Mark Oppenheimer:

Thank you very much for having us here today. I'm briefed on behalf of Johannesburg Attorneys Association. I'll tell you briefly what the organization is about.

They're the largest voluntary organization to represent Johannesburg and represent over two and a half thousand members of all races and our submission will deal with a number of points.

Firstly, we want to emphasize that as lawyers, we care deeply about justice. And one of the most important parts of justice is restoring past wrongs. And so we emphasize this importance of land restitution, the idea that if your land was stolen from you, it ought to be restored to you. And that in any just society, must have a compensation mechanism in place to ensure that the justice of the past righted.

So that is our starting point, we will then turned to look at the scope of inquiry before this committee and what powers it has to recommend any possible change to the Constitution.

Will then briefly discuss what international law is on the area of expropriation without compensation, and we will raise a number of concerns that may be present if the constitution were to be amended and then finally in with a couple of solutions.

So firstly, with regards to the scope of inquiry, this committee has done a tour of the country and asked the public and a number of organizations to present submissions and for a narrow question. Question is, should the constitution be changed to allow for the exploration of land without compensation. Now, section 25, of our constitution deals with a much broader category being property.

This means that no recommendation could be made to change anything in the property clause of the constitution that would interfere with any property rights whatsoever, except for land because of the narrowness of this inquiry.

With regards to international law:

So South Africa was a founding member of United Nations and there are a number of different treaties in place and customary international law, which deal with this question of what power states have to expropriate land.

Now firstly, expropriation is one of those things that is going to be necessary for States to use. In other words, if you're going to engage in building public infrastructure, something like the Gautrain project or to build roads it is often necessary to go through privately held land, and a seller may not want to sell and therefore the State will have to expropriate. International law says that you must pay adequate compensation.

Now, if we removed the requirement of compensation in our Constitution, i.e. no compensation was offered for the case of land, this would be a flouting of international law. So these are the two concerns that we have.

So with in regards to some of the other concerns that must be taken into account. The first is with regards to how much money has been dedicated towards this process of land and restitution.

So if we look at the most recent budget, we see that only naught point 3% of the budget has been dedicated towards this important process of land.

And the amount is roughly 5.6 billion Rand, which is basically a rounding error when you look at the entire budget, which is roughly 1.3 trillion.

So if this is a concern for South Africans, and you know, this is the hottest issue in public discourse at the moment, then it is incumbent upon governments to dedicate the correct amount of resources. In other words, the way to solve this problem is to ensure that those people who have had their land taken away from them, are given adequate compensation and those people that need adequate housing are addressed in that regard. One way to do that is to increase the budget.

The other thing that must be taken into account is the real interest or some Africans. So if we look at polling that has been done by the South African Institute for Race Relations we see that when Africans are asked, *"What are the major issues for you? What are your primary concerns?"* First of all, they list unemployment and that figure of concern as close to 40%, then it service delivery at around 33%, and you know, access to water, access to basic shelter and right at the bottom is land redistribution, which comes into the latest survey 2%.

So we know that when we're looking at the hierarchy of issues when we need to prioritize things that this does come towards the bottom of people's needs. So that must be taken into account before something so drastic as changing the Bill of Rights occurs. You must remember, that in the entire history of our Constitution, which has been amended 17 times the Bill of Rights has never been amended. The Bill of Rights is one of the most sacred portions of the Constitution and I think we ought to have enormous pause before amending the Bill of Rights, especially when there are other measures that can be done.

Next, while recognizing that restitution is important, the mechanism that's used to do that restitution matters enormously.

And we must bear in mind the needs of also Africans and the damage that can be done by using certain mechanisms. So the concern with expropriating property without compensation is that you undermine a very important right and if we look at the economic devastation that has occurred around the world from states that have tried this before, you know, we find that it's not only to those that held land, it's to the entire population. So if we look at what's happened to our neighbour in the north in

Zimbabwe and if we look at what has happened in Venezuela. We see in Venezuela, for example, that you know, one of the most prosperous countries in South America has been in a rendered a basket case that people are fleeing the country in droves.

To give you an example of this, there's a famous picture of police arresting someone who's got these white bags of powder on him So you think because its South America it must be bags cocaine. Actually he's being arrested because he has bags of flour, and the state says, you cannot use this for flour for your own purposes, this is State flour you cannot bake your own bread. They have mass starvation in Venezuela because they have so dramatically interfered with property rights there.

So the signal which will be sent to the international community is, as an international investor you can invest in any part of the world, you don't have to pick South Africa. Someone that acts in their own interests would want to invest in a country where their land rights are secure.

so as much as there is a noble end here which is to ensure that there is greater access to land and that those that have had their land stolen have been properly compensated, the mechanism may be much worse. We don't want medicine that's worse than the poison.

What we must also recognize that farming is a highly technical job. Government in a recent case bought up to them 264 Farms in the Eastern Cape for the purpose of redistribution towards new farmers and only 26 of those farms are still fully functioning. So 10% which means a 90% failure rate and you know, if you're going to have redress, if you're going to give people land, then you need to do so in a manner which is sustainable.

Farming has sort of become a much more scientific process over time that must be recognized that if what you want is sustainable development, handling of the land is insufficient for that, you know, you require people that have their own expertise and resources.

So, with regards to solutions, what we can look at is what has been done thus far, so between 1995 and 2014, one point eight million individuals have received compensation for land that was taken from them in the Land Claims Court Process. One point eight million is a large number and we know that 92% of those individuals elected to take money over land and one of those reasons is that money is fundable, money is freedom. Money means that you're not stuck in a rural area learning how to farm. You can use that money to start a business, to invest etc. So that's important and this is a solution that can be used for remaining claims which is to use the existing Land Claims Process.

The other thing that many people have said is that you ought to be conferring title. So those people that have been occupying land with the uncertainty of being able to remain there, are granted title deeds. The importance of title deeds is that they are

transferrable and you can borrow against it. So we need to have more security over land as opposed to less.

The other thing is to use the current constitutional powers that are in place in section 25. So we know from case law that the first thing you look at is what the market value of the land but then you can deviate up and down based on the other powers. So for example, the history of acquisition is one of those things that is currently mentioned in our constitution. So if you have land that was taken by the barrel of a gun, that is going to be a very good reason for reducing compensation, possibly down to zero rands.

You can also look at the purpose of the expropriation. If the purpose of the expropriation is to benefit people that are in need of land, that's going to play a role in determining the price that is ultimately paid.

And finally, the use of the property is also going to play a role in determining price. So I would say that the constitution in its current form provides ample powers to government and that must be taken into account."

Q & A:

Speaker 1:
"Thank you very much. I would just like to ask you, in lieu of the possible breaches of international law obligations where you mentioned earlier that the onus shall be paid appropriate compensation, in terms of resolution improvements of natural resources at the United Nations, should we be in breach of the international obligations, can economic sanctions be applied to a member state in such circumstances?

Secondly, in your submission you indicate that section 25 as it is presently formulated, you say they will be situations where no compensation is due after expropriation. Is that is that your position? In other words, are you saying that it's necessary to amend the Constitution or not necessary? That's the second issue.

Then because you know, as lawyers yourself, we've had various lawyers that are saying that it is necessary to amend the constitution for clarity sake, would you not suggest that a constitutional court test case can be brought to give clarity as to the parameters of section 25 as it presently stands given the doubt that exists and some members of the committee are saying you need to amend the constitution to bring clarity. Would it not be an easier step to go to the court and let the court give clarity so everybody knows what the position is."

Speaker 2:
"Thank you for your presentation. I also want to ask a question on the international law. You did say we would be flouting international law if adequate compensation is not paid. Could you just expand a bit more on your understanding in terms of International Law, what adequate would be vis a vie just and equitable compensation

as is foreseen within the Constitution and what you think would happen within the International context should we make a case that it could be zero? Thank you."

Speaker 3:
"Thank you very much Chair. In your presentation, page 5 under section 'Reason not to amend the Constitution' you did mention that the: 'country has a dark history of land theft' In your case, as a lawyer, how do you deal with something that was stolen? Do you normally buy a stolen property? Or how do you deal with it? If I come to your court and then I accuse Honourable Chair for stealing my pen? Do I have to compensate him for doing that? For stealing my property?

Again in your presentation, in page 6 of it, you did mention of failed programs of expropriation of land. And if we have time, I will tell you that they didn't fail. It is the systems that they have which made them to fail.

Now, why always you do mention Zimbabwe and Venezuela but you don't tell us about the positive projects like for e.g. Mozambique? Do you have an intention of misleading the country or misleading the world that if ever the expropriate, if ever the amend the constitution it means we'll be as Venezuela and Zimbabwe?

Thirdly, you did mention that 92% that were compensated during the land redistribution decided to take cash. In your analysis, as your status quo of the country, how can you give a legal perspective to that? Why this poor people decided to take cash?

One, is it because they took cash because of they the poverty stricken environment that they are living in?

Two, did they took cash because the environment couldn't enable them to do whatever activity they can want to do? Don't you think it was the environment that didn't enable them to do that?

Three, you did mention that our people are moving from the poor rural areas. Let me tell you, our areas, our villages are not poor, they are very rich. The reason they were moving was because of the Group Areas Act, the reason was they were put on a barren land. That is why they are moving to towns and the reason why they see the towns as a better place is because of the Apartheid Spatial Development plan. So as a legal person, how then are you going to make sure that or are you going to advise parliament when we take our decision to deal with this matter.

Last question, I want to check your affiliation. You said you are representing plus minus two thousand five hundred members, in terms of race can you analyse to us, can you tell us how many, it doesn't have to be in numbers merely a rough estimate – how many blacks and how many whites you have?"

Speaker 4:

“Thank you Chair. Does international law override our constitution? Such that we would sacrifice complying with our Constitution, just so that we're all are in line with some international agreements.

The question second one is, would you agree with me, we're talking about the matter of budgets, which you said is very, very small. Would you agree with me that you looking at this budget only and exclusively from the perspective of land acquisition, as well as land reform, that is programs that help people as different from the right to own land, pure restitution without paying anything.

So you're looking at it purely from saying to purchase so much land, your budget as government is too small, you're not looking at it from the perspective of advancing pure cause of restitution, which could require zero budget, that's why I'm asking you whether you would agree with me. That is because you're looking at the purchase price.

Thirdly, you're talking about the fact that, property ownership is undermined.

Now, you probably know that Chair, there's very few people on large amounts of land and many people who own very little or no land at all.

Now, would you agree with me when I say that this is a totally selfish protection of the minority rights or right to own land, vis a vie the grand or necessary ownership of land by the majority of South Africans? Would you agree with me that you’re just looking at it from the perspective of the few who own land, understanding, because you went further to say this has got to negative impact on the economy, understanding that the economy is driven or is influenced to a large extent by an asset known as land? I.e. whichever way it’s got consequences.

Lastly, very brief one. Very, very brief. Thank you, sir. Has it ever occurred to you that one of the reasons why people choose cash over land when it comes to restitution is because of a deeply eroded culture of cultivating land, something that stretches for centuries. Has it ever occurred to you that, that could be one of the reasons or are you just simplifying such a deep wound? That people have lost the culture of cultivating such that they opted for cash. Thank you.”

<u>Speaker 5:</u>
“Let me start on that one but with another different version as well. Sir, as you know, when you say, on page 5, you talk about the 92% that choose cash and you make a bold statement saying: “…this shouldn’t come as much of a surprise because money translates to freedom…”. I would argue that that is absolutely not true. The entire struggle in this country for freedom was about land. That’s the point that I’m making. That it was about land and it was not about money.

And secondly sir, I think the real reason why we are asking about access to land is about the dignity, when we went around the country people spoke about their

dignity. So don't reduce this exercise to money because money can never buy the dignity of many farm workers who can't bury or whose ancestors burial places have been taken by mines. So don't reduce it to freedom. That's the first point.

The second point, sir, the gentleman that is just sitting down there now, he's a retired attorney, I think from the High Court and he came to say to us a few minutes ago that you see you don't need to change the constitution. Because Mashaba in Johannesburg is expropriating and everybody else. You come to us and you say to us to do that will flout international law. So are you suggesting to us that Mashaba and Zille are flouting international law? Thanks, Chair."

Chairman:
"Mr Mark from the Johannesburg Attorneys Association, can you respond?"

Mark:
"Yes. Okay, so let's look at this, this question around dignity and freedom. So I think one of the advantages of money is that it can be used to purchase land that it can be used to purchase any number of things. So in other words, it is a more fungible asset class than land. So in other words, if someone says: 'I want land', they may not want land in the middle of the Northern cape, they may want land in a place they're choosing. And so one of the reasons why people have chosen as I say, 92% of cases, money instead of a particular piece of land is because it gives them that freedom to pick whatever they want. And it may be that they would like land they just wanted somewhere else.

You raise another important point, which is that sometimes that specific land really matters because as you say, there's a burial ground there, or there's some other intimate connection with that particular piece of land. And I think as far as possible in the restitution process, that land should be restored to that person.

But when we look at this question of dignity and it cuts across both lines. In other words, if we have someone who legitimately owns land and the state takes it from them without paying them anything for it. There has been an invasion of their dignity and this will cut across colour lines. So if the recommended change is to go here with the rest of our Constitution, bear in mind in s1 of our constitution, it says that South Africa is a nation founded on the value of non-racialism - that any change the constitution will then be done in a non-racial manner. What it does, is that it jeopardizes rich people, poor people, black people and white people. In other words, all of them will be endangered by the State, all of them can have their land taken from them with no compensation.

With regards to when you could a pay zero compensation and in our submission, we say that the current constitution allows for the payments of zero compensation. In some cases.

So, for example, Herman Mashaba's powers in the city. So what we know is that the starting point is: 'What is the market value?' then you can adjust up or down.

So for example, you may have something that has no market value – given the size of land or the location of the land i.e. in that case just on that factor alone you could pay zero.

You may also find that the nature in which it was acquired. So for example, a case was given for a piece of land that was directly stolen.

Well then, I think you have all the reason in the world to pay zero compensation someone directly stole something from you. You don't compensate them for it. But this, this is a point that I think need to be elaborated on properly.

So if we have the case that was illustrated which is that property was stolen by someone and if you can identify who it was then they must return it and they must not receive any compensation whatsoever.

But if we have a different case, so I'll go through a couple of different degrees of complexity and also, we must bear in mind, that South Africa can look abroad to other countries who have had to deal with this problem. So, for example, Germany engages in a compensation process for land that was stolen from Jews by Nazis and we know that they said if you were a direct thief – In other words, if you were a Nazi they would say: 'We're not going to pay you anything. That would be unjust to pay anything. We're going to restore the property without compensation.' That's just and our constitution allows that.

However it gets more complicated if you are someone who purchased that property many degrees down the line.

So in other words, you had no knowledge of the theft and uhm, maybe you've even bought a portion of it and it was re-transferred and re-re-transferred and re-transferred, you are an innocent bystander.

Now, I think it's important as well when we look at this case that we don't say, well, you look like a perpetrator and you look like a victim because of your race and therefore the transfer should be done on that basis. In other words, we cannot make these broad claims that white people stole the land and black people must be the beneficiaries. What we must look at is the individuals that stole the land and individuals that were stolen from and justice must be done between those two sets of people.

So the idea that we could say that 'All people who have a particular level of melanin in their skin are equally vicious and equally land thieves'. Well that goes against what our constitution demands, which is this value of non-racialism.

So for example, there's going to be an enormous amount of difference between people in this country who fled Nazis like my grandparents who came to this country in 1933 with the clothes on their back. People, you know, people who have arrived in this country from various different parts of the world, who pray to different gods, speak different languages all who happen to have the same level of melanin, to clump them together as land thieves would be inappropriate.

With regards to, as I said, this idea of minority protections, well-"

Speaker:

"Chair, a point of order please? A point of order? I want to check with the presenter, when he's presenting he alluded that when they deal with the case of theft, there is a process that they follow. Now, in this case there is a property that was stolen from the majority of people and there is evidence to that. To say that plot 175, for example, these are the beneficiaries of this plot which was taken, when you follow the history people will give you how was it taken. Then when he give a narrative to say people bought land, we can still argue, Chair, that everybody who came looking the same as he looks, to South Africa, he never brought any land with. So those ones are the ones that are regarded as land thieves."

Chairman:
"Can I assist this situation, please? I don't think it will be fair to engage on that issue because it appears to be a point of debate and the gentlemen from the JAA is trying to respond to questions from members. Whatever that point was, lets park it and give the gentleman the opportunity to continue."

Mark:
"I'll turn to some of the questions regarding international law, so as I say, what we have is a situation which is that all states are granted the power to expropriate and it terms of international law the case, the question is that you must par appropriate compensation. Now the states are given some latitude to determine what 'appropriate compensation' is and our state, for example, has set that out in our Constitution. So we know how this process will be done and that there is a fact finding mission in regards in regards to each particular case. You work out what this is worth, how it was acquired, what it is going to be used for…
We also, our courts make use of a thing called the Pont Gourd Principle. Which is the idea that, you know, if you have the state's seeking to expropriate land from a land owner, what they could do is say, well let me drive up the price dramatically because the state wants this and so they artificially inflate it because of artificial demand. The Pont Gourd Principal says no, you can't do that. We must look at the value of the land, aside from the fact that we're expropriating or not. So you look at the ordinary market value and then again we can use all these other factors which are good just factors to determine where compensation will be due. So in the case, for example, which Mashaba was talked about, this idea of looking at inner-city buildings which have been abandoned. One way in which you could pay zero rands in compensation is to use the Constitution. So to say, well is there any debt owed on this building. So if you've had a

building that's been abandoned in the city for 20 years. It may be that the rates owed on that building outstrip it's value, in which case the State can expropriate and pay zero compensation because it is owed more than the value of the land. So doing so in such an instance, would be appropriate compensation and would not be a flouting of international law.

However, if there is a piece of land that is valuable, that was justly acquired then to pay zero compensation in that instance, would not be just and equitable in terms of our Constitution and would not be appropriate in terms of international law.
That person is innocent, their dignity would be impinged upon by the State, if their land was taken and they were given nothing for it.

It would ultimately amount to some sort of State sanctioned theft. And we know as I've alluded to, that we have this dark history of land theft in this country for a very long time. And that the law has been used as a weapon against citizens to take their land. It has been used as a weapon against poor, vulnerable black citizens for a long time, we look at the group areas act, we know that that was a complete in justice people were wrongly deprived of their land, and what we need to do as South Africans is to say, never again, never again shall the poor and vulnerable be subject to the demands of the state and for the for the law to be utilized against them to perpetrate further injustice. It's important that the law is used in a just manner.

Now, on this point, as well. I think it's important that when drafting the law, we must bear in mind that positions of power change over time. So for example, in America, publicans and democrats change office on a very frequent basis. And they always bear in mind that the remedies that they craft in law are like weapons, which can be used against them by their other opponents across the aisle. And of course, this must be borne in mind by all parliamentarians. That if the Constitution is changed, if the Bill of Rights is changed, for the first time ever, to allow for expropriation without compensation, there is no guarantee that in the future, even if now, those that make that change have very just ends in mind that it will be done so in the future."

Chairman:
"Can you maybe in the interest of time, just wrap up in a minute because I think we are doing very bad for time and as indicated earlier on, if there are other, further submissions you can always do that in writing. Let me just give you a minute to wrap up."

Mark:
"I appreciate that. So I will say that there is this concern that if a change is made, it will be utilized as a weapon against those that want to use it for good and that is something that must be borne in mind. We do know that South Africa is governed by multiple, multiple range of different political parties who may use it in all sorts of ways. It will not always be the noble that expropriate. They may use it as a weapon to punish people and who don't share the same political views or their ethnic backgrounds. That must be borne in mind.

With regards to the concerns about breaching international law. What we may have is a situation of South Africa being taken to international tribunals if land is taken without appropriate compensation. So there'll be those sanctions. There may also be a pariah status that is attached to the country which South Africa has had before in the international community and we would not like that again. Um, so you may have a situation where we are cut out from the international community because we are not respecting international law and that is something to be avoided. Thank you very much."

Chairman:
"Thank you very much. We appreciate that you took the time to enrich us with your deliberations. Thank you."