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 change⁶ 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 Anglophone-centric⁸ 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-honoured 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

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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.
mainly focus on the construction of institutional architecture towards ad-
dressing this as an ‘emerging’ issue.

Substantive discussions around ‘third world approaches to interna-
tional law’, conventionally forget that the ‘third world’ even by conserva-
tive 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 population16 with rising influence is not deemed significant –
alogous to living in the basement of a house and referring to the rest of it
as ‘the non-basement’.17 Feminist worldviews emphasizing power dynam-
ics of the one percent patriarchy while excluding 50 percent of the popu-
lation 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 main-
tenance of the status quo hegemonic world view of public interna-
tional 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 ter-
ritories; second, this provides new sovereigns with exclusive beneficiary
rights from the extractive economic system in place, often enabling escala-
tion 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 discus-
sions over accountability.

The destruction of circular economies commencing with colonization
has become systematized. 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;18 and
human communities that live within the environment19 merely consid-
ered 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 perpetra-
tors and the exploitative economic system itself were left untouched.
The re-emergence of contemporary slavery highlights the dangers of system
adjustment rather than overhaul.20

Significant allies enlisted in perpetrating this myth include: historians
to sing praises of adventurers and produce singular male-oriented entre-
preneurship 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
fundamental principles of title to territory in perpetrators’ home states
as furthering ‘growth and development’; lawyers deeming established
preneurship narratives; economists justifying exploitation of resources
to sing praises of adventurers and produce singular male-oriented entre-
trepreneurs occupied themselves while ‘resting’ from their ‘contributions
for the good of humanity’.

While the IPCC report makes sobering 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, steel21 and subterfuge. Highlighting how the colonial era
mindset is not relegated to history books, the attempt to frame a global
30x30 protected area initiative ‘to preserve biodiversity’22 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-comers23 should
now be considered collateral to ‘global’ desires to protect an en-
vironment destroyed by its wanton quest for profits is not just morally
dubious. It is deeply ineffective, as emerging scientific consensus shows
beyond doubt.24 Its persistence as an idea that may nonetheless be imple-
mmented tightens infrastructural and institutional stranglehold on
biodiversity preservation.30x30 protected areas, for example, are dubious.
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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,25 debates on reparations
have focussed on former colonial powers.26 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 engage-
ment 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 main-
taining 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?27 These albeit legitimate questions restrict reparations
discussions to rhetoric and emotion, with even symbolic victories gained in
‘de-plinth-ing’ statues of oppressors28 not widely tolerated in societies

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22 See Katie M. Murphy, “Fear and Loathing in Monuments: Rethinking the Politics and Practice of Monumentality and Memorialization”, in Memory Studies, 2021, vol. 14, no. 6, pp. 1143–1158.
where this has occurred.22

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 misinformation 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 correlativelv as transferees and transferees of what was not transferred gratuitously.32

23 “Edward Coulson Statute: Boris Johnson says we ‘cannot seek to change our history’”, ITN News, 6 January 2022.
25 Ibid.
28 Ibid.
31 Ibid.
32 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 toll 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 injury fieri locupletorem, 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 Tribunal38 between 1983 and 1987.39 Its existence in a number of jurisdictions is well developed: on statute books in France,40 the...

45 Dickson, 1995, see above note 27.


49 See Giovanni Criscuoli and David Pugsley, Italian Law of Contract, Jo- veni, 1991, p. 194. Also see Paolo Gallo, “Unjust Enrichment: A Com-

40, p. 431.


42 See Giovanni Criscuoli and David Pugsley, Italian Law of Contract, Jo- veni, 1991, p. 194. Also see Paolo Gallo, “Unjust Enrichment: A Com-

43 How- ever, 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, the latter approach has directly liti-