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# Entrenched Structural Discrimination and the Environment: Recovery-Based International Law Response to Colonial Crime

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While the call for the unravelling of structural discrimination has been widespread and well disseminated, the task of achieving this remains obscure.[1] As now accepted, environmental destruction based on an anthropocentric worldview has driven the approach of planetary boundaries, with the sharp rise in the risk and consequences for the climate commencing during colonisers' exploitation of territories and seas well beyond their own jurisdictions.[2] Discussion on reparations appear to have their heyday in compensation paid to victims of the Holocaust;[3] further attempts to extend this to other episodic and systemic crimes have merited polite agreement but little action.[4] Successes have been sporadic, assisted by a level of privilege in system access rather than systemic approached to right wrongs. The attempt to codify the crime of ecocide forms an exception to the trend of talk without action.[5] In incorporating ecocide as a crime, its sponsors are taking an important step towards ensuring that the wanton destruction of Earth's environment could be made accountable. This destruction generated immense profit – labelled for much of human history as 'progress', despite its destruction of circular economies and displacement of indigenous and local communities.

Yet even codification of the crime of ecocide within international criminal law may fall short in generating the change necessary for: (i) ensuring that perpetrators of the environmental destruction are not granted impunity; and (ii) the return of wealth necessary to rejuvenate efforts towards climate justice.

This policy brief addresses this gap, emphasizing two central elements: the nature of the tort of environmental destruction; and the call for inter-generational justice and accountability through codification of a new international crime of unjust enrichment. It seeks to achieve this through three sections. The first offers commentary on the nature and impact of past and contemporary environmental crime, attributes responsibility for such crime, identifies potential victims beyond the Anthropocene, and briefly highlights inherent problems in progressing this discussion. The second outlines what are suggested as the contours for the crime of unjust enrichment, drawing the concept from its private law origins, while the third section frames its public international legal application responding to the imperative of achieving inter-generational justice that is mindful of the tort of environmental crime, while generating levels of finance necessary to address the ecological, structural and human damage. I end by offering a few tentative conclusions in a bid to stimulate further discussion.

## 1. Drawing on Science to Understand the Nature, Impact, Victimhood and Responsibility for Environmental Crime

To many, the Intergovernmental Panel on Climate Change's ('IPCC') identification of the link between colonial activities and climate change[6] is merely overdue recognition of the multifaceted impacts of the widespread colonial adventures of European superpowers that gained momentum commencing in the eighteenth century. Scholarship outside the mainstream focused significant attention to this with post-colonial studies making this point often.[7] Yet mainstream Anglosphere-centric[8] thinking tolerated these narratives in the same way that 'subaltern' perspectives were received: as points to be noted in preambular introductory phrases to the discipline of public international law, before continuing substantive discussions in the same way they had always done.[9] Thus, cursory nods to 'alternative' thinking exist in brief commentaries on feminist, Marxist and third world 'perspectives' in standard international law textbooks before time-honed views of the discipline are disgorged to eager audiences of aspiring public international law students.

Discussions on colonial adventures and state formation are deemed beyond the realms of the disciplinary boundaries. Thematic engagement with colonial crime is ignored as foreclosed by the existence of the inter-temporal rule of law. Structural discrimination, with its emphasis on the constitutional architecture of established and emerging States, is relegated to the study of human rights; and explorations of environmental justice

1 This piece builds on Joshua Castellino, "Colonial Crime, Environmental Destruction and Indigenous Peoples: A Roadmap to Accountability and Protection", in Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (eds.), *Colonial Wrongs and Access to International Law*, Torkel Opsahl Academic EPublisher ('TOAEP'), Brussels, 2020, p. 577 (https://www.legal-tools.org/doc/2rkcrx/).

2 Martin Crook, Damian Short and Nigel South, "Ecocide, Genocide, Capitalism and Colonialism: Consequences for Indigenous Peoples and Glocal Ecosystems Environments", in *Theoretical Criminology*, 2018, vol. 22, no. 3, pp. 298–317.

3 Carla Ferstman, Mariana Goetz and Alan Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, Brill, 2009.

4 Rhoda E. Howard-Hassmann, *Reparations to Africa*, University of Penn Press, Philadelphia, 2008.

5 Darryl Robinson, "Ecocide – Puzzles and Possibilities", in *Journal of International Criminal Justice*, 2022, vol. 20 , no. 2, pp. 313–347.

6 Intergovernmental Panel on Climate Change ('IPCC'), *Climate Change 2022: Impacts, Adaptation and Vulnerability*, Cambridge University Press, 2022, p. 3056.

7 See, for example, Richard Grove, Ecology, *Climate and Empire: Colonialism and Global Environmental History, 1400-1940*, White Horse Press, 1997, or Pallavi Das, *Colonialism, Development and the Environment: Railways and Deforestation in British India 1860-1884*, Springer, 2016. The many statements of indigenous leaders decrying 'development' for its impact on the planet were often ignored as non-scientific and anti-progress.

8 With acknowledgement to Morten Bergsmo for his comments and the suggestion of this term to capture the widespread domination of the 'mainstream' beyond Eurocentricism and American influence. The term is envisaged to capture the colonial domination of the Americas (north and south) and Australia by European thinking which displaced indigenous populations and facilitated population transfers through slavery and indentured labour.

9 See also Rohit Gupta, "Voicing and Addressing Colonial Grievances under International Law", Policy Brief Series No. 134 (2022), TOAEP, Brussels, 2022 (https://www.legal-tools.org/doc/5bhfr7/).

mainly focus on the construction of institutional architecture towards addressing this as an 'emerging' issue.

Substantive discussions around 'third world approaches to international law', conveniently forget that the 'third world' even by conservative estimates, constitutes over two-thirds of customary international law practice. The dated world map with Europe at the centre of a world of five continents remains the central geographic tool in use despite its obvious limitations. That one of these 'continents', Asia, accounts for 60 percent of the global population[10] with rising influence is not deemed significant – analogous to living in the basement of a house and referring to the rest of it as 'the non-basement'.[11] Feminist worldviews emphasizing power dynamics of the one percent patriarchy while excluding 50 percent of the population did not warrant change either. The 'defeat' of communism meant that previous lip service paid to 'Marxist views' could be conveniently mothballed.

Despite this criticism significant justification exists for continued maintenance of the *status quo* hegemonic world vision of public international law. Two facets support its dominance: post-colonial sovereign States support the current structure of international society which views them as the only legitimate holders of jurisdiction in their inherited territories; second, this provides new sovereigns with exclusive beneficiary rights from the extractive economic system in place, often enabling escalation of exploitation ostensibly to generate wealth to aid state-building. That much of the wealth exploited and monetary benefits generated do not accrue to communities facing loss and damage is not featured in discussions over accountability.

The destruction of circular economies commencing with colonization has become systematised. An extractive model relying on the existence of an 'economic good', its benefits are considered to legitimately flow to those with means to extract, refine, market and invest in its exploitation. Two stakeholders are relegated to objects not subjects with consent: the natural environment, its flora and fauna, deemed merely to exist;[12] and human communities that live within the environment,[13] merely considered factors of production (including as slave labour) warranting minimal return until other technologies are found to achieve the same outcome. The entire operation is wrapped in the rhetoric of 'economic growth and prosperity', its founders considered visionaries and progressives' and their actions hailed as great leaps forward for humanity. Progress signalling system adjustment (for example, abolition of slavery) are celebrated from victims' perspectives as genuine markers of civilization, while perpetrators and the exploitative economic system itself were left untouched. The re-emergence of contemporary slavery highlights the dangers of system adjustment rather than overhaul.[14]

Significant allies enlisted in perpetrating this myth include: historians to sing praises of adventurers and produce singular male-oriented entrepreneurship narratives; economists justifying exploitation of resources as furthering 'growth and development'; lawyers deeming established fundamental principles of title to territory in perpetrators' home states as irrelevant elsewhere; adventurers and profiteers using free trade and finders' principle arguments to seize what they determined to be theirs by their own rules; and leaders who constructed patriarchal societies and an international economic system with fairness as a rhetoric.

For the two ignored parties the costs are monumental. Failures to account for the value of 'raw material' meant only acquisition costs were recognised with no attention to replenishment costs since nature was not deemed compensable. The damage to biodiversity from extractive activities were accentuated by post-production emission impacts with the ignominy of sport-hunting becoming an acceptable pastime – what entrepreneurs occupied themselves with while 'resting' from their 'contributions for the good of humanity'.

While the IPCC report makes sobering reading for some, persistent objection to environmental destruction from the extractive economic model has been voiced by indigenous leaders *via* platforms to which they have had access and through intensive resistance. Where successful, this resistance has had a dramatic impact on biodiversity preservation in stark contrast to places where the resistance was broken through a combination of guns, germs, steel[15] and subterfuge. Highlighting how the colonial era mindset is not relegated to history books, the attempt to frame a global 30x30 protected areas initiative 'to preserve biodiversity'[16] shows how one voiceless constituency, the environment, is instrumentalized against the second constituency, that is, indigenous populations. That indigenous communities with net zero climate footprints living in symbiosis with their environment protecting global biodiversity against all-comers[17] should now be considered collateral to 'global' desires to protect an environment destroyed by its wanton quest for profits is not just morally dubious. It is deeply ineffective, as emerging scientific consensus shows beyond doubt.[18] Its persistence as an idea that may nonetheless be implemented heightens injustice, deepens structural discrimination, and is potentially disastrous for climate mitigation. Greater environmental impact could be achieved in transitioning any one of the world's megacities to sustainable energy sources over the next decade. The ability to bully one category of the population in contrast to those that control levers of power gives rise to this so-called 'green solution'.

Another key facet must be emphasized concerning the nature of the tort perpetrated, who has perpetrated it and who its victims are. At least since the *Durban World Conference on Racism*,[19] debates on reparations have focussed on former colonial powers.[20] These receive polite hearings with little action. The potential exception, the German discussion over the Nama and Ovaherero genocides, commenced as a reparation claim, but the side-lining of the communities and the 'take-over' of proceedings by the Namibian government, instead yielded a national development plan. While such a plan may be appropriate and necessary, the lack of engagement with the communities means that the genocide remains unaccounted for. Other reparations claims, whether concerning the return of artefacts, the generation of vast wealth on former colonial territories, the loss and damage at sites of colonial activity or the continued influence in maintaining an extractive system skewed towards European and American dominance have been muted at best. Critics emphasize the 'unworkable' nature of such quests: who will pay, what would they pay, and who should such money flow to.[21] These albeit legitimate questions restrict reparations discussions to rhetoric and emotion, with even symbolic victories gained in 'de-plinth-ing' statues of oppressors[22] not widely tolerated in societies

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10 See United Nations Population Fund, "Asia and the Pacific: Population Trends", October 2022.

11 An analogy that must be ascribed to Carl Söderbergh, Chief Editor, Minority Rights Group, London, United Kingdom.

12 Clive Hamilton, François Gemenne and Christophe Bonneuil (eds.), *The Anthropocene and the Global Environmental Crisis Rethinking Modernity in a New Epoch, Routledge*, 2015.

13 Russell L. Barsh, "Indigenous Peoples in the 1990s: From Object to Subject in International Law?", in *Harvard Human Rights Journal*, 1994, vol. 7, pp. 33–62.

14 See Tomoya Obokata, Special Rapporteur on contemporary forms of slavery, including its causes and consequences, "Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences", UN Doc. A/77/163, 14 July 2022.

15 Jared Diamond, *Guns, Germs and Steel: A Short History of Everybody for the Last 13,000 Years*, Vintage, 1998.

16 Joshua Castellino, "A Four-Fold Path to Mitigating the Environmental Crisis", in *Minority Rights Group Blog*, 11 June 2021.

17 ICCA Consortium, *Territories of Life: 2021 Report*, September 2019.

18 This is backed by multiple scientific papers, for example, Victoria Reyes-García *et al.*, "Recognizing Indigenous Peoples' and Local Communities' Rights and Agency in the Post-2020 Biodiversity Agenda", in *Ambio*, 2022, vol. 51, pp. 84–92; Christopher J. O'Bryan *et al.*, "The Importance of Indigenous Peoples' Lands for the Conservation of Terrestrial Mammals", in *Conservation Biology*, 2021, vol. 35, no. 3, pp. 1002–1008; Kira M. Hoffman *et al.*, "Conservation of Earth's Biodiversity is Embedded in Indigenous Fire Stewardship", in *PNAS*, 2021, vol. 118, no. 32, pp. 1–6.

19 See Ulrika Sundberg, "Durban: The Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance", in *Revue Internationale de Droit Pénal*, 2002, vol. 73, p. 301.

20 See Pablo de Greiff (ed.), *The Handbook of Reparations*, Oxford University Press, 2006.

21 As discussed by Katrina Forrester, "Reparations, History and Global Justice", in Duncan Bell (ed.), *Empire, Race and Global Justice*, Cambridge University Press, 2019.

22 See Kaitlin M. Murphy, "Fear and Loathing in Monuments: Rethinking the Politics and Practice of Monumentality and Monumentalization", in *Memory Studies*, 2021, vol. 14, no. 6, pp. 1143–1158.

where this has occurred.[23]

## 2. Sharpening Legal Tools to Address Accountability and Provide Remedies for Structural Discrimination

According to Webster's Dictionary, the legal definition of '*unjust enrichment*' is:

> 1: the retaining of a benefit (as money) conferred by another when principles of equity and justice call for restitution to the other party. Also: the retaining of property acquired especially by fraud from another in circumstances that demand the judicial imposition of a constructive trust on behalf of those who in equity ought to receive it. […]
>
> 2: a doctrine that requires an equitable remedy on behalf of one who has been injured by the unjust enrichment of another.

Lionel Smith explains unjust enrichment in the following terms:

> In a wide range of situations, the law requires that a defendant who has been enriched at the expense of a plaintiff make restitution to that plaintiff, either by returning the very substance of the enrichment, or, more often, by repaying its monetary value. But only if the enrichment is unjust, or unjustified: a gift, for example, is justified enrichment.[24]

Smith refers exclusively to private law, though his explanation ends ominously by stating, "this generic description of the scope of the subject can hardly give an inkling of the range of situations in which it plays a role".[25] According to Peter Birks, often credited in the Anglophone world as the leading commentator on the subject, rules governing unjust enrichment form the "indispensable foundation of private law".[26] Even though it has manifestations in several jurisdictions and is notably better developed in civil law jurisdictions,[27] at the beginning of the twenty-first century, unjust enrichment remained unfamiliar to common lawyers, playing "no independent part in their intellectual formation".[28] A 'gain-based recovery', distinguished from 'loss-based compensation', traces its evolution in common law back to attempts in the United States in the 1930s to address problems concerning misrepresentation and misdescription of products, which resulted in the American Law Institute's *Restatement of the Law of Restitution*.[29]

From the perspective of this discussion, unjust enrichment is an accepted private law remedy substantiating corrective injustices that arise due to liability from defective transfers of value.[30] Drawing on its underpinning theoretical foundations, Ernest Weinrib describes this as:

> […] the law can recognize a claim involving an unjust transfer of value even though the defendant's right to the thing of value is not in question. A transfer of value ('enrichment at another's expense') occurs when one transfers a thing of value without the reciprocal receipt of a thing of equivalent value. The question then arises whether such a transfer is 'unjust', that is, whether circumstances are present that create an obligation to retransfer the value. This obligation arises if the transferor has given the value without donative intent and if the value has been accepted by the transferee as non-donatively given; the transferee cannot keep for free what was given and received non-gratuitously.[31]

Further,

> […] unjust enrichment situates the parties correlatively as transferor and transferee of what was not transferred gratuitously, thereby conforming to corrective justice. In accordance with Kant's conception of an *in personam* right as a right to the causality of another's will, the claimant's right is not to the value as such, but to having the value retransferred. This is the right to which the defendant's duty to make restitution is correlative.[32]

An immediate question arises as to whether a private law remedy could be applied in public law. Martin Loughlin suggests that a key differentiating factor between private and public law is that public law ought to embrace politics. According to him,

> The challenge for politics, and therefore for public law, is to find ways to ensure, as a prudential matter, that the sovereign power of the state can be deployed in order to improve public well-being, practically rather than theoretically speaking, even in the presence of such disagreement. This is a matter of wisdom, judgement, or statecraft rather than selection of a particular normative theory.[33]

This supports the extension of the concept and attendant norms of unjust enrichment to the public sphere through legislative change. Emphasizing how colonial crime reified structural discrimination amidst the continuing tort of environmental damage makes it logical that focus be shifted to those that gained from the harms rather than those who suffered loss and damage.

## 3. What an International Crime of Unjust Enrichment Could Look Like

From an international legal perspective, the crime of unjust enrichment could be described as a general principle of law stemming from Pomponius' adage: *Jure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem,* a facet of natural law that no one should be enriched by the loss or injury of another. In enunciating its use in the *Lena Goldfield Award*,[34] the principle was already deemed by Friedman as a 'general principle of international law' in 1938. In that arbitration, the Tribunal granted monetary compensation against the Russian government for the value of the benefits of which the company had been wrongfully deprived, "applying the principle of unjust enrichment as one of international law".[35] Its usage in customary international law may be significantly wider, drawing in the *Chorzów Factory Arbitration*,[36] *ADC v. Hungary*,[37] and the *Iran-United States Claims Tribunal*[38] between 1983 and 1987.[39] Its existence in a number of jurisdictions is well developed: on statute books in France,[40] the

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23 "Edward Coulson Statute: Boris Johnson says we 'cannot seek to change our history'", *ITV News,* 6 January 2022.

24 Lionel Smith, "Unjust Enrichment", in *McGill Law Journal*, 2020, vol. 66, no. 1, pp. 165–168.

25 *Ibid*.

26 Peter Birks, *Unjust Enrichment*, 2nd ed., Clarendon Law Series, Oxford, 2005.

27 Brice Dickson, "Unjust Enrichment Claims: A Comparative Overview", in *Cambridge Law Journal*, 1995, vol. 54, pp. 100–126.

28 *Ibid*.

29 American Law Institute, *Restatement of the Law of Restitution*, St. Paul, 1937. Also see Andrew Kull, *Restatement (Third) of Restitution and Unjust Enrichment*, American Law Institute Publishers, St. Paul, 2011.

30 Ernest J. Weinrib, "Correctively Unjust Enrichment", in Robert Chambers, Charles Mitchell and James Penner (eds.), *Philosophical Foundations of the Law of Unjust Enrichment*, Oxford, 2009.

31 *Ibid*.

32 *Ibid*.

33 Charles Mitchell and Peter Oliver, "Unjust Enrichment and the Idea of Public Law", in Robert Chambers, Charles Mitchell and James Penner (eds.), *Philosophical Foundations of the Law of Unjust Enrichment*, Oxford University Press, 2009, p. 406.

34 *Lena Goldfield Arbitration Award*, in *The Times (London)*, 3 September 1930, p. 13, col. 2.

35 W. Friedman, "The Principle of Unjust Enrichment in English Law", in *Canadian Bar Review*, 1938, vol. 16, p. 384.

36 Permanent Court of International Justice, *Factory at Chorzów (Germany v. Poland)*, Jurisdiction, Judgment, PCIJ Series A No. 9, ICGJ 247, 26 July 1927.

37 International Centre for Settlement of Investment Disputes, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award, ICSID Case No. ARB/03/16, 2 October 2006.

38 For more, see John R. Crook, "Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience", in *American Journal of International Law*, 1989, vol. 83, no. 2, pp. 292–293.

39 See Charles Manga Fombad, "The Principle of Unjust Enrichment in International Law", in *Comparative and International Law Journal of South Africa*, 1997, vol. 30, pp. 120, 121; Emily Sherwin, "Restitution and Equity: An Analysis of the Principle of Unjust Enrichment", in *Texas Law Review*, 2001, vol. 79, pp. 2083–2104.

40 Ordinance from 10/02/2016 created Article 1303.1-4 framed 'l'enrichissement sans cause' (unjust enrichment), now entitled 'enrichissement injustifié'. Prior to this, the principle was reflected in jurisprudence (see France, Court of Cassation, Civil Chamber 1, Judgment, 4 April 2001, 98-13.285, and France, Court of Cassation, Civil Chamber 1, Judgment, 25 June 2013, 12-12.341). Also see Wouter Veraat, "Two Rounds of Postwar Restitution and Dignity Restoration in the Netherlands and France", in *Law and Social Inquiry*, 2016, vol. 41, no. 4, pp. 956–972.

Netherlands,[41] Italy[42] and Germany.[43] This leads Brice Dickson to state that in civil law unjust enrichment is merely a residual category from the law of obligations which comes into play when other categories have been exhausted.[44]

Just as the original principle evolved to eliminate the accountability gap in restitution law when tort, property and contract law failed, similar preconditions exist for its extension to address contemporary environmental tort that commenced under colonial rule. The *intertemporal rule of law* incorrectly indemnifies past actions; historical exploitation of resources has become unrecoverable by a web of laws, not least statutes of limitations; the intricate mixing of populations makes inter-generational liability difficult to gauge; and overstated difficulties around 'costing' compensation for loss and damage restrict conversations around colonial crime to diatribes with little consequence.

A change in focus from victims' loss and damage to victors' gain and enrichment would alter this trajectory. Rather than focus on former colonial states whose financial gains from colonial crime are difficult to track, attention must shift to corporations and individuals who benefitted in ways that remain traceable. The wealth extracted through legal wrongs provable beyond doubt – not least in the environmental crisis and existing knowledge of its damage – needs better recovery mechanisms. This is already explored in the realm of indigenous peoples' rights where two established approaches at accountability – land rights claims and tort litigation against multinational corporations – have made some inroads.[45] However, while the former is still designed to win legal recognition of existing ancestral domains from States that have superimposed others' laws onto existing custom without consent,[46] the latter approach has directly litigated against corporations.[47] The key difference in the approach required is that rather than focussing on contemporary quantifications of loss and damage, greater emphasis needs to be placed on forensic tracing of wealth extracted and its multiplication. The Ogoni experience in Nigeria makes this explicit. Their success in litigating against Shell Oil based on loss and damage yielded compensatory settlements that have neither restored the Niger Delta environment nor significantly assisted the fishing communities that relied on it. The loss and damage approach allows corporations to build compensation payments into their economic model and continue wrongful action with impunity.[48] Further tactics include the passing off of responsibility to local subsidiaries to avoid claims, or declarations of bankruptcy to avoid clean-up and restoration.

## 4. Conclusion

The need for structural change struck a chord among populations in the midst of the climate emergency and the Covid-19 pandemic. The palpable growth in inequality and decimation of public services in societies feed a simmering anger, simulated into scapegoat politics. Often conducted at the instigation of the super-wealthy who control media and messaging, this politics aims to rile populations into frenzy to distract from the continued over-exploitation of resources, accompanied by unwillingness to embark on urgent structural change. Identity politics' incursion into the mainstream has fragmented societies when societal unity and a calm focus on climate adaptation and mitigation ought to be uppermost on the policy agenda. Green Plans set out with fanfare, tinker systems to avoid the overhaul climate scientists and civil society demand. The nexus between modern governments and big businesses, especially extractive industries, are a key driver. For many of these, system overhaul requires their complete exit from it. It is thus unsurprising that the evidence emanating is of long-term policies of distraction and denial not least by support for dubious science and lobbying against change.[49]

It is of central interest to those seeking colonial accountability to note that the same corporations at the forefront of system preservation are among those that may be the biggest beneficiaries of colonial crime. Focussing on the genesis of that wealth, tracing its accumulation and subsequent flight from sites, its dispersal to think-tanks, academies and political parties while emphasizing its role in the continued contemporary tort driving climate change would be a fundamental blow to strike in favour of system change. The stances political parties take over engaging, confronting, framing and accepting responsibility will be indicative of their willingness to act for system overhaul over sombre sounding sound-bites.

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41 For a discussion of the revised Dutch Civil Code in 1992 and the changes to restitution see B. Wessels, "Civil Code Revision in the Netherlands: System, Contents and Future", in *Netherlands International Law Review*, 1994, vol. 41, p. 163; E.J.H. Schrage, "Restitution in the new Dutch Civil Code", in P.W.L. Russel (ed.), *Unjustified Enrichment: A Comparative Study of Law of Restitution*, Vrije Universiteit, 1996, pp. 10–53.

42 See Giovanni Criscuoli and David Pugsley, *Italian Law of Contract*, Jovene, 1991, p. 194. Also see Paolo Gallo, "Unjust Enrichment: A Comparative Analysis", in *American Journal of Comparative Law*, 1992, vol. 40, p. 431.

43 It appears that in Germany most commentators refer to two main categories of unjust enrichment claim – those based on unlawful interference ('*Eingriffskondiktionen*') and those derived from a performance ('*Leistungskondiktioneri*'). For more, see Michael Martinek and Dieter Reuter, *Ungerechtfertigte Bereicherung*, 1983. Also see Berthold Kupisch, "Ungerechtfertigte Bereicherung", in E.J.H. Schrage (ed.), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, vol. 15, 2nd ed., Duncker and Humblot GmbH, 1999, pp. 237–274.

44 Dickson, 1995*,* see above note 27*.*

45 David N. Fagan, "Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations", in *New York University Law Review*, 2001, vol. 76, p. 626.

46 Notable among these are the Ogiek case, African Court of Human and People's Rights, *African Commission of Human and Peoples' Rights v. Kenya*, Judgment, 17 May 2017, Application No. 006/2012, and its subsequent reparations judgment on 23 June 2022.

47 See, for example, United States of America, Court of Appeals, Second Circuit, *Jota v. Texaco, Inc*., Judgment, 5 October 1998, 157 F.3d 153 (2d Cir. 1998); United States of America, District Court for the Central District of California, *National Coalition Government of Burma v. Unocal, Inc.*, Judgment, 5 November 1997, 176 F.R.D. 329 (C.D. Cal. 1997); United States of America, District Court for the Eastern District of Louisiana, *Beanal v. Freeport-McMoRan, Inc.*, Judgment, 10 April 1997, 969 F. Supp. 362 (E.D. La. 1997); United States of America, District Court for the Central District of California, *Doe v. Unocal Corp.*, Judgment, 25 March 1997, 963 F. Supp. 880 (C.D. Cal. 1997); United States of America, District Court for the Southern District of Texas, *Sequihua v. Texaco, Inc.*, Judgment, 27 January 1994, 847 F. Supp. 61 (S.D. Tex. 1994) among many others in United States' jurisdictions.

48 See EarthRights International, "Wiwa v. Royal Dutch Shell: Getting Away with Murder: Shell's Complicity with Crimes Against Humanity in Nigeria" (available on its web site).

49 See BBC, "Big Oil vs the World tells the 40 year story of how the oil industry delayed action on climate change", 2022 (available on its web site).

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