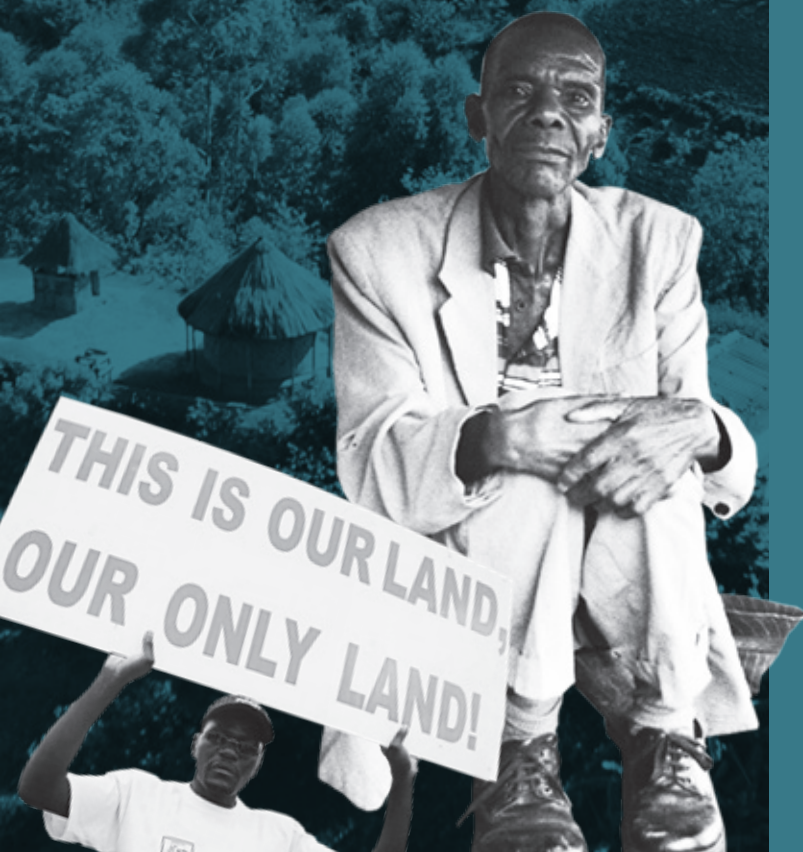


UNDERMINING THE INDIGENOUS RIGHT TO LAND AND PERPETUATING COLONIAL WRONGS

BORDER TIMBERS AND VON PEZOLD VS ZIMBABWE

In Zimbabwe's Eastern Highlands, thousands of indigenous families face the imminent risk of forced eviction from their ancestral lands, which they have cultivated for centuries. In blatant disregard of the rights of indigenous people under international law, three investment arbitrators have ordered Zimbabwe to 'restitute' their land to Austrian-Swiss-German investors operating large timber plantations in the area, which had been partly seized during Zimbabwe's land reform programme. The tribunal disdainfully declined to even hear the communities that would be displaced yet again by its judgement.





The South-Eastern Chimanimani region of Zimbabwe is a mountainous area where people's livelihoods traditionally depended on planting small fields and raising cattle and goats. But after British colonisation in the 1890s, the most fertile areas were taken by white settlers, forcing the local population to move up into the hills and to less accessible and productive lands further afield. To honour the graves of their ancestors and other sacred sites however, some remained behind, cultivating fields in restricted areas, often in return for a form of slave labour known as 'vhicki', or 'chibharo' for the new land 'owners'.¹

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Most of this area was taken away from us by white settlers... Our homes were destroyed, and... we had to live in compounds on our own territory, little more than slaves for the white settlers.

**CHADWORTH RINGISAI CHIKUKWA,
LATE CHIEF OF THE CHIKUKWA PEOPLE²**

After Zimbabwe's independence in 1980, many dispossessed families moved back to their traditional homeland. By then, however, their traditional territories were controlled by Border Timbers Limited (BTL), a successor of the British South Africa Company, which led the imperial conquest under a mandate from the British Crown.

In the 2000s, as part of much-needed land reforms in a country where a small group of white farmers owned almost all land, the returnees proposed negotiations for a "Joint Forest Management" system, under which they would have regained access to the land, while BTL would have continued its business and a fair share of income would have gone to the local community. But Heinrich von Pezold, an Austrian-Swiss-German landholder and by then majority-owner of BTL, rejected the plan with a categorical "we will not yield an inch".³

While the average size of a farm in Europe is 16 hectares, and 179 hectares in the United States, the Pezold family 'owned' at least 78,000 hectares at the time⁴ – about the size of New York City.

Forced evictions, harassment and violence

BTL and von Pezold launched a flurry of court cases, harassments and violence, forcibly evicting numerous families. One particularly brutal eviction took place in January 2013, when BTL security guards burned down over a hundred homes of the Maguta-Gadyadza community and three children died due to exposure to rain and cold. The clan's former headman, Thomas Masengedzero Gadyadza, remembers: "They used blow-torches to set my home on fire... I was not able to save any of my possessions. My wife and I ran to the forest and my two children... ran to the forest from where we watched the burning of our home. There was a lot of noise. We were very frightened."⁵

“

We were dispossessed of our land and territory on racial grounds, and we were treated, and in many ways still are treated, as a sub-human species by the very whites who openly have done their best to destroy our culture, our history, and our ability to gain decent livelihoods from our own land, our own labour and our own natural resources.

**PHINEAS ZAMANI NGORIMA, REGENT CHIEF
OF THE NGORIMA PEOPLE⁶**

Neo-colonial investment arbitration

In 2010, BTL and the von Pezold family sued Zimbabwe under the country's investment treaties with Germany and Switzerland.⁷ They challenged government actions during Zimbabwe's post-2000 land reform programme, including the expropriation of some of the investors' property in 2005, the violence that occurred at the time, as well as the government's alleged failure to protect the von Pezolds from settlers on their plantations.⁸

Zimbabwe lost both disputes in 2015. The three arbitrators who decided both cases ordered the country to return the land to the von Pezolds and forcefully remove the settled communities – consistently referred to as “Invaders” in the award. In addition, Zimbabwe was ordered to pay US\$65 million plus interest in compensation (or a hefty US\$196 million in case there was no restitution).⁹ The state challenged both awards (which can be allowed on very narrow legal grounds), but lost again in November 2018.¹⁰ Like in colonial times, the twenty-first century tribunal followed the imperial logic of “whoever owns the land, the natives do not”.¹¹

As independent researcher Ciaran Cross has observed, the ISDS tribunal, in an approach disturbingly similar to colonial times, “has effectively enjoined both parties (sovereign and corporate) to facilitate the invasion of the indigenous communities' lands – to burn their crops and homes, and remove them by force if necessary – in the name of white European capital, again”.¹²

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BTL is attempting to evict the Chinyai people from land and territory that is ours by historical right, which BTL or their predecessors, the British South Africa Company, obtained fraudulently and violently, without our agreement, without compensation, with violence and illegality.

**JOHN SITHOLE NGEZIMANA CHINYAI,
ELDER OF THE CHINYAI PEOPLE¹³**

As Zimbabwe is obliged to comply with the award, more than 6,000 indigenous families (at least 1,400 of them living in Chimanimani) face the imminent risk of eviction from their ancestral lands and sources of livelihoods as this report goes to press (June 2019).¹⁴ Juliet Chirombo Mavare Mtisi, a member of the Gadyadza clan, describes the fear this creates: “I do not feel safe in my home and in my own fields, and I now fear to remain alone at home, if these BTL security guards can come with guns to arrest me and charge me at their will, even if I am innocent.”¹⁵



Arbitrators find human rights irrelevant

In 2012, four indigenous people living on the land at the heart of the dispute wrote to the tribunal to try to prevent this scenario unfolding. In partnership with the European Center for Constitutional and Human Rights (ECCHR), they wrote that human rights, and in particular the rights of indigenous people under international law, should be considered by the arbitrators. They argued that the tribunal could not legally reach a decision which would violate their internationally recognised rights to traditional land and to being consulted, for example by declaring the company the exclusive owner of the land, or by declaring their presence unlawful. To do so “would be to produce or make inevitable a violation of (our) fundamental human rights under international law”, the communities argued.¹⁶

But the arbitrators denied their petition. Despite acknowledging that the proceedings might impact on the rights of the indigenous people, they asserted that international human rights law had no relevance to the dispute.¹⁷ According to the UN Special Rapporteur on the Rights of Indigenous Peoples, this position “amounts to the subordination of indigenous peoples’ rights to investor protections, with no option provided for participation or appeal.”¹⁸ Moreover, the von Pezold case is no exception. According to the Special Rapporteur, indigenous peoples’ rights and interests were “effectively ignored” by all investor-state tribunals she looked at for a 2016 report on the issue.¹⁹

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International investment agreements... contribute to the subordination of indigenous peoples’ rights to investor protections, as those protections become an obstacle to future recognition of indigenous peoples’ pre-existing rights.

VICTORIA TAULI CORPUZ, UN SPECIAL RAPPOREUR ON THE RIGHTS OF INDIGENOUS PEOPLES²⁰





Land grabbing through investor–state lawsuits

As pressure on land is growing globally in a world increasingly impacted by climate change, more investor–state lawsuits concerning agricultural investments have been filed in recent years. Since 2004, at least one such claim has been lodged each year, with six cases initiated in 2018 alone.²¹

Many land-related investor–state disputes challenge government actions which respond to community opposition to damaging projects.²² One example is the US\$52 million case by Swedish investor Agro EcoEnergy, which is suing Tanzania for revoking a land title for a sugar plantation. The revocation followed accusations that the company had grabbed the land because it had failed to obtain the free, prior and informed consent of the affected communities living there.²³

Researchers have warned that such investor–state challenges could undermine human rights based approaches to land governance,

and hinder necessary land distribution and restitution. Under investment treaties, compensation orders are based on the current full market price of a piece of land (even though it might have been acquired in colonial times at a price way below the full market price) and frequently include compensation for expected future profits. Such high levels of compensation, which go beyond what is required in national law, can make public interest land reforms and actions to address land grabbing too costly for governments to pursue.²⁴

“ By increasing the cost of land redistribution, restitution or tenure reform, or of public action to address “land grabbing”, investment treaties could enter into tension with progressive land policies.

LORENZO COTULA, INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT (IIED)²⁵



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p39 (foreground) Ciaran Cross, (background) CELUCT

p40 (top) Zimbabwe Land, (bottom) David Wright

p41 Time to Climb

p42 Zimbabweland

This case is part of the report *Red carpet courts: 10 stories of how the rich and powerful hijacked justice*, by Corporate Europe Observatory, the Transnational Institute and Friends of the Earth Europe/International, June 2019. www.10isdstories.org