



Rights and Accountability in Development

Sanctions, violence, pensions and Zimbabwe

A New York hedge fund, a London-traded mining company and the stealing of an election?

July 2013

EXECUTIVE SUMMARY

Introduction

Rights & Accountability in Development (RAID), a British NGO working on business conduct and human rights, is calling for an investigation by the US Treasury, under US sanctions against Zimbabwe, into payments made by a subsidiary of Och-Ziff Capital Management Group LLC (Och-Ziff), a New York hedge fund.

In the 2008 election, ZANU-PF's Robert Mugabe retained the presidency of Zimbabwe after a campaign of horrific brutality against Movement for Democratic Change (MDC) supporters. According to media reports and senior MDC officials, the violence was financed by the money originating with Och-Ziff and channelled to the Mugabe government via a loan as part of a lucrative platinum deal by a UK-traded mining company.

In April 2008, the UK-registered and traded Central African Mining & Exploration Company plc (CAMEC) acquired a majority holding in a Zimbabwean platinum joint venture. As part of this transaction, CAMEC advanced a US\$100 million loan to enable its newly acquired subsidiary to 'comply with its contractual obligations to the Government of the Republic of Zimbabwe'. Regulatory news releases indicate that the money for the loan came from OZ Management LP, a subsidiary of Och-Ziff.

The Mugabe regime's campaign of violence subverted democratic elections. Up to 200 people were killed, 5,000 more were beaten and tortured, and 36,000 people were displaced. An opposition spokesman has stated: 'all the heartache, pain, gerrymandering, violence, intimidation, repression that took place at the 2008 election is directly linked to that 100 million.'

The US Ambassador to Zimbabwe in 2008, James McGee, condemned the 'systematic campaign of violence designed to block this vote for change...orchestrated at the highest levels of the ruling party.' The electoral violence led to an extension of US sanctions against Zimbabwe, which remain in force.

It would be paradoxical if money from a US hedge fund had ultimately financed the electoral violence that led to the US tightening sanctions against Zimbabwe in the first place. Given the potential for such a transaction to undermine US policy on Zimbabwe, the US Treasury's Office of Foreign Assets Control (OFAC) must surely scrutinise Och-Ziff's role to determine compliance with US sanctions.

There are many unanswered questions concerning Och-Ziff's transaction with CAMEC: the timing and sequencing of its investment; its knowledge of the purpose to which the money would be put; and the extent of its due diligence. The answers to such questions concern not only compliance with US sanctions, but also engage the governance and human rights policies applied by a number of the largest US public pension funds with investments through Och-Ziff at the time. There is also the question of the views of US public sector unions on pension investments in a Zimbabwean regime – undemocratic and anti-union – that they sought to oppose.

The full briefing, 'Sanctions, violence, pensions and Zimbabwe' is available at <www.raid-uk.org>.

The 2008 Zimbabwean elections: extracts from Human Rights Watch 2008 reports

Zimbabwe had held presidential and parliamentary elections in March 2008. MDC's presidential candidate Morgan Tsvangirai (47.9 per cent of the vote) defeated Robert Mugabe (43.2 per cent) in the first round of elections, but did not win an outright majority. The Mugabe regime and governing party, ZANU-PF, unleashed a wave of violence and intimidation against MDC supporters and voters in the run-up to the crucial second round vote. Tsvangirai withdrew from the flawed process and Mugabe regained power.

"The combination of restrictions on campaigning, flawed electoral procedures, the politicization of the distribution of agricultural equipment and food, an overwhelmingly pro-government media bias, arrests, beatings and other forms of intimidation during the run up to the March 29 elections precludes the possibility of holding free and fair elections." [*All Over Again: Human Rights Abuses and Flawed Electoral Conditions in Zimbabwe's Coming General Elections*, March 2008, p. 46]

"The violence appears to be intended to punish Zimbabweans who voted for the MDC on March 29, in particular those who voted in the [former ZANU-PF] 'strongholds.' It is being used to deter people from voting for the MDC and to persuade them to vote for ZANU-PF during the presidential runoff." [*"Bullets for Each of You": State-Sponsored Violence since Zimbabwe's March 29 Elections*, June 2008, p. 15]

"ZANU-PF officials and 'war veterans' are beating, torturing and mutilating suspected MDC activists and supporters in hundreds of base camps, many of them army bases, established across the provinces as local operations centers." [*"Bullets for Each of You"*, p. 2]

"The abductions have taken an even more disturbing turn with at least five incidents of abductions and killings of known MDC activists recorded in May. In one particularly horrifying incident, at least 12 suspected ZANU-PF supporters abducted, beat, tortured and murdered three MDC activists on May 7... The eyes of the victims had been gouged out, and their tongues and lips cut off." [*"Bullets for Each of You"*, p. 29]

CAMEC's dubious provenance and its Zimbabwean platinum deal

RAID has already filed complaints both about CAMEC's compliance with stock market rules – which the UK authorities have failed to address – and about its compliance with European Union sanctions against Zimbabwe. The company was able to flourish on the London Stock Exchange's junior market despite its continued business relationship with Mugabe crony and convicted

fraudster, Billy Rautenbach, who sold mining assets – originally acquired by the Zimbabwe regime in war-torn Congo – to CAMEC. Rautenbach became a significant CAMEC shareholder and continued to run the mines for CAMEC. CAMEC itself was successfully sold to controversial Eurasian Natural Resources Corporation (ENRC) plc in 2009.

In April 2008, CAMEC acquired a majority holding in a Zimbabwean platinum joint venture, Todal Mining (Private) Limited. The Zimbabwe Mining Development Corporation (ZMDC), which is wholly owned by the Government of Zimbabwe, held the remaining 40%. As part of this transaction, CAMEC advanced a US\$100 million loan to the Zimbabwean government.

Bloomberg confirmed the beneficiary of the loan as ‘Mugabe’s government’ and other mining commentators describe the loan as ‘nothing less than an unsecured cash loan to the Zimbabwe Government; for that, read “the president Robert Mugabe regime”’.

Och-Ziff’s investment in CAMEC and the financing of the loan to the Mugabe regime

In July 2012, South Africa’s Mail & Guardian reported that the \$100 million used to finance the loan came from Och-Ziff. An obscured paper trail leads to the Och-Ziff subsidiary used to make the investment. CAMEC placed 150 million new shares with an investor to raise money for the Todal acquisition, but failed, contrary to market rules, to immediately disclose the identity of the new shareholder. However, three months later, a release noted ‘OZ Management LP... is now interested in 5.83% of the outstanding share capital of the Company. The shares are held in the name of Mosrstan [sic – Morstan?] Nominees Limited and Goldman Sachs Securities (nominees) Ltd.’ The release made reference neither to the April 2008 placing, nor to the Zimbabwean platinum deal. However, that 5.83% equated to the same 150 million shares, making it highly probable that OZ Management was the original placee. The fact that the shares are held in the nominee accounts of companies which are part of two global investment groups – Goldman Sachs and Morgan Stanley – raises serious questions about the undisclosed identity of the ultimate beneficiaries of the holdings.

Determining compliance with US sanctions

It is for OFAC to determine compliance or non-compliance with US sanctions.

Targeted US financial sanctions against Zimbabwe were first imposed in 2003, renewed in 2005 and further extended in July 2008. Executive Order 13391, in force prior to 25 July 2008, prohibited transactions with any ‘person, entity or organization found to... be undermining democratic institutions and processes in Zimbabwe’; and Executive Order 13469, in force from that date onwards, prohibited transactions with, *inter alia*, any ‘senior official of the Government of Zimbabwe’ and those ‘responsible for, or to have participated in, human rights abuses related to political repression in Zimbabwe.’ The US publishes a list of Specifically Designated Nationals (SDNs), comprising individuals, companies and other entities, targeted by sanctions.

Yet, despite, the existence of sanctions, there is evidence that finance originating from Och-Ziff went to the government of Zimbabwe; and that the government of Zimbabwe is synonymous with the Mugabe/ZANU-PF regime – comprising sanctions targets – who used the finance to undermine democracy, commit human rights abuses and retain power for their own benefit.

SDNs were directly implicated in the planning and orchestration of Operation Makavhoterapapi (‘Where Did You Put Your Vote?’), the Mugabe regime’s violent campaign to subvert the election. The campaign was planned and coordinated by the government’s Joint Operations Command (JOC),

eight members of which, in addition to Mugabe, were already designated sanctions targets at the time of the platinum deal.

Not only did SDNs benefit from the loan, but certain designated entities were parties to the Todal transaction. On 25 July 2008, the US Treasury added ZMDC to the SDN list, recognising that ‘Robert Mugabe and his senior official and regime cronies’ have used entities such as ZMDC ‘to illegally siphon revenue and foreign exchange from the Zimbabwean people’. On 25 November 2008, Billy Rautenbach was also designated.

Whilst the designation of ZMDC and Rautenbach occurred after CAMEC had announced its acquisition of Todal, only further inquiries can establish whether all material aspects of the transaction were finalised by the relevant dates: for example, OZ Management’s significant holding in CAMEC was not formally notified until 28–29 July 2008, three to four days after ZMDC was designated.

Involvement of US Pensions Funds

At the time of the Och-Ziff payment some of the largest public pension funds in the United States – in California, New Jersey and Massachusetts – were all invested in Och-Ziff. Many public pension funds advocate investment principles that include the protection of human rights; a key question – examined in the full briefing – is the extent to which such principles and other divestment measures apply to external fund managers, such as Och-Ziff.

Many public pension funds have strong union representation on their boards. Trade unions, including the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), have been at the forefront in campaigning for democratic change in Zimbabwe. The action by unions in South Africa and across the region – supported by their counterparts in the US – is credited with the initial blocking of Chinese arms, reportedly paid for by the loan, from reaching the Mugabe regime. The same US trade unions that campaigned against the ZANU-PF-led violence had many members with stakes in the US public-sector pension funds that dealt with Och-Ziff.

Recommended Action

Unanswered questions remain in respect of Och-Ziff’s role in providing finance and the extent to which US sanctions applied to that aspect of the transaction concerning Och-Ziff. There are also questions for the US state pension funds about ultimate investment in repressive regimes and the effectiveness or otherwise of the corporate standards they espouse.

RAID has written to the US Treasury and to Och-Ziff to ask:

- OFAC to investigate and determine whether US sanctions were engaged in respect of Och-Ziff’s role in relation to CAMEC’s transaction to acquire its Zimbabwean platinum assets;
- For clarification from Och-Ziff in relation to unanswered questions outlined in the full report: the nature of its due diligence; what it knew about CAMEC’s platinum transaction; the extent to which it knew, or should have known, that it was providing funds whose ultimate beneficiary was the Mugabe regime and SDNs; and the purpose, timing and sequencing of its investment.

RAID has also written to key US state pension funds and to US trade unions:

- RAID calls upon the major US pension funds: to confirm, account for and review their past and present investments through Och-Ziff; to establish the extent to which they have already sought or will be seeking clarification from Och-Ziff about its payment to CAMEC; and to

publicly assess whether any such investments were and remain consistent with their investment policies.

- RAID asks such public pension funds to respond to the critique that principled investment or divestment, even when it concerns repressive regimes, is rendered ineffective in light of legal and fiduciary constraints on what a pension board can or cannot do.
- Given their condemnation of the Mugabe regime, RAID seeks the view of US unions on the use by that regime of finance originating from a US hedge fund for a campaign of violence. RAID calls upon the US unions, with members who have stakes in the major US public sector pension funds, to ascertain what action is possible to prevent investment through external managers in repressive regimes that the unions themselves oppose.



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INTRODUCTION

In the 2008 election, ZANU-PF's Robert Mugabe retained the presidency of Zimbabwe after a campaign of violence against Movement for Democratic Change (MDC) supporters. According to media reports and senior MDC officials, this campaign was financed by money originating from a US hedge fund – a subsidiary within the Och-Ziff Capital Management Group ('Och-Ziff') - and channelled to the Mugabe government via a loan as part of a lucrative platinum deal by the UK-traded Central African Mining And Exploration Company plc ('CAMEC'). The US\$100 million changed Zimbabwe's future by thwarting progress towards democracy. The money was transferred despite the existence of US sanctions. This briefing seeks to examine the nature of the platinum deal and the circumstances of the loan that supported it.

A background section (I, p. 2) begins by detailing the transaction to acquire the platinum mines before examining further the source of funding for the acquisition. As finance originated from an entity within the Och-Ziff Capital Management Group, additional information is given on the group's identity, incorporation and structure.

The main part of the briefing (II, p. 5) considers Och-Ziff's role in the CAMEC transaction from two standpoints: whether questions for the US authorities arise concerning the engagement of sanctions and; whether the use of Och-Ziff as an external investment manager warrants further scrutiny by US public pension boards if they are to adhere to their stated investment principles.

The briefing ends (III, p. 20) with a number of recommendations and calls for action in respect of both the sanctions regime and principled pension investment.

I. BACKGROUND CONCERNING THE CAMEC ZIMBABWE TRANSACTION AND OCH-ZIFF'S ROLE

A. The transaction to acquire the platinum mines

On 11 April 2008, CAMEC announced the acquisition of an interest in platinum mining assets in Zimbabwe via its acquisition of 100% of Lefever Finance Ltd, registered in the British Virgin Islands.¹ Lefever owned 60% of Todal Mining (Private) Limited, a Zimbabwean company, which held the rights to the Bougai and Kironde claims south west of the city of Gweru in Zimbabwe.² The remaining 40% of Todal was held by the Zimbabwe Mining Development Corporation ('ZMDC'), wholly owned by the Government of Zimbabwe. Todal was given the right by the Zimbabwean Government to export platinum from Zimbabwe and 'also secured an agreement to allow it to expatriate the profits generated by its mining operations in the country.'³ The Reserve Bank of Zimbabwe gave extensive fiscal incentives to Todal covering royalties, income tax, import duties, value added tax and withholding taxes.

The consideration paid for Lefever was a cash payment of US\$5 million and the issue of 215,000,000 new CAMEC ordinary shares. CAMEC's announcement of the acquisition stated:⁴

Furthermore, CAMEC has agreed to advance to Lefever an amount of US\$100 million by way of loan to enable Lefever to comply with its contractual obligations to the Government of the Republic of Zimbabwe. Repayment to Lefever is to be made from the ZMDC's share of dividends from Todal.

B. The source of funding for CAMEC's Todal acquisition

South Africa's *Mail & Guardian* has recently reported that the \$100 million loan from CAMEC was provided by a US hedge fund, Och-Ziff Capital Management Group, in return for 150 million CAMEC shares.⁵ The price paid for the shares was £75 million (about \$150 million).

There is evidence that: (i) an Och-Ziff Group company was indeed the purchaser of 150,000,000 CAMEC shares and; (ii) when it agreed to buy the shares, it did so at a time when it must have known that the cash it provided would be used in the transaction to acquire the Zimbabwean platinum assets.

In the months preceding the Todal acquisition, CAMEC's accounts show that it did not have the cash reserves to fund the loan element of the deal. Preparations began in March to raise capital in advance of both the Todal acquisition and to finance CAMEC's projects in the DRC. An agreement was drawn up with placees – both new and existing investors – by which the company issued new shares to them for an agreed sum: on 10 March 2008, £43.5 million had

¹ CAMEC, RNS 1641S, 'Acquisition of Platinum Assets,' 11 April 2008, available at: <<http://www.investegate.co.uk/central-afr--min--38-exp--cfm-/rns/acquisition/20080411130081641S/>>.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Stefaans Brümmer, Craig McKune and Owen Gagare, 'The investor who saved Mugabe,' *Mail & Guardian*, 10 August 2012, <<http://mg.co.za/article/2012-08-10-00-the-investor-who-saved-mugabe>>.

been conditionally raised through the placing of 72,500,000 new ordinary shares of 0.1 pence each in CAMEC at 60 pence per share.⁶ On 28 March 2008, CAMEC announced:⁷

Following further discussions with the placees regarding the multiple investment opportunities available to the Company in Africa, the Company has now expanded the fundraising. The Company now intends to place 200,000,000 new ordinary shares of 0.1p each in the Company ('New Ordinary Shares') at 50 pence per share to raise £100 million.

150,000,000 of the New Ordinary Shares have already been placed firm and the balance of 50,000,000 New Ordinary Shares is in the course of being allocated to existing institutions.

Firstly, it should be noted that the 'multiple investment opportunities available to the Company in Africa' must have encompassed the planned acquisition of Todal, just two weeks later. Moreover, at the time of the 28 March announcement, CAMEC's chief executive noted 'it enables us to accelerate our well known development plans in the DRC and also take advantage of other opportunities elsewhere within our regions of operations.'⁸ Hence the placees ought surely to have known that their finance was, at least in part, earmarked for investment in Zimbabwe. Secondly, it is apparent that 150,000,000 shares had already been 'placed firm' with a new investor, as distinct from allocations to existing investors.

On 4 April 2008, one week before the Todal acquisition, CAMEC announced completion of the placement, confirming that the admission of the 150,000,000 shares to trading was expected to occur on 7 April 2008, followed by the expected admission of the balance of 50,000,000 shares on 9 April 2008.⁹

Despite AIM rules requiring notification without delay of any relevant changes to any significant shareholders, CAMEC made no such disclosure identifying the holders of the 150,000,000 shares either on 7 April or in the days, weeks and months that followed.¹⁰ However, on 29 July 2008, CAMEC eventually issued a release (attributed 'From OZ Management' and dated 28 July 2008) noting 'OZ Management LP as Investment Manager to a number of investment funds is now interested in 5.83% of the outstanding share capital of the Company. The shares are held in the name of Mosrstan [*sic*] Nominees Limited and Goldman Sachs Securities (nominees) Ltd.'¹¹ The release made no reference to the April 2008 placing, nor to the Zimbabwean platinum deal, but was prompted by the dilution of shareholdings following an unrelated major deal in the DRC.

⁶ CAMEC, 'Central African Mining & Exploration Company Plc To Raise £43.5 Million For Expansion,' 10 March 2008, available at: <<http://www.investegate.co.uk/central-afr--min--38-exp--cfm-/rns/placing-announcement/200803100702146906P/>>.

⁷ CAMEC, 'Planned Placing Extended To Raise Additional Funds For Expansion,' 28 March 2008, available at: <<http://www.investegate.co.uk/central-afr--min--38-exp--cfm-/rns/placing-extension/200803281300050470R/>>.

⁸ *Ibid.*

⁹ CAMEC, 'Placing Completed,' 4 April 2008, available at: <<http://www.investegate.co.uk/central-afr--min--38-exp--cfm-/rns/placing-completed/200804040916496202R/>>.

¹⁰ 'Disclosure of miscellaneous information,' Rule 17, *AIM Rules for Companies*, February 2007 (the version of the AIM Rules in force at the time of CAMEC's Todal transaction).

¹¹ CAMEC, 'Holding(s) in Company,' RNS 1627A, 29 July 2008, available at: <<http://www.investegate.co.uk/central-afr--min--38-exp--cfm-/rns/holding-s--in-company/200807291809131627A/>>.

Identity, incorporation and structure of Och-Ziff Capital Management Group

Och-Ziff Capital Management Group was founded in 1994. It is incorporated in Delaware and has Principal Executive Offices in New York.¹² Och-Ziff Capital Management Group LLC became a public company in November 2007 and is traded on the New York Stock Exchange.¹³ The company describes itself as 'one of the largest institutional alternative asset managers in the world'.¹⁴ In early 2013, the Group had approximately \$33.1 billion in assets under management; in 2008, the year when CAMEC shares were placed with an Och-Ziff company, this figure stood at \$27 billion.

Och-Ziff Capital Management Group LLC owns 100% of Och-Ziff Corp, which in turn owns 100% of OZ Management LP (itself part of the Och-Ziff Operating Group).¹⁵ OZ Management LP is described as a Delaware limited partnership.

A few days before the announcement was made, CAMEC had confirmed the number of ordinary shares in issue at 2,572,806,383:¹⁶ hence the 5.83% under the management of OZ Management equated to 150,000,000 shares. It therefore is highly probable that OZ Management was the original placee for the new CAMEC shares issued just prior to the Total deal. At the time when the 150,000,000 shares were expected to be admitted to trading in early April 2008, it can be calculated that they represented (an undisclosed) 12 per cent of CAMEC's ordinary shares.¹⁷

The fact that that OZ Management's shares are held in the nominee accounts of companies which are part of two global investment groups – Goldman Sachs and Morgan Stanley – raises further serious questions about the undisclosed identity of the ultimate beneficiaries of the holdings.¹⁸

¹²Och-Ziff Capital Management Group, *2011 Annual Report*, Form 10-K; also Item 1. Business, Business Description, p.3.

¹³Shareholder FAQs, Company Information, <http://www.ozcap.com/class_a_shareholders/faq/index>.

¹⁴Our Firm, <http://www.ozcap.com/our_firm/index>.

¹⁵*2011 Annual Report*, op. cit., Our Structure, pp.13 – 14; also diagram p.16.

¹⁶See CAMEC, 'Exercise of options and TVR,' *RNS 8019Z*, 24 July 2008, available at: <<http://www.investgate.co.uk/central-afr--min--38-exp--cfm-/rns/exercise-of-options-and-tvr/200807241152428019Z/>>.

¹⁷In a notification of 16 April 2008 ('Holding(s) in Company,' *RNS 4974S*, <<http://www.investgate.co.uk/central-afr--min--38-exp--cfm-/rns/holding-s--in-company/200804161532304974S/>>) CAMEC confirmed that, as of 14 April 2008, Credit Suisse Securities (Europe) Limited held 68,642,517 Ordinary Shares of CAMEC, representing 5.58% of the issued share capital. From this it can be calculated that there was a total of 123,015,263 CAMEC shares in issue on 14 April, of which the 150,000,000 shares would have represented 12.2%.

¹⁸Morstan Nominees Limited is a UK-incorporated subsidiary of Morgan Stanley (see <<http://www.sec.gov/Archives/edgar/data/895421/000119312512081807/d262950dex21.htm>>). Companies House records show: Address: Legal Department, 25 Cabot Square, Canary Wharf, London, E14 4QA, Company No.: 02068223; date of incorporation 1986. Goldman Sachs Securities (nominees) Limited is a UK-incorporated subsidiary of Goldman Sachs. Companies House records show: Address: Peterborough Court, 133 Fleet Street, London, EC4A 2BB; Company Number: 02163916; date of incorporation 1987.

II. OCH-ZIFF, THE SANCTIONS REGIME AND US PENSION FUND INVESTMENT

A. The engagement of US sanctions

US sanctions against specifically identified individuals and entities in Zimbabwe were first imposed in 2003, renewed in 2005 and further extended in July 2008. Yet, despite US sanctions against the Mugabe regime, there is evidence that finance originating from Och-Ziff went to the government of Zimbabwe – constituting designated individuals or entities – which used the finance to undermine democracy, commit human rights abuses and retain power for their own benefit. Unanswered questions remain in respect of Och-Ziff's role in providing finance: matters of key importance include the extent to which US sanctions applied to that aspect of the transaction concerning Och-Ziff; due diligence and the extent to which Och-Ziff knew, or should have known, that it was providing funds whose ultimate beneficiary was the Mugabe regime and Specially Designated Nationals (SDNs); and the purpose, timing, and sequencing of its investment.

RAID calls upon OFAC to investigate these matters to determine whether or not US sanctions apply to the transaction.

1. *US Zimbabwe Sanctions Program*

US sanctions against specifically identified individuals and entities in Zimbabwe were first imposed on 7 March 2003, under Executive Order 13288. On 23 November 2005, new Executive Order 13391 superseded the original order, expanding the list of sanctions targets. On 25 July 2008, Executive Order 13469 increased further the scope of sanctions.

It is our understanding that Executive Order 13391 of November 22, 2005, in force at the time when arrangements were being made to finance CAMEC's acquisition of the Zimbabwean platinum assets and when the acquisition was completed,¹⁹

prohibits U.S. persons, wherever located, or anyone in the United States from engaging in any transactions with any person, entity or organization found to: 1.) be undermining democratic institutions and processes in Zimbabwe; 2.) have materially assisted, sponsored, or provided financial, material, or technological support to these entities; 3.) be or have been an immediate family member of a sanctions target; or 4.) be owned, controlled or acting on behalf of a sanctions target. Persons, entities and organizations referenced in Annex A of the Executive Order are all incorporated into OFAC's list of Specially Designated Nationals (SDNs). Prohibited transactions include, but are not limited to, exports (direct and indirect), imports (direct and indirect), trade brokering, financing and facilitation, as well as most financial transactions. Attempts to evade or avoid these sanctions are also prohibited. These prohibitions also extend to any person, organization or entity found to be owned, controlled or acting on behalf of any Zimbabwe entity included on the SDN list.

Shortly after the Todal acquisition was announced – and possibly before all material aspects of the transaction were finalised – Executive Order 13469 of July 25, 2008 was issued. The Order referred explicitly to the finding that

the continued actions and policies of the Government of Zimbabwe and other persons to undermine Zimbabwe's democratic processes or institutions, manifested most recently in the fundamentally undemocratic election held on June 27, 2008, to commit acts of

¹⁹ US Department of the Treasury, Office of Foreign Assets Control, *Zimbabwe – What You Need To Know About U.S. Sanctions: Executive Order – Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe*, 23 November 2005.

violence and other human rights abuses against political opponents, and to engage in public corruption, including by misusing public authority, constitute an unusual and extraordinary threat to the foreign policy of the United States, and to deal with that threat, hereby expand the scope of the national emergency declared in Executive Order 13288 of March 6, 2003, and relied upon for additional steps taken in Executive Order 13391 of November 22, 2005...

Executive Order 13469 extended the prohibitions to transactions with, *inter alia*, any person determined (i) to be a senior official of the Government of Zimbabwe; (ii) to be owned or controlled by, directly or indirectly, the Government of Zimbabwe or an official or officials of the Government of Zimbabwe; (iii) to have engaged in actions or policies to undermine Zimbabwe's democratic processes or institutions; (iv) to be responsible for, or to have participated in, human rights abuses related to political repression in Zimbabwe.

2. The loan to the Zimbabwean government: an ultimate transaction with designated persons and entities

There is evidence that finance originating from Och-Ziff went to (a) the government of Zimbabwe and; (b) that the government of Zimbabwe is synonymous with the Mugabe/ZANU-PF regime – comprising sanctions targets – which used the finance to undermine democracy, commit human rights abuses and retain power for their own benefit. There are also questions concerning (c) the finalisation of the CAMEC transaction and the designation of certain parties to the transaction.

a. Confirmation of use of the loan by the Zimbabwean government

It should be recalled that CAMEC advanced the \$100 million loan to its wholly-owned subsidiary, Lefever, to enable it 'to comply with its contractual obligations to the Government of the Republic of Zimbabwe.' CAMEC, through a spokesperson and its chief executive, have confirmed that the loan was used by the Zimbabwean government. An article in *The Telegraph* on 15 June 2008 quoted a spokesman from CAMEC on the matter of the \$100m loan:²⁰

Drawdown of this loan was affected by payments to a series of mainly international creditors for a variety of commodities primarily for seeds, grain, fertilizer and fuel.

An unnamed senior shareholder told *The Telegraph* that the issue of the use of payments from the platinum rights had been raised with CAMEC's chief executive, Andrew Groves, and others in the company:

Some payments were apparently made to creditors of the Zimbabwe government but these payments, they say, were 'hand picked' and totally legitimate.

MDC's Roy Bennett said in an interview on 18 July 2008:²¹ 'any deal done under the kind of circumstances surrounding the Camec acquisition of those mineral rights will not be honoured and will be undone.' In response, Groves, stated:²² 'Assuming the MDC gets into power then let them try. That deal was done in accordance with all the laws of Zimbabwe... [The MDC] will

²⁰Andrew Alderson and Russell Hotten, 'Business and morality: Is Phil Edmonds right to trade with Robert Mugabe?', *The Telegraph*, 15 June 2008, <<http://www.telegraph.co.uk/finance/newsbysector/energy/2791649/Business-and-morality-Is-Phil-Edmonds-right-to-trade-with-Robert-Mugabe.html>>.

²¹*Miningmx*, 'Camec's Zimbabwe platinum project threatened,' 18 July 2008, <http://www.miningmx.com/pls/cms/iac.page?p_t1=1535&p_t2=0&p_t3=0&p_t4=0&p_dynamic=YP&p_content_id=674062&p_site_id=83>

²²Idem.

find the deal very difficult to undo and we will take the issue to international arbitration if necessary.’ Groves confirmed: ‘The \$100m loan provided was used to pay off Zimbabwe’s external creditors.’

There are two points of note: (i) confirmation that the loan went to, and was used by, the Zimbabwean government with CAMEC’s knowledge; (ii) CAMEC’s careful emphasis on the use of the funds to pay external creditors, whereas other sources indicate that the money was used to fund ZANU-PF’s campaign of violence within Zimbabwe (*intra, b., below*).

b. Engaging sanctions (I): the loan as a transaction with the Mugabe regime-/ZANU-PF-led government comprising SDNs

There is clear evidence that the Zimbabwean government was synonymous with the Mugabe/ZANU-PF-led government and that the latter was responsible for a campaign of violence following the March 2008 elections; moreover informed commentators at the time and subsequently have stated that the loan was used by the Mugabe/ZANU-PF regime to fund this campaign of violence. In addition, SDNs were directly implicated in the planning and orchestration of Operation Makavhoterapapi (‘Where Did You Put Your Vote?’).

Reports from 2008, at the time the transaction took place, were unequivocal in stating the ultimate destination of the loan. Bloomberg reported that, under the deal to purchase the Zimbabwean platinum assets, CAMEC would ‘lend a further \$100 million to President Robert Mugabe’s government.’²³ Other mining commentators, referring to the loan, state:²⁴ ‘This thinly disguised donation appears to be nothing less than an unsecured cash loan to the Zimbabwe Government; for that, read “the president Robert Mugabe regime”’.

In an August 2012 radio interview, MDC-T’s treasurer, Roy Bennett, directly linked the \$100 million loan to the Mugabe regime for use in financing its campaign of violence:²⁵

AB [Alex Bell, presenter]: So I guess it’s not a stretch to say then that it seems that this deal [CAMEC’s acquisition of Todal] definitely helped to entrench the regime in their place of power back then?

RB [Roy Bennett]: Absolutely, it totally helped them entrench them. You would never have been able to get the military out into the areas to unleash the violence that they did. You would never have been able to get the militias into the areas to unleash the violence that they did. You would never have been able to have the election machinery of ZANU-PF to be able to do what they did if they hadn’t accessed that money. That money totally brought about all the heartache, pain, gerrymandering, violence, intimidation, repression that took place at the 2008 election is directly linked to that 100 million.

The loan cannot therefore be distanced from – and on the contrary funded and made possible – an orchestrated campaign of violence by the ZANU-PF-led government, which resulted in incidents of horrific brutality.

The US Ambassador to Zimbabwe in 2008, James McGee, condemned the ‘systematic campaign of violence designed to block this vote for change... orchestrated at the highest levels

²³ Antony Sguazzin and Mark Herlihy, ‘Camec to Mine Platinum With Zimbabwe Government Unit,’ *Bloomberg*, 11 April 2008, <<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aazJsnZq4Jck&refer=africa>>.

²⁴ Barry Sergeant, ‘Zimbabwe’s robber barons’, *Moneyweb*, 28 June 2008.

²⁵ MDC-T Treasurer, General Roy Bennett, in a SW Radio Africa interview, presented by Alex Bell, broadcast 14 August 2012. See *Transcript of Diaspora Diaries with Roy Bennett*, posted 17 August 2012, available at: <<http://www.swradioafrica.com/2012/08/17/transcript-of-diaspora-diaries-with-roy-bennett/>>.

of the ruling party.²⁶ Ambassador McGee confirmed that a diplomatic convoy had seen evidence of violence of a “massive” scope, including proof that civilians had been interrogated at a torture camp. A State Department spokesman linked Mugabe to the campaign of violence, urging him to “call off his dogs”.²⁷ The US administration repeatedly criticised the failure of the ruling party in Zimbabwe to accept and announce the results of the election, accusing Mugabe of trying to steal the election.²⁸ The UN High Commissioner for Human Rights, Louise Arbour, attributed serious human rights violations ‘to groups linked to the ruling ZANU PF,’ describing the ongoing crisis in Zimbabwe as a ‘perversion of democracy’.²⁹ She condemned the murder of opposition activists in Zimbabwe, referring to ‘politically motivated extra-judicial killings’ and noted that ‘arrests, harassment, intimidation and violence – directed not just at people with political affiliations, but also at members of civil society – are continuing on a daily basis.’³⁰ Arbour called on the Government of Zimbabwe and its legitimate security forces ‘to discharge their lawful responsibilities... and ensure the protection of all Zimbabweans, irrespective of whom they do or do not support politically’.³¹

Testimony from Human Rights Watch, “Bullets for Each of You”: State-Sponsored Violence since Zimbabwe’s March 29 Elections

Abusive “re-education” meetings are being held to compel MDC supporters into voting for Mugabe. In one of these meetings, on May 5 in Chiweshe, ZANU-PF officials and “war veterans” beat six men to death and tortured another 70 men and women, including a 76-year-old woman publicly thrashed in front of assembled villagers.

...

Six men subsequently died from the horrific beatings and torture that took place that day. Two of them, Alex Chirisiri and Tapiwa Meda died on the spot after the beatings. Joseph Madzuramhende died later that day. Geoffrey Jemedze and Wilson Emmanuel died at Avenues clinic on May 9, Jemedze from renal failure. Fushirai Dofu died on May 10 at Howard hospital.

...

The relatives of Joseph Madzuramhende, one of the three men who died on May 5, told Human Rights Watch about how he was beaten and tortured. According to relatives... six ZANU-PF youth started beating Madzuramhende... and stuffed a cloth in his mouth to prevent him from shouting out. They allegedly said to him: “Your particular crime is that you have a radio at your place and other villagers were coming to your home to listen to Studio 7 (Voice of America program which airs in Zimbabwe) and to listen to election results and this is your crime.”

²⁶ James D. McGee, US Ambassador to Zimbabwe, ‘Breaking the Silence on Political Violence in Zimbabwe,’ 14 May 2008, available at: <<http://iipdigital.usembassy.gov/st/english/article/2008/05/20080514150007eaifaso.9153559.html#axzz2TAkACsMH>>.

²⁷ Tom Casey, Deputy Spokesman, US Department of State, *Daily Press Briefing*, Washington, DC, 1 May 2008, available at: <<http://2001-2009.state.gov/r/pa/prs/dpb/2008/may/104268.htm>>.

²⁸ See, for example, Assistant US Secretary of State for African Affairs, Jendayi Frazer, quoted in ‘Mugabe Trying to Steal Elections, Says U.S. Official,’ *CNN*, April 24, 2008.

²⁹ United Nations High Commissioner for Human Rights, ‘Arbour calls for justice for victims of electoral violence in Zimbabwe,’ *Press Release*, 26 June 2008.

³⁰ United Nations High Commissioner for Human Rights, ‘Arbour condemns murders of opposition activists in Zimbabwe,’ *Press Release*, 28 May 2008.

³¹ United Nations High Commissioner for Human Rights, ‘Alarmed by violence in Zimbabwe, Arbour urges restraint,’ *Press Release*, 27 April 2008.

They took barbed wire and tied his genitals and tied the other end of the wire to a log. They said: “We will beat you until you move the log with your penis.” He attempted to do so and the wire was cutting into his genitals as they continued to beat him. They then took another log, put his genitals on the log and begun to beat the genitals. Later they tied another wire around his genitals and started dragging him until a part of his genitals came off. After the beatings Madzuramhende's relatives put him on an ox cart. He was still talking. He died in his home at around 8 p.m. that night in a leaning position because he couldn't lie on his stomach or his back due to his injuries.

Human Rights Watch confirmed the role of government ‘at national and local levels’ in the systematic and methodical targeting of MDC supporters, with the top leadership of the security forces ‘aligned to President Robert Mugabe and ZANU-PF’:³²

As in the elections of 2000 and 2002, the post-election violence in 2008 did not arise spontaneously. Human Rights Watch has credible evidence that senior security officers at the local and national level of government are organizing and inciting the violence. Human Rights Watch researchers interviewed more than 60 victims and eyewitnesses who implicated by name local headsmen, ZANU-PF councillors, MPs and supporters who were working closely with senior ranking army officers, police and prison officers, and agents from the Central Intelligence Organization (CIO).

The use of torture by state agents – the army and police – was characterised as endemic; moreover youth militias and ‘war veterans’ were used by the government and ZANU-PF as ‘proxy forces to commit violent acts’:³³ ‘those who directly committed abuses were acting under the orders or with the acquiescence or complicity of senior ranking army and police officers’.

The objective of Operation Makavhoterapapi was to keep President Mugabe in power by seeking to ensure that those who voted for MDC in the first round of the elections – including many in the areas considered as the ZANU-PF heartland – did not do so again. First and foremost, a loan to the Zimbabwean government was loan to Mugabe as president and ZANU-PF leader.

⇒ Robert Gabriel Mugabe, President of the Republic of Zimbabwe, was added to the SDN list at the outset of sanctions against Zimbabwe in March 2003 and has remained on the list ever since, including during the period in which the loan was agreed and transacted with his regime.

Operation Makavhoterapapi was planned and coordinated by the government's Joint Operations Command (JOC). The JOC comprised the heads of the security forces: the Central Intelligence Agency, the Zimbabwe Defence Forces, the police and the prison services. The JOC took control of the state security apparatus in order to ensure the re-election of Mugabe so that the vested interests of the Committee’s own members could be protected whilst a ZANU-PF-led

³²“*Bullets for Each of You*”, op. cit., p.17.

³³*Bullets for Each of You*”, op. cit., p.18.

regime remained in power.³⁴ The use of the Lefever loan to finance Operation Makavhoterapapi directly benefited high-ranking members of the JOC; moreover, the majority of that membership were on the OFAC SDN list prior to CAMEC's acquisition of the platinum assets. In other terms, an entity comprised of SDNs used money sourced from a US investment firm to undermine democracy in Zimbabwe.

Members of the JOC on the OFAC SDN list

- ⇒ Happyton Bonyongwe – Director-General of the Central Intelligence Organisation, added to the OFAC SDN list, 30 January 2008
- ⇒ Commissioner Augustine Chihuri – Commissioner of the Zimbabwe Republic Police, Named in the Annex to Executive Order 13288, 6 March 2003
- ⇒ General Constantine Chiwenga – Commander of the Zimbabwe Defence Forces, named in the Annex to Executive Order 13288, 6 March 2003
- ⇒ Gideon Gono – Governor of the Reserve Bank of Zimbabwe, named in the Annex to Executive Order 13391, 22 November 2005.
- ⇒ Emmerson Mnangagwa – Rural Housing Minister and Chair of the JOC after the electoral defeat, named in the Annex to Executive Order 13288, 6 March 2003
- ⇒ Didymus Mutasa – Former chair of the JOC prior to the electoral defeat, named in the Annex to Executive Order 13288, 6 March 2003
- ⇒ Air Marshal Perence Shiri – Commander of the Air Force of Zimbabwe, named in the Annex to Executive Order 13288, 6 March 2003
- ⇒ Major General (Ret.) Paradzayi Zimondi – Head of the Zimbabwe prison service, Named in the Annex to Executive Order 13288, 6 March 2003

The \$100 million loan and payment for an arms shipment from China

Shortly after CAMEC's acquisition of the Todal platinum assets, in the second week of April 2008, a Chinese ship An Yue Jiang was at anchor waiting to dock at Durban, South Africa.³⁵ Dockers represented by the South African Transport and Allied Workers Union (SATAWU) refused to unload or transport the shipment. A High Court order blocking transfer of the shipment through South Africa was obtained:³⁶ the bill of lading and other documents detailed a cargo of 77 tons of bullets, rocket-propelled grenades, and mortars bound for Zimbabwe.³⁷

³⁴ On the role of the JOC/Mugabe, see US Embassy South Africa, *Transcript Press Roundtable with Assistant secretary of State for African Affairs*, Dr.Jendayi E. Frazer, 21 December 2008, available at: <<http://southafrica.usembassy.gov/root/pdfs/zimbabwe081221.pdf>>; also 'Zimbabwe: 2008 Elections and Implications for U.S. Policy,' op. cit., p.9 and footnote 42.

³⁵ David Beresford, 'Chinese ship carries arms cargo to Mugabe regime,' *The Guardian*, 18 April 2008.

³⁶ High Court of South Africa Durban & Coast Local Division, Court Order, Case No. 4975/08, 18 April 2008.

³⁷ The documents produced in court included the bill of lading, packing list and commercial invoice. Copies are available at: <[http://wikileaks.org/wiki/Zimbabwe_Chinese_weapons_shipment_documentation_\(2008\)](http://wikileaks.org/wiki/Zimbabwe_Chinese_weapons_shipment_documentation_(2008))>.

The June 2008 article in *The Telegraph*, in discussing the Zimbabwean platinum deal, as concluded by CAMEC and its chairman, Phillippe Edmonds, referred to the use of the consideration and \$100 million loan as payment for the platinum assets to pay for arms:³⁸

Edmonds is facing criticism over the decision by his company to strike a lucrative business deal with a state-run company in Zimbabwe and for his willingness to cosy up to Mugabe's government. In particular, critics... question whether part of the \$120m (£60m) payment that Camec made earlier this year for platinum rights in Zimbabwe – and a further \$100m loan – have been used to pay for a massive arms cache from China: semi-automatic rifles, guns and bullets that may soon be used against Zimbabwe's impoverished population if the situation turns ugly in the run-up to the new presidential elections on June 27.

A shareholder confirmed to the newspaper 'very heated conversations over the past two or three months between Andrew Groves and some of his shareholders... We are aware of the allegations that some of the payments for the platinum rights somehow found their way to being used for the Chinese arms payment.'³⁹ According to the shareholder, Groves and others 'vehemently deny that there were any direct payments to the Chinese'.

CAMEC said that 'None of the drawdown payments [on the loan], so far as Camec knows, had anything to do with the acquisition of arms' and denied that the company had been contacted by shareholders expressing concern about recent investment in Zimbabwe.⁴⁰

Amidst mounting international pressure, US Assistant Secretary of State Jendayi Frazer called upon both the regional governments and China to prevent the weapons transfer.⁴¹ On 22 April, the Chinese government announced that the ship would return to China. The An Yue Jiang docked in Angola to take on fuel and unload construction supplies, but was reportedly denied permission to unload its Zimbabwe cargo.

However, although the arms shipment was believed at the time to have been returned to China, *The Telegraph* quotes intelligence sources saying that it was secretly unloaded at Luanda, the Angolan capital and Brazzaville, the capital of the Republic of the Congo.⁴² A commercial carrier is then believed to have flown the two arms shipments to Harare. According to the International Peace Information Service (IPIS), in August 2008, 53 tons of the ammunition was allegedly flown from the DRC to Harare by Enterprise World Airways, aboard a Boeing 707-3B4C aircraft registered as 9Q-CRM.⁴³ An employee of the state-owned Zimbabwe Defence Industry (ZDI) in Harare told IPIS that the shipment had arrived in Zimbabwe.

³⁸ 'Business and morality: Is Phil Edmonds right to trade with Robert Mugabe?', op. cit..

³⁹ *Idem*.

⁴⁰ *Idem*.

⁴¹ Lauren Ploch, 'Zimbabwe: 2008 Elections and Implications for U.S. Policy,' *CRC Report for Congress*, RL34509, 22 May 2008, p.11.

⁴² 'Business and morality: Is Phil Edmonds right to trade with Robert Mugabe?', op. cit.

⁴³ Brian Johnson-Thomas & Peter Danssaert, *Zimbabwe - Arms and Corruption: Fuelling Human Rights Abuses*, International Peace Information Service, July 2009; also Fiona Forde, 'Weapons flowing in and out of Zimbabwe,' *The Sunday Independent*, 12 July 2009.

c. *Engaging sanctions (II): parties to the transaction, SDN status or their links to SDNs*

ZMDC, the partner in Todal, was added to the SDN list on 25 July 2008 '[i]n light of the continued intransigence of the brutal Mugabe regime'. It remains on the SDN list. The OFAC release adding ZMDC to the list states:⁴⁴

Today's designations include a number of Zimbabwean parastatals and entities that are owned or controlled by the Government of Zimbabwe. Robert Mugabe, his senior officials, and regime cronies have used these entities to illegally siphon revenue and foreign exchange from the Zimbabwean people. Treasury's designations today include...the Zimbabwe Mining Development Corporation (a.k.a. ZMDC), involved in investment in the mining industry in Zimbabwe, and in planning, coordinating and implementing mining projects on behalf of the Government of Zimbabwe...

On 25 November 2008, Muller Conrad (aka 'Billy') Rautenbach, an individual who has been associated with the Meryweather company (see box) that sold Lefever to CAMEC, was designated as providing financial and other support to the Government of Zimbabwe and Zimbabwean SDNs. He was described by OFAC as a 'Mugabe regime crony,' providing financial and logistical support for 'large-scale mining projects in Zimbabwe that benefit a small number of corrupt senior Officials' and that 'has enabled Robert Mugabe to pursue policies that seriously undermine democratic processes and institutions in Zimbabwe'.⁴⁵

Whilst the designation of ZMDC occurred on 25 July 2008 after the CAMEC announced its acquisition of Todal, only further inquiries can establish whether all material aspects of the transaction, including arrangements with Och-Ziff/OZ Management to buy CAMEC shares and transfer funds – were finalised by this date: for example, OZ Management's significant holding in CAMEC was not formally notified until 28–29 July 2008.⁴⁶

Billy Rautenbach and Meryweather Investments

CAMEC identified the seller of the shares in Lefever as Meryweather Investments Limited, which 'will on completion of the transaction hold a 13.07% interest in the enlarged share capital of CAMEC.'⁴⁷ According to the public relations company representing CAMEC at the time of the acquisition, CAMEC was not disclosing the identity of Meryweather's owners.⁴⁸

A Zimbabwean businessman with close ties to Mugabe, Billy Rautenbach, has been associated with Meryweather Investments. Although Rautenbach denies any such association between himself and Meryweather, other information must be considered in assessing this claim. There is an unequivocal and confirmed relationship between Rautenbach and CAMEC: he sold DRC mining and transport assets to CAMEC, he continued to manage his former companies in the DRC after their sale to CAMEC, and was a significant CAMEC shareholder

⁴⁴US Department of the Treasury, 'Treasury Designates Zimbabwean Parastatals and Companies Supporting the Mugabe Regime,' 25 July 2008, available at: <<http://www.treasury.gov/press-center/press-releases/Pages/hp1097.aspx>>.

⁴⁵US Department of the Treasury, 'Treasury Designates Mugabe Regime Cronies,' 25 November 2008, available at: <<http://www.treasury.gov/press-center/press-releases/Pages/hp1295.aspx>>.

⁴⁶ See *intra*, note 11. CAMEC's notification is dated 29 July 2008, reproducing notification on the previous day from OZ Management.

⁴⁷ 'Acquisition of Platinum Assets,' *op. cit.*

⁴⁸ Ben Brewerton of London-based Financial Dynamics Ltd., a public relations firm representing CAMEC, quoted in Antony Sguazzin and Mark Herlihy, 'Camec to Mine Platinum With Zimbabwe Government Unit (Update4),' *Bloomberg*, 11 April 2008, available at: <<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=age21cHHHm5Y>>.

until CAMEC was itself acquired by Eurasian Natural Resources Corporation plc (ENRC) in late 2009.

In its offer document, ENRC included further information on 'Sanctions and ongoing post-acquisition management issues,' noting that 'US sanctions regulations are implicated because there are a few senior managers of ENRC (including Felix Vulis, ENRC's chief executive officer) who are US persons and who may not participate in or support transactions involving sanctioned countries or individuals'.⁴⁹ ENRC put in place arrangements, without the participation of any US persons, to negotiate the offer and manage certain assets post acquisition.⁵⁰ Although ENRC did not name the sanctioned entities or individuals associated with the acquisition, the offer document did provide information on certain shareholdings in CAMEC, including Meryweather Investments.

ENRC describes how it had received irrevocable undertakings to accept the offer from, *inter alia*, Temple Nominees Limited with a holding of 115,000,000 shares or approximately 4.00 percent of the entire issued ordinary share capital of CAMEC and Chambers Nominees Limited with a holding of 100,000,000 shares or approximately 3.48 percent.⁵¹ Both Temple and Chambers nominees are confirmed by ENRC as acting 'for and on behalf of Meryweather Investments Limited'. The total of shares held by Meryweather's nominees is equal to the consideration of 215,000,000 CAMEC shares paid as part-consideration for the Total acquisition. CAMEC, in its 2009 annual report, confirms that Meryweather held 215,000,000 ordinary shares or 7.49 percent of CAMEC's issued share capital, as of 18 September 2009 (the day ENRC's offer for CAMEC was announced).⁵²

According to *Private Eye* magazine, 'CAMEC... is understood to have informed the Treasury earlier this year that Meryweather was linked to Zimbabwean businessman 'Billy' Rautenbach, whose assets are supposedly frozen by UK and US sanctions against the Mugabe regime...'⁵³

The article continues: 'Rautenbach himself denies any links to Meryweather (*Eye* 1246), so that must be true. Yet new information concerning Meryweather and its dealings with CAMEC suggest that Rautenbach may at least have a very good idea as to who stands to benefit from the Meryweather millions... The sole director of Lefever, and who also appeared to sign for Meryweather, was one James Ramsay. Now that's a remarkable coincidence. For a lawyer named James Ramsay has for many years represented Rautenbach... So were the two Ramsays one and the same?'

According to *Private Eye*, 'Neither Temple nor Chambers appears to have any connection to CAMEC. However, the letters accepting the bid for the Meryweather shares were signed by the CAMEC company secretary, Philip Enoch. This suggests that CAMEC is well acquainted with the real owners and empowered to act for them. Which would be so if, as is suggested, CAMEC had volunteered to the Treasury that the Meryweather shares were linked to Rautenbach and as such covered by the sanctions freeze.'

⁴⁹ENRC, 'Recommended Cash Offer by ENRC Africa Limited (a wholly-owned subsidiary of Eurasian Natural Resources Corporation PLC) to acquire Central African Mining & Exploration Company plc,' 9 October 2009, p. 25.

⁵⁰ Ibid., Sanctions and ongoing post-acquisition management issues, pp. 25–6.

⁵¹ Ibid., Other CAMEC Shareholders, p. 11.

⁵² CAMEC, *Report and Financial Statements: Year ended 31 March 2009*, Substantial shareholders, p. 49.

⁵³ 'In the City,' *Private Eye*, issue no. 1252, 25 December 2009 – 7 January 2010, p. 33.

3. *Unanswered questions in respect of Och-Ziff's role in providing finance*

An investigation of whether or not funds from a US investment fund were used to finance the 2008 campaign of violence by the Zimbabwean government is warranted in light of the Zimbabwe sanctions program: recalling that Executive Order 13391, in force prior to 25 July 2008, prohibited transactions with any 'person, entity or organization found to... be undermining democratic institutions and processes in Zimbabwe'; and Executive Order 13469, in force from that date onwards, prohibited transactions with, *inter alia*, any 'senior official of the Government of Zimbabwe' and those 'responsible for, or to have participated in, human rights abuses related to political repression in Zimbabwe.'

- ◆ What did OZ know about how the money it provided was going to be used? Did it know that it would be used to finance a loan to the Mugabe/ZAUN-PF-led government?

A CAMEC spokesperson told *The Telegraph* that 'the April deal was only done after consultation with a number of major shareholders'; one conclusion that can be drawn from this is that the Och-Ziff Group were consulted and therefore must have been aware of how the Group's investment was to be used.

- ◆ Did OZ contact OFAC and seek its advice on any investment in CAMEC with respect to the Zimbabwean platinum deal and whether or not there were any implications *vis-à-vis* US sanctions?
- ◆ What due diligence did OZ carry out to determine the likelihood of how its finance was to be used by CAMEC or its Lefever subsidiary to 'comply with its contractual obligations to the Government of the Republic of Zimbabwe'?

The notion that any firm – committing to invest in a company preparing to acquire platinum assets in a joint venture with a state-owned mining company requiring a loan to the Zimbabwean government – could have been unaware of numerous reports of human rights violations by the Mugabe/ZANU-PF regime at the time lacks credibility. *Inter alia*, four major reports by Human Rights Watch, two from Amnesty International, and statements of condemnation by the US authorities and the UN High Commissioner for Human Rights, were all in the public domain, alongside extensive coverage in the US domestic and international press.⁵⁴

Further clarification is required on the exact timing of the transaction to invest concerning OZ Management and CAMEC:

- ◆ When did OZ Management/Och-Ziff first discuss the investment with CAMEC?
- ◆ When did OZ Management/Och-Ziff agree the investment with CAMEC?
- ◆ When were funds transferred from OZ Management/Och-Ziff to CAMEC/Lefever or to any other entity associated with the Todal acquisition?
- ◆ When did OZ Management/Och-Ziff receive shares in CAMEC?

⁵⁴ Human Rights Watch: *All Over Again: Human Rights Abuses and Flawed Electoral Conditions in Zimbabwe's Coming General Elections*, (March 2008); *"Bullets for Each of You": State-Sponsored Violence since Zimbabwe's March 29 Elections* (June 2008); *"They Beat Me Like a Dog": Political Persecution of Opposition Activists and Supporters in Zimbabwe* (August 2008); *"Our Hands Are Tied": Erosion of the Rule of Law in Zimbabwe* (November 2008). Amnesty International: *Zimbabwe: A Trail of Violence after the Ballot* (June 2008); *Zimbabwe: Time for Accountability* (October 2008). United Nations High Commissioner for Human Rights: 'Arbour calls for justice for victims of electoral violence in Zimbabwe,' *Press Release*, 26 June 2008; 'Arbour condemns murders of opposition activists in Zimbabwe,' *Press Release*, 28 May 2008; 'Alarmed by violence in Zimbabwe, Arbour urges restraint,' *Press Release*, 27 April 2008.

- ◆ Did OZ Management seek to establish the beneficial owners of the shares, held in the name of Mosrstan [*sic* – Morstan?] Nominees Limited and Goldman Sachs Securities (nominees) Ltd?
- ◆ Why did OZ Management not notify its holding in CAMEC until 28 July 2008? Does this indicate that it had only acquired CAMEC shares on that date?
- ◆ Is it the case that OZ Management’s transaction with CAMEC had not been concluded until that date and that monies to pay for the CAMEC shares and provide finance for the loan had not been transferred until then?

If this aspect of the transaction had not been concluded until 28 July 2008, ZMDC was by then on the SDN list.

B. Och-Ziff and US public pension funds: the need for further scrutiny?

1. State pension funds investing through Och-Ziff at the time of the Zimbabwe transaction

Och-Ziff describes a focus ‘on establishing long-term relationships with a global base of institutional investors,’ including pension funds.⁵⁵ Indeed, pensions account for 30 per cent of Och-Ziff’s investor base across its hedge funds and other alternative investment vehicles.⁵⁶ Although Och-Ziff does not release information on its clients, some of these investors – in particular pension funds, accountable to their boards, councils or trustees – have released information on their investments managed by Och-Ziff. In the US, it is reported that some of the biggest public pension funds – the \$255 billion California Public Employees’ Retirement System (CalPERS), the \$71 billion state pension funds managed by the New Jersey Division of Investment (NJDI), the \$53 billion Massachusetts Pension Reserves Investment Trust Fund – have placed investments with Och-Ziff.

The investment of certain of the State pension funds, including California and New Jersey, in Och-Ziff funds coincided with the latter’s provision of finance to CAMEC, made available as a loan to the Mugabe-led government in 2008. In July 2012, NJDI confirmed a long-standing relationship of over 6 years with Och-Ziff. An investment report for January 2009 gives details of \$150,000,000 commitments to OZ Domestic Partners II LP, with an inception date of June 2006.⁵⁷ As of May 2012, the NJDI confirmed \$838 million in net asset value invested across two products, the Master Fund and OZSC L.P. and, later the same year, committed to increase investment by \$500 million in existing and new accounts in its portfolio managed by Och-Ziff.⁵⁸ CalPERS records for the period 2008 – 2009 show investments totalling over \$400

⁵⁵Och-Ziff, Our Firm, <http://www.ozcap.com/our_firm/index>.

⁵⁶Och-Ziff, Fund Investors by Type, <http://www.ozcap.com/our_business/fund_investors/index>.

⁵⁷NJDI, *Director’s Monthly Investment Report*, Data for January 2009, Schedule 25, as of 31 January 2009.

⁵⁸According to the *Memorandum to the State Investment Council*, ‘Proposed Investment in Och-Ziff Separate Accounts,’ 27 July 2012: ‘an additional commitment of up to \$200 million to the existing bank loan fund OZSC, LP with an extension of the current investment period, \$200 - \$500 million in bank loan fund OZSC II, LP, up to \$400 million in a hedge fund account OZNJ – Credit Strategies, up to \$200 million in a real estate account OZNJ – Real Estate, and up to \$150 million in a real assets account OZNJ – Real Assets. The investments will be partially funded through a \$100 million redemption from the existing hedge fund investment in OZ Domestic Partners II, L.P. (the “Master Fund”) and a new commitment of \$500 million. The aggregate new capital allocated across these four accounts will not exceed \$600 million.’

million in the OZ Domestic Partners LP fund.⁵⁹ Current CalPERS investments total \$600 million in two Och-Ziff funds.⁶⁰

2. Investment standards in public pension funds: the example of CalPERS

CalPERS has long maintained that the investment decisions of large institutional investors should be used to further corporate governance standards and help eliminate human rights violations in countries or markets where funds are invested. CalPERS advocates that external fund managers and other investment service providers ‘understand our expectations’:⁶¹

External managers and vehicles represent an important part of the CalPERS portfolio, and the concept of alignment of interest is highly relevant....The goal is to ensure that CalPERS interests are represented through the investment chain, and an alignment of interest framework is our strategic theme in the governance of that process.

“Where possible, we want to show how we take responsibility for our impact through the investments we make and through the relationships we have with our investee companies, regulators, contractors, investment peers, and, most importantly, our members.”

CalPERS, *Towards Sustainable Investment: Taking Responsibility* (2012), p.5.

CalPERS recognises that the procurement process, by which it chooses external managers, is a key part of the framework through which the pensions fund’s core principles are implemented.⁶² This must hold forth the prospect that those investment funds, who do not share the fund’s advocated principles or who refuse to move decisively to eliminate improper practices or fail to affect adequate controls to prevent their recurrence, will have their service contracts terminated.

“Until 2007, we did not invest in a large number of emerging markets due to risks that we might invest in companies or other entities that abuse labor or violate human rights....When we reviewed this approach in 2007, we concluded that it both hurt our returns by reducing our investable universe and reduced our ability to be a positive influence on these markets.”

CalPERS, *Towards Sustainable Investment: Taking Responsibility* (2012), p.29.

In 2008, as the CalPERS Board adopted its Global Principles of Accountable Corporate Governance, the Mugabe/ZANU-PF led government unleashed its campaign of killing, torture and intimidation in order to hold on to power.⁶³ The highest standards that CalPERS advocates under the Principles for US companies in its portfolio ought surely to apply to its US-domiciled and US-listed investment managers, including Och-Ziff, who are expected to align with CalPERS values:⁶⁴

⁵⁹The CalPERS *Annual Investment Report* to fiscal Year ending 30 June 2008 records: OZ Domestic Partners LP, 360,000,000 shares, market value \$407,953,080. The AIR to 30 June 2009 records: OZ Domestic Partners LP, 420,000,000 shares, market value \$449,302,140.

⁶⁰As of 31 October 2012: OZ Domestic Partners II, L.P., market value \$39 million and OZ Eureka Fund, LP market value \$558 million. See CalPERS, *ARS Hedge Fund Investments*, available at: <<http://www.calpers.ca.gov/eip-docs/investments/assets/equities/ars-hedge-fund.pdf>>.

⁶¹CalPERS, *Towards Sustainable Investment: Taking Responsibility* (2012), respectively, p. 6 and p. 11, available at: <<http://www.calpers.ca.gov/eip-docs/about/press/news/invest-corp/esg-report-2012.pdf>>.

⁶²Ibid., Our implementation framework – the “3 Ps”, Procurement, p. 6.

⁶³Ibid., Taking the Lead, entry for 2008, p.7: ‘The “Global Principles of Accountable Corporate Governance” were approved by the CalPERS Board and guide corporate engagement and proxy voting’.

⁶⁴CalPERS, *Global Principles of Accountable Corporate Governance*, p.17, available at: <<http://www.calpers-governance.org/docs-sof/principles/2011-11-14-global-principles-of-accountable-corp-gov.pdf>>.

CalPERS recommends that:

6.1 Human Rights Violations: Corporations adopt maximum progressive practices toward the elimination of human rights violations in all countries or environments in which the company operates.

It would be anomalous if the human rights standards expected of US companies in which CalPERS owns shares directly were not the same as those standards expected of its US external fund managers, investing in companies on behalf of the pension fund.

US Trade Unions, opposition to the Mugabe regime and investment in Zimbabwe

Trade unions have been at the forefront in campaigning for democratic change in Zimbabwe. In the run up to the 2008 elections and their aftermath, a number of prominent Zimbabwean unionists were beaten, tortured and falsely imprisoned. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the umbrella organisation comprising 57 unions, issued statements condemning the anti-democratic violence in Zimbabwe and the detention of senior Zimbabwe Congress of Trade Unions (ZCTU) officials, campaigning on behalf of unionists who had been targeted by ZANU-PF.⁶⁵

The action by unions in South Africa and across the region is credited with the initial blocking of Chinese arms from reaching the Mugabe regime and with mobilising wider international condemnation of the shipment.⁶⁶ The US joined the UK government in calling for UN Security Council consideration of an arms embargo.⁶⁷ The American Federation of Teachers (AFT), describing the 'travesty' of the 2008 presidential elections in Zimbabwe, made specific reference to the arms shipment, resolving:⁶⁸

that the AFT stand in solidarity with labor unions in South Africa, Mozambique, Angola and Namibia that have refused to deliver shipments of Chinese-manufactured arms to the government of Zimbabwe — weapons that can only inflame the political crisis

The same US trade unions that campaigned against the ZANU-PF-led violence (which – unbeknown to them at the time – had been financed by money originating with Och-Ziff) had many members with stakes in the US public sector pension funds that dealt with Och-Ziff. The links between the unions and the major public pension funds are often strong; in the case of CalPERS, six out of thirteen trustees are elected by beneficiaries and typically come from public-employee unions.⁶⁹ The question therefore arises as to the view of the unions on the investment of members' funds, to whatever extent, with Och-Ziff, given the latter's role in financing the CAMEC transaction, which included the loan to the Mugabe regime?

⁶⁵ Statement by AFL-CIO President John Sweeney on the Beatings and Mass Arrests of Trade Union Members in Zimbabwe, 18 September 2006; also Statement of AFL-CIO President John Sweeney on the Recent Arrest of Zimbabwe Congress of Trade Unions (ZCTU) President Lovemore Matombo and Secretary General Wellington Chibebe, 13 May 2008.

⁶⁶ For an analysis of the outcome, see Samuel J. Spiegel and Philippe Le Billion, 'China's weapons trade: from ships of shame to the ethics of global resistance,' *International Affairs*, 85: 2 (2009), pp. 323–346.

⁶⁷ See United States Africa Command, *Transcript: U.S. Department of State Press Roundtable in Pretoria, South Africa*, 24 April 2008. See also, for example, *Los Angeles Times*, 'U.S. urges Zimbabwe embargo,' 25 April 2008.

⁶⁸ American Federation of Teachers, Executive Council, 'Zimbabwe: Political, Trade Union and Human Rights,' *Resolution*, 2008.

⁶⁹ See CalPERS, Board of Administration, <<http://www.calpers.ca.gov/index.jsp?bc=/about/board/home.xml>>.

3. Pension fund divestment: the need for further clarity?

Divestment as a means of undermining support for regimes responsible for human rights abuse is a long-standing practice in the US. However, federal legislation is generally required to allow for the adoption of restrictive investment or divestment measures at the state and local levels.⁷⁰

Federal laws in respect of Sudan and Iran have been enacted, allowing divestment or restrictions on investment in certain companies doing business with those countries.⁷¹ State-level divestment and restrictive investment policies and laws have followed.⁷²

Such divestment largely impacts upon the pension fund holdings of non-US companies transacting with Sudanese and Iranian entities, because US companies and firms are already prohibited from doing business under US sanctions. Although similar, permissive, federal-level divestment legislation has not been introduced in relation to Zimbabwe – and this is a key point – US sanctions against Zimbabwe have been in force since 2003 and hence US companies such as Och-Ziff were already, and remain, prohibited from doing business with designated entities. In the light of this, US pension fund investments through Och-Ziff give rise to questions around two central issues:

- ◆ Did Och-Ziff's actions engage US sanctions – a question that only OFAC can address – and, even if this were the case, what are the implications for current investments through Och-Ziff?
- ◆ Notwithstanding the engagement or otherwise of sanctions, given the absence of permissive federal legislation allowing state-level divestment or restrictions on investment, could state pension funds have legally withdrawn investment from Och-Ziff because of concern over related transactions with Zimbabwe? If permissive federal and state-level laws are a necessary requirement – as exemplified in respect of Iran and Sudan – then principled state procurement, such as that developed by CalPERS, is rendered meaningless and unenforceable when it comes to taking divestment action in respect of companies and investment managers transacting with other undemocratic regimes. In the case of Zimbabwe – and, indeed other countries subject to US sanctions, but where federal divestment laws have not been enacted – is it not the case that state pension funds are precluded from divestment measures, whether these concern either foreign entities in their portfolio transacting with such regimes or where transactions by US-based entities have slipped through the sanctions net?

⁷⁰In the late 1990s, Massachusetts legislators passed restrictions that resulted in its pension's board – responsible for the state's \$18 billion fund – withdrawing \$10 million investment from companies investing in Myanmar and proposed similar measures for Indonesia and East Timor. The state's measures were successfully challenged in court and overturned because they undermined the primacy of federal sanctions against Burma under the Foreign Operations Appropriations Act (1997). See Michael John Garcia and Todd Garvey, 'State and Local Economic Sanctions: Constitutional Issues,' *CRS Report for Congress*, RL33948, 20 February 2013; also Alexandre Lamy and Maria van Wagenberg, 'State and Local Divestment Measures: A Growing US Trade Compliance Concern,' *Bloomberg Law*, March 2013.

⁷¹ Public Law 110-174, Sudan Accountability and Divestment Act of 2007, available at: <<http://www.gpo.gov/fdsys/pkg/PLAW-110publ174/content-detail.html>>; Public Law 111-195, Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, available at: <<http://www.gpo.gov/fdsys/search/pagedetails.action?browsePath=111%2FPUBLIC%2F%5B100%3B199%5D&granuleId=&packageId=PLAW-111publ195&fromBrowse=true>>.

⁷²Measures concerning Iran and Sudan have been adopted, respectively, in some 28 states (18 have legislated) and 35 states (23 have legislated), although additional states may have taken measures since some of the figures were compiled. See 'State and Local Economic Sanctions: Constitutional Issues,' *op. cit.*, Appendix, pp.17 ff.. The figure for state-level policies and legislation on Sudan is from The United States Government Accountability Office, 'Sudan Divestment,' *GAO-10-742*, p.5, June 2010 and would benefit from updating. The figure for state-level policies and legislation on Iran is from 'State and Local Divestment Measures,' *op. cit.*

Divestment by pension funds is further governed by their overarching fiduciary duty to provide benefits to members of the scheme.

Withdrawing investments from repressive regimes: the limits of CalPERS divestment policy

The CalPERS Investment Committee adopted a divestment policy in February 2009.⁷³ It was drawn up to respond to

external or internal initiatives to cause CalPERS to sell investments or refrain from making additional investments... for the purpose of achieving certain goals that do not appear to be primarily investment-related, such as promoting social justice (“Divestment Initiatives”). Typically, Divestment Initiatives focus on companies that do business in a specified country, are engaged in a specified industry, or in specific practices deemed undesirable by federal and state law (e.g., human rights violations) (“Targeted Companies”).⁷⁴

However, the divestment policy is, in practice, highly constrained and is unlikely, of itself to result in divestment, even from regimes responsible for human rights abuse. Firstly, CalPERS has

fiduciary obligations [that] generally forbid CalPERS from sacrificing investment performance for the purpose of achieving goals that do not directly relate to CalPERS operations or benefits. Divesting appears to almost invariably harm investment performance....This Policy, therefore, generally prohibits Divesting in response to Divestment Initiatives, but permits CalPERS to use constructive engagement...⁷⁵

Secondly, CalPERS divestment must also be in compliance with any federal laws and Californian state laws that require divesting, provided that such compliance with the latter is consistent with fiduciary duties.⁷⁶ In reality, if returns or performance would be damaged by selling investments – even in regimes responsible for human rights abuse – then CalPERS would engage with targeted companies, but would not divest. This fiduciary constraint even applies where federal and state laws permit divestment, such as in Iran and Sudan.

⁷³ CalPERS, Statement of Investment Policy Regarding Divestment, 17 February 2009.

⁷⁴ Ibid., I. Purpose, p.1.

⁷⁵ Ibid., I. Purpose, p.2.

⁷⁶ Ibid., IV. Statement of Policy, B. and C., p.3.

III. RECOMMENDED ACTION

RAID has written to the US Treasury and to Och-Ziff to ask:

- OFAC to investigate and determine whether US sanctions were engaged in respect of Och-Ziff's role in relation to CAMEC's transaction to acquire its Zimbabwean platinum assets
- for clarification from Och-Ziff in relation to unanswered questions outlined in the full report: the nature of its due diligence; what it knew about CAMEC's platinum transaction; the extent to which it knew, or should have known, that it was providing funds whose ultimate beneficiary was the Mugabe regime and SDNs; and the purpose, timing and sequencing of its investment.

RAID has also written to key US state pension funds and to US trade unions:

- RAID calls upon the major US pension funds: to confirm, account for and review their past and present investments through Och-Ziff; to establish the extent to which they have already sought or will be seeking clarification from Och-Ziff about its payment to CAMEC; and to publicly assess whether any such investments were and remain consistent with their investment policies.
- RAID asks such public pension funds to respond to the critique that principled investment or divestment, even when it concerns repressive regimes, is rendered ineffective in light of legal and fiduciary constraints on what a pension board can or cannot do (for example, when there is an absence of permissive federal divestment legislation or when direct or indirect investments engaged in business with repressive regimes are performing well).
- Given their condemnation of the Mugabe regime, RAID seeks the view of US unions on the use by that regime of finance originating from a US hedge fund for a campaign of violence. RAID calls upon the US unions, with members who have stakes in the major US public sector pension funds or union members on the pension boards, to ascertain what action is possible to prevent investment through external managers in repressive regimes that the unions themselves oppose.