South African law.[145]

Here it is important to highlight that the Protection of Investment Act provides that its interpretation and application will be subject to the constitutional prescripts relating to the important place international law occupies in the South African legal order, as described earlier.[146] However, nowhere in the Act is there any explicit reference to the payment of compensation. This deliberate omission will not automatically allow the government to expropriate without compensation, as this may constitute a violation of the international minimum standard and expose South Africa to claims based on a legitimate expectation that compensation must be considered.

Mindful of the fact that the rules and principles analysed in the preceding two parts are applicable to the relationship between a host state and foreign nationals or investors, we are tempted to argue that these could also be considered and applied to the relationship between South Africa and its nationals. Nowhere in international law is this prohibited. Prohibited treatment of own nations could, however, be considered under the auspices of human rights, as will be done in the section below. Since World War II, human rights have taken centre stage in the international arena, and international law no longer allows states to treat their nationals as they please. The individual is, due to the unbalanced relationship in which it stands towards the state, protected by various human rights instruments. The content of most of these instruments are today accepted as customary international law, and in some instances *jus cogens* and *erga omnes*.

D Property and human rights

The question as to whether human rights can be a legal foundation for the duty to compensate in instances where property is expropriated will be considered in this section. As mentioned, the argument is that the right to own property is a fundamental human right, and an encroachment of such a right entitles its owner, natural or juristic person to indemnification.

1 *Universal Declaration of Human Rights*

Although there is no binding treaty governing the protection of property at a global level, the body of human rights law laid down in several universal and regional instruments provide a legal basis for the international protection of property rights. A right to property was included in art 17 of the Universal Declaration of Human Rights in 1948 (UDHR), but not in the two

[145] Protection of Investment Act 22 of 2015 s 15.

[146] Ibid s 3.

subsequent international human rights Covenants, which were introduced into international law by the declaratory provisions of the UDHR.[147]

The UDHR was adopted after lengthy periods of deliberation and has in the meantime been embraced worldwide: among others, during the World Conference on Human Rights in Vienna in 1993. Article 17(1) states that everyone 'has the right to own property alone as well as in association with others' and art 17(2) that no one 'shall be arbitrarily deprived of his property'.[148] The language of art 17(1) is broad and comprehensive, and it clearly applies to individual and collective forms of property ownership. The right to own property is, however, not absolute, since art 17(2) foresees that persons can be deprived of their property under certain circumstances, but not arbitrarily.

Although the UDHR, given that it is a UN General Assembly resolution, enjoys what is commonly referred to as a non-binding character, many of its principles have become incorporated into customary international law, or have even been elevated to a peremptory norm status from which no derogation is permitted by any state. One such example is non-discrimination as contained in in art 2,[149] and art 17 should also be read in conjunction with this and other provisions of the UDHR.[150] The question around whether or not the right to own property in art 17(1) enjoys the status of customary international law is, however, debatable. This is because a constant and nearly uniform[151] settled state practice that is generally and widely accepted,[152] coupled with an acceptance thereof as legally binding,[153] is difficult to prove. The difficulty in doing so is perhaps owing to the ideological differences in the way states worldwide think about property. In contradistinction to this, some would argue that there is compelling evidence to support the conclusion that the right to property has received recognition as a rule of customary international law in that state practice is almost unanimous in recognising the right to property, as evidenced by the inclusion of the right to property in the constitutions and legislation of 95 per cent of the 193 UN member states.[154] This might be true, but the specificities of the right to property are certainly not the same among those comprising the 95 per cent.

Whether or not the right not to be deprived of one's property in an 'arbitrary' manner in art 17(2) belongs to the corpus of customary international law is perhaps not the most pressing issue. From a human rights perspective, with sub-focus on art 17, one is more likely to succeed in stating the word 'arbitrarily' than the word 'property' to be central. The term 'arbitrary' describes 'a course of action or a decision that is not based on reason or judgment, but on

[147] The International Covenant on Economic, Social and Cultural Rights (1966)(ICESCR) and the International Covenant on Civil and Political Rights (1966)(ICCPR).

[148] The right to own property was not included in the two subsequent international human rights Covenants, the ICCPR and the ICESCR, which introduced into international law the declaratory provisions of the UDHR. Both Covenants prohibit discrimination on the basis, inter alia, of property (ICCPR, art 2(1), 24(1), 26; ICESCR, art 2(2)), but they do not include the actual right to own property.

[149] *Filartiga v Pena-Irala* 630 F 2d 876 (2d Cir 1980), (1980) 19 ILM 966.

[150] United Nations General Assembly Resolution 45/98.

[151] *Asylum case (Columbia v Peru)* (1950) ICJ 6.

[152] *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (1974) ICJ 175.

[153] *North Sea Continental Shelf cases* (*Federal Republic of Germany v Denmark*; *Federal Republic of Germany v Netherlands*) (1969) ICJ 1.

[154] JG Sprankling 'The Emergence of International Property Law' (2012) 90 *North Carolina Law Review* 461, 480.

personal will or discretion, without regard to rules or standards.'[155] The term 'arbitrarily' in the current context would seem to prohibit unreasonable interferences by states and the taking of property without compensation, but a precise and agreed-upon definition does not appear in the preparatory documents of the UDHR and art 17 in particular.[156]

2 *European Convention for the Protection of Human Rights and Fundamental Freedoms*

At the regional level, the right to property is included in a number of instruments. For example, in chronological order, the following documents each protect the right to property: Additional Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952) (Protocol No 1 ECHR); the American Convention on Human Rights (1969) (ACHR); and the African Charter on Human and Peoples' Rights (1981) (African Charter). In 1990, the United Nations General Assembly Resolution 45/98 stressed the need 'to ensure respect for the right of everyone to own property' and 'the right not to be arbitrarily deprived of one's property',[157] while furthermore requiring that states provide for an adequate procedural and institutional framework in this regard.[158]

Unlike the international minimum standard on the treatment of foreign nationals and international investment law governing the relationships between states and foreign investors, regional human rights law does not exclusively protect foreign-owned property. The ECHR and ACHR protect the property of everyone under the jurisdiction of the States Parties to the treaty, irrespective of their nationality. However, in contrast to Protocol No 1 ECHR, art 1 reads that every 'natural *or legal person* is entitled to the peaceful enjoyment of his possessions', and the ACHR and African Charter only afford protection to natural persons and not corporations. Clearly, the principle of human rights cannot be used as a legal basis for the law of state responsibility where corporations are involved in the American and African contexts.

One could turn to case law of the ECtHR for guidance in this respect, as it is the most developed on a regional level. For an expropriation to be justified under this regional framework, the deprivation of property must be in the public interest, lawful and proportionate. As to public interest, it is left to states to determine what public interest is. However, nothing prohibits the court from reconsidering the state's determination of what is in the public interest. In respect of lawfulness, the rules of domestic law must be sufficiently accessible, precise and foreseeable.[159] This criterion of lawfulness is infringed when national case law leads to an inconsistent application of a rule, which could result in unforeseeable or arbitrary outcomes and deprive litigants of effective protection of their rights.[160] With regard to proportionality, there must be a correlation between the means employed and the aim sought to be achieved.[161] A balance needs to be struck between the demands of the community in general, and each individual's right to the peaceful enjoyment of his/ her property.

[155] *The Free Dictionary* 'Arbitrary', available at https://legal-dictionary.thefreedictionary.com/arbitrary#:~:text=The%20term%20arbitrary%20describes %20a,regard%20to%20rules%20or%20standards.

[156] G Alfredsson, A Eide, G Melander, LA Rehof, A Rosas & T Swinehart (eds) *The Universal Declaration of Human Rights: A Commentary* (1992) 256–257.

[157] United Nations General Assembly Resolution 45/98 para 3.

[158] Ibid at para 4.

[159] *Lithgow & Others v The United Kingdom* [1986] ECHR 8, (1986) 8 EHRR 329 at para 110.

[160] *Carbonara & Ventura v Italy* [2000] ECHR 206 at paras 63–65.

[161] *James v The United Kingdom* (note 123 above) at para 50.

The ECHR does not explicitly provide for compensation to a national who has suffered an expropriation. This was confirmed by the ECtHR in *Lithgow v the United Kingdom*, where the court concluded that 'the general principles of international law are not applicable to a taking by a state of the property of its own nationals'.[162] Despite this, the European court developed a requirement to also compensate nationals in case of an expropriation by applying the proportionality principle. The court reaffirmed that 'compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants'.[163] The requirement of achieving a fair balance between public and private interests will not be respected if property is expropriated without payment of an amount reasonably related to its value.[164] The ECHR does, however, not guarantee a right to full compensation in all circumstances, since legitimate objectives of public interest may call for reimbursement at less than the full market value.[165] Examples where a reduced level of compensation may be justified include government measures to achieve economic reform and/ or greater social justice.[166] A total lack of compensation, however, is only justifiable in exceptional circumstances.[167] What these circumstances could include are not certain, and will depend on the facts of each case. One example could be where the foreign investor visibly earns inordinate profits from its investment and the host state no benefits at all.[168]

A further aspect which must be taken into account with a view to calculating any compensation is the length of expropriation proceedings.[169] In cases where there are unreasonable delays concerning the payment of compensation, the adequacy of the latter may be diminished.[170] Lastly, a difference between nationals and non-nationals regarding the amount of compensation is justified by the ECtHR, which has indicated that there may 'be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals'.[171]

3 *African Charter on Human and People's Rights*

Closer to home, the African Charter on Human and Peoples' Rights (1981) determines in art 14 that 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.' Unlike art 17 of the UDHR, art 14 of the African Charter does not specify who the right holders (individuals, groups or legal persons) are, and does not lay down the normative content of the right. It only commits states to guarantee the right to property. It also does not explicitly require the payment of compensation; neither does it provide protection against arbitrariness or proportionality.

[162] *Lithgow v The United Kingdom* (note 159 above) at para 119.
[163] Ibid at para 120.
[164] *Former King of Greece v Greece* (2001) 33 EHRR 21, [2000] ECHR 640, 33 EHRR 21 at para 89.
[165] *Holy Monasteries v Greece* 20 EHRR 1, [1994] ECHR 49, (1995) 20 EHRR 1 at para 71.
[166] *Lithgow v The United Kingdom* (note 159 above) at para 121.
[167] Ibid at para 120.
[168] M Sornarajah *The International Law on Foreign Investment* (5th Ed, 2017) 406.
[169] *Malama v Greece* [2001] ECHR 174 at para 51.
[170] *Akkus v Turkey* (2000) 30 EHRR 365, [1997] ECHR 45 at para 29.
[171] *James v The United Kingdom* (note 123 above) at para 63.

The African Commission on Human and Peoples' Rights has, however, provided some clarity on the content of the right through the Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter. Principles 53 to 55 provide, among others, that the right to property protects the rights of both individuals and groups to the acquisition and peaceful enjoyment of property. It also clarifies that the right to property protects the communal ownership of land and other natural resources and places an obligation on states to ensure security of tenure and prevent interference by third parties as well as state agents. The right may only be limited by states for legitimate public interest in a non-arbitrary manner, according to the law and the principle of proportionality. Effective public participation in any acquisition process and the payment of fair compensation, which must generally be reasonably related to the market value of the property, are prerequisites for the deprivation of the right to property, except in exceptional circumstance where less than market value compensation or none at all may be required. The African Commission has also developed jurisprudence through a number of communications that provide further clarity on the scope and normative content of the right to property. In the *Mauritania* case,[172] for example, the African Commission held that arbitrary expropriation without adequate compensation amounted to a violation of the right to property.

From an international and regional human rights law perspective, it is clear that the right to property is not absolute. As a consequence, it can be limited by the state, but only under certain circumstances. The prescripts of human rights law are aimed at the protection of the individual against the state. This does not mean that a state loses its sovereignty to human rights, but that states should exercise their competencies without unreasonably limiting or infringing human rights. Human rights law further requires a fair balance between the means a state employs (expropriation) and the aim it wishes to achieve (economic reform and/or greater social justice). Again, with regard to compensation, it should be considered, and the state has freedom as to the standard and method thereof.

IV CONCLUSION AND RECOMMENDATIONS

This article sought to look at (im)possibilities of the non-payment of compensation for expropriation in terms of international law. It focused specifically on the question of whether, by default, 'expropriation without compensation' and/or 'nil compensation' is permissible in international law.

The discussion starts with the 'one system of law' argument for a specific reason: to show how the transformative measures, and the protection of property against arbitrary state interference, do not stand in opposition to one another, but are part of the same constitutional goal: to bring about deep-seated social change as required by the preamble to our Constitution. And this also plays out in the calculation for compensation in terms of the Constitution: the protection of property rights from arbitrary state interference does not stand in opposition to the state's duties to effect land reform. Instead, these interests must be balanced in such a way as to ensure that South Africa achieves its constitutional goals. In this respect, the state's constitutional duties in terms of international law do not stand in opposition to the state's national duty to effect transformation.

[172] *Malawi African Association v Mauritania* [2000] ACHPR 19.

Ideological differences between capitalist and socialist states, historical differences between former colonial powers and decolonised states, and economic differences between developed and developing states result in disagreement on the standard that must be applied when the property of a foreign national is expropriated. Some insist on an international standard, while others maintain that the domestic law of the expropriating state should govern the situation. This either-or approach is seemingly based on a general assumption or premise that international law and domestic law are two separate legal systems. It is argued here that the truth for South Africa lies somewhere in between. Even if the latter approach is followed, namely that South African domestic law should regulate expropriation, international law will still have to be considered, because the Constitution, as the supreme law of the land, makes this mandatory. Amending section 25 of the Constitution will not absolve the government from considering international law, because the preamble and sections 39(1)(b), 231, 232 and 233 of the Constitution remain intact.

Another incorrect general assumption or premise is that international law is the villain in the narrative around South African property. This could not be further from the truth. Not only did international law condemn apartheid and its racial laws pertaining to property, it also supported and still supports the African National Congress in its quest to bring an end to the injustice the Republic that her people suffered. Under international law, South Africa enjoys sovereignty, which allows the Republic to exercise its legislative, executive and judicial competencies within its territory and to the exclusion of others. This implies that South Africa is free to embark on its land reform initiatives within its National Development Plan, and to expropriate property as a means to achieve its goal. This, however, must happen within the relevant international, regional and domestic legal frameworks. South Africa also enjoys a generous amount of discretion when it comes to the standard and method of compensation.

It has been established here that a failure to consider compensation will fall short of what is regarded as lawful, and that 'appropriate' compensation can in some instances be less than market value, and in exceptional circumstances, 'nil compensation' could be justified after a due process has been followed and relevant criteria considered.

The article has further established that the government will be held to its international treaty obligations despite any amendment because, under international law, a party may not invoke provisions of its domestic law as a justification for failure to carry out an international agreement. Whether regulated in future by BITs or the Protection of Investment Act, most guarantees afforded to foreign investors are in any event based on general state practice and can be regarded as being part of the general principles of investment law and, as such, these enjoy relevance beyond the life of any individual treaty. Failure by the government to observe its obligations will open the Republic up to claims, and result in South Africa becoming a less favourable destination for foreign investment. Both should be avoided at all costs because we cannot afford either.

Although South African nationals do not enjoy the same protection of their property rights in South Africa under the international minimum standard as foreign nationals in South Africa do, they are not without recourse. This is because the right to own property is a fundamental human right, and an encroachment of such a right, entitles its owner, natural or juristic person to indemnification. International and regional human rights law were considered. Because the African Court on Human and Peoples' Rights has not yet decided any case concerning property, the jurisprudence of the European Court of Human Rights was useful. Based on

the principle of proportionality, there must be a correlation between the means employed (expropriation) and the aim sought to be achieved (economic reform and/ or greater social justice). We have established in this article that a fair balance will only be achieved with the payment of an amount reasonably related to its value (not necessarily full market value). Also, that a total lack of compensation will only be justifiable in exceptional circumstances.

This leads to the conclusion: nil compensation offers the best compromise: in other words, an understanding that the calculation of compensation requires a weighing up of interests, by taking into account the open list of factors listed in section 25(3). In certain instances, this balance might land on nil rand compensation. This position is in line with international and foreign law. When decision-makers and, ultimately, the courts have to decide on 'just and equitable' compensation, the following will be positioned to converge in order to reach our constitutional goals: and the protection of property from arbitrary state interference, the state's duty to effect land reform and the adherence to international law. This will ensure that South Africa indeed belongs to all who live in it.