UNDERMINING ENTRENCHED STRUCTURAL DISCRIMINATION: PROPOSING A RECOVERY BASED INTERNATIONAL LAW RESPONSE TO ADDRESSING COLONIAL CRIME

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While the call for the unravelling of structural discrimination has been widespread and well disseminated, the actual task of achieving this remains obscure.[1] Further, it has now been widely accepted that environmental destruction based on an anthropocentric worldview has contributed significantly to the approach of planetary boundaries, and that the sharp rise in the risk and consequences for the climate was achieved during colonisers' exploitation of territories and seas well beyond their own jurisdictions.[2] The discussion on reparations appeared to have its heyday in the compensation paid to victims of the Holocaust,[3] but further attempts to extend this to other forms of episodic and systemic crimes have merited polite agreement but little action.[4] The successes that have been gained have been sporadic, assisted by a level of privilege in accessing the system, rather than a system wide approach to correct wrongs. The attempt to codify the crime of ecocide forms something of an exception to the trend of talk without action.[5] In seeking to incorporate ecocide as a crime its sponsors are taking an important step towards ensuring that the wanton destruction of the earth's environment could be made accountable. This destruction is being perpetrated while generating immense profit - labelled for much of human history as 'progress', despite its significant destruction of circular economies and displacement of indigenous and local communities.

Yet even the codification of a modern crime of ecocide and its potential inclusion within the jurisdiction of international criminal law, may fall short in generating the step change necessary for: (i) ensuring that the perpetrators of the environmental destruction are not granted permanent impunity; and (ii) that the return and transfer of wealth necessary to rejuvenate the effort towards global justice is given the shot in the arm it deserves.

This brief paper seeks to address this gap by emphasizing two central elements: the nature of the tort that is environmental destruction; and the call for intergenerational justice and accountability, while emphasizing the need to codify a new international crime, the crime of unjust enrichment. It will seek to achieve this through two main parts. The first part offers brief commentary on the nature and impact of environmental crime on the past and present; attributes responsibility for such crime; identifies its potential victims beyond the Anthropocene; and briefly highlights the inherent problems to progress in this area. The second then seeks to outline what are suggested as the contours for the crime of unjust enrichment, drawing the concept from its private law origins, and seeking to frame it in response to the public law imperative to achieve inter-generational justice that is mindful of the tort of environmental crime, while framing a response that seeks to generate the levels of finance necessary to address the ecological, structural and human damage. The paper ends by offering a few tentative conclusions in a bid to stimulate further discussion.

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[1] This piece builds on Joshua Castellino, 'Colonial Crime, Environmental Destruction and Indigenous Peoples: A Roadmap to Accountability and Protection' in *Colonial Wrongs & Access to International Law* (Bergsmo, Kaleck & Hlaing eds.) [Brussels: Torkel Opsahl Academic EPublisher, 2020] 577.

[2] Martin Crook, Damian Short & Nigel South, 'Ecocide, Genocide, Capitalism & Colonialism: Consequences for Indigenous Peoples & Glocal Ecosystems Environments', 22(3) *Theoretical Criminology,* (2018) 298–317.

[3] Carla Ferstman, Mariana Goetz, Alan Stephens, *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 Hassman, *Reparations to Africa* (Philadelphia: University of Penn Press, 2008).

[5] Darryl Robinson. 'Ecocide – Puzzles & Possibilities' 20(2) *Journal of International Criminal Justice* (May 2022) 313–347.

I Drawing on Science to Understand the Nature, Impact, Victimhood and Responsibility for Environmental Crime

To many, the IPCCC's 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 had focussed significant attention to this with post-colonial studies making this point often.[7] Yet mainstream Anglospherecentric[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. 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 intertemporal 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 any exploration of environmental justice mainly focuses on the construction of institutional architecture towards addressing this as an 'emerging' issue.

Substantive discussions around themes labelled 'third world approaches to international law', conveniently forget that the 'third world' even by conservative estimates, constitutes over two thirds of customary international law. 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 per cent of the global population[9] 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'.[10] Feminist worldviews emphasizing power dynamics of the one per cent patriarchy while excluding 50 per cent 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

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[6] IPCC, 2022 *Climate Change 2022: Impacts, Adaptation and Vulnerability* Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)] (Cambridge University Press 2022) 3056 pp.

[7] See e.g. Richard Grove, *Ecology, Climate and Empire: Colonialism and Global Environmental History, 1400-1940* (White Horse Press, 1997) or Pallavi Das, *Colonialism, Development & 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 Professor 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 UNFPA, *Asia and the Pacific: Population Trends* (October 2022)

[10] An analogy that must be ascribed to Carl Söderbergh, Chief Editor, Minority Rights Group, London, UK.

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;[11] and human communities that live within the environment,[12] merely considered factors of production (as labour including slave labour) warranting minimal return until other means including technology 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 (e.g. 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.[13]

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 IPCCC 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[14] 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'[15] shows how one voiceless constituency, the environment, is used as a blunt instrument to

[11] Clive Hamilton, François Gemenne, Christophe Bonneuil, (eds.) *The Anthropocene & the Global Environmental Crisis Rethinking Modernity in a New Epoch* (Routledge, 2015).
[12] Russell L. Barsh, 'Indigenous Peoples in the 1990s: From Object to Subject in International Law?' 7 *Harvard Human Rights Journal* (1994) 33-62.
[13] See 'Report of the Special Rapporteur on contemporary forms of slavery in the informal economy' UN Doc. A/77/163 (14 July 2022).
[14] Jared Diamond, *Guns, Germs and Steel: A Short History of Everybody for the Lat 13,000 Years* (Vintage: New Edition, 1998).
[15] Joshua Castellino, 'A Four-Fold Path to Mitigating the Environmental Crisis' MRG Blog, June 2021.

relegate the second constituency, i.e. indigenous populations. That indigenous communities with net zero climate footprints living in symbiosis with their environment protecting global biodiversity against all-comers,[16] 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.[17] 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,*[18] debates on reparations have focussed on former colonial powers.[19] 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.[20] These albeit legitimate questions restrict reparations discussions to rhetoric and emotion, with even symbolic victories gained in deplinthing statues to oppressors[21] not widely tolerated in societies where this has occurred.[22]

II Sharpening Legal Tools to Address Accountability and Provide Remedies for Structural Discrimination

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

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[16] ICCA Consortium, *Territories of Life: 2021 Report* (ICCA Consortium worldwide 2021). Available at: report.territoriesoflife.org.

[17] This is backed by multiple scientific papers e.g. Reyes-García, V., Fernández-Llamazares, Á., Aumeeruddy-Thomas, Y. *et al.* 'Recognizing Indigenous peoples' and Local Communities' Rights and Agency in the Post-2020 Biodiversity Agenda', 51 *Ambio* (2022), 84–92 (2022); O'Bryan CJ, Garnett ST, Fa JE, Leiper I, Rehbein JA, Fernández-Llamazares Á, Jackson MV, Jonas HD, Brondizio ES, Burgess ND, Robinson CJ, Zander KK, Molnár Z, Venter O, Watson JEM, 'The importance of Indigenous Peoples' Lands for the Conservation of Terrestrial Mammals' 35(3) *Conservation Biology* (2021) 1002-1008; Kira M. Hoffman, Emma L. Davis, Sara B. Wickham, Kyle Schang, Alexandra Johnson, Taylor Larking, Patrick N. Lauriault, Nhu Quynh Le, Emily Swerdfager and Andrew J. Trant, 'Conservation of Earth's Biodiversity is Embedded in Indigenous Fire Stewardship' 118(32) PNAS (2021).

[18] See Ulrika Sundberg, 'Durban : the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' 73 *Revue Internationale de Droit Pénal* (2002/1-2) 301.

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

[20] As discussed by Katrina Forrester, 'Reparations, History and Global Justice' in *Empire, Race & Global Justice* [Duncan Bell ed.] (Cambridge University Press, 2019).

[21] See Kaitlin M Murphy, 'Fear and Loathing in Monuments: Rethinking the politics and practice of monumentality and monumentalization' 14(6) *Memory Studies*, (2021) 1143–1158.

[22] [Eds.] Edward Coulson Statute: Boris Johnson says we 'cannot seek to change our history' *ITV News*, Thursday 6 January, 2022 available https://www.itv.com/news/westcountry/2022-01-06/pm-says-we-cannot-seek-to-change-our-history-after-colston-verdict

> 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.

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.[23]

Of course the 'wide range of situations' Smith refers to are restricted to private law, though his explanation ends ominously by stating, '[T]his generic description of the scope of the subject can hardly give an inkling of the range of situations in which it plays a role'.[24] According to 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'.[25] Even though it has manifestations in several jurisdictions and is notably better developed in civil law jurisdictions,[26] according to Birks at the beginning of the 21st century unjust enrichment remained unfamiliar to common lawyers, playing 'no independent part in their intellectual formation'. [27] Labelling it a 'gain-based recovery' to distinguish it from 'loss-based compensation' Birks traces its common law evolution to attempts in the USA 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*.[28]

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.[29] Drawing on its underpinning theoretical foundations, 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.[30]

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[23] Smith, Lionel, 'Unjust Enrichment' 66(1) *McGill Law journal* (2020) 165-168
[24] Ibid.
[25] Peter Birks, *Unjust Enrichment* (2nd edition, Clarendon Law Series, Oxford, 2005).
[26] Brice Dickson, 'Unjust Enrichment Claims: A Comparative Overview' 54 *Cambridge Law Journal* (1995) 100-126
[27] Ibid.
[28] American Law Institute, *Restatement of the Law of Restitution* (St, Paul, 1937). Also see *Restatement (Third) of Restitution and Unjust Enrichment*. Andrew Kull, Reporter. (St. Paul: American Law Institute Publishers. 2011).
[29] Ernest J Weinrib, 'Correctively Unjust Enrichment' in Robert Chambers, Charles Mitchell &James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, 2009)
[30] Ibid.

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.[31]

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

> 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.

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 shifts to those that gained from the harms rather than those who suffered loss and damage.

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 the 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*[32] Dickson highlights[33] that the principle was already accepted 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'.[34] Its usage in customary international law may be significantly wider, drawing in the *Chorzów Factory Arbitration*,[35] *ADC v. Hungary*,[36] and the *Iran-United States Claims Tribunal*[37] between 1983 and 1987.[38] In any case its existence in a number of

[31] Ibid.
[32] *Lena Goldfield Arbitration Award* HC Deb 03 November 1930 vol. 244 cc440-1.
[33] Dickson (1995) *Ibid.*
[34] Friedman, 'The Principle of Unjust Enrichment in English Law' (1938) 16 *Canadian Bar Review* (1938) 365 at 384.
[35] *Factory at Chorzów, Germany v Poland*, Jurisdiction, Judgment, PCIJ Series A No 9, ICGJ 247 (PCIJ 1927), 26th July 1927.
[36] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16.
[37] For more see John R. Crook, 'Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience', 83 *American Journal of International Law* (1989) 292-93.
[38] See Charles Manga Fombad, The Principle of Unjust Enrichment in International Law, 30 *Comparative & International Law Journal of South Africa* (1997) 120, 121; Emily Sherwin, Symposium: Restitution and Unjust Enrichment: Restitution and Equity: An Analysis of the Principle of Unjust Enrichment, 79 *Texas Law Review* (2001) 2083-2104.

jurisdictions is well developed: on statute books in France,[39] the Netherlands,[40] Italy[41] and Germany.[42] This leads 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.[43]

Just as the original principle evolved to eliminate the accountability gap that existed 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 how to 'cost' compensation for loss and damage, restrict conversations around colonial crime to passionate 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 that can be proved without doubt - not least in the context of the environmental crisis and the 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 already made some inroads.[44] However, while the former is still designed to win legal recognition of existing ancestral domains from States that have mostly superimposed others' laws onto existing custom without consent,[45] the latter approach has directly litigated against corporations.[46] 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

[39] Ordonnance from 10/02/2016 created art. 1303.1-4 framed 'l'enrichissement sans cause' (unjust enrichment), now entitled 'enrichissement injustifié'. Prior to this the principle was reflected in jurisprudence (Cass. civ. 1re, 4 avr. 2001, n° 98-13.285 ; Cass. com., 25 juin 2013, n° 12-12.341, inédit.). Also see Wouter Veraat, 'Two Rounds of Postwar Restitution and Dignity Restoration in the Netherlands and France' in 41(4) *Law & Social Inquiry* (2016) 956-972.

[40] 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' 41 *Netherlands International Law Review* (1994) 163. E. J. H. 'Restitution in the new Dutch Civil Code', in *Unjustified Enrichment. A Comparative Study of Law of Restitution* [P. W. L. Russel Ed.] (Vrije Universiteit, 1996) 10-53.

[41] See G. Criscuoli & D. Pugsley, *Italian Law of Contract* (Jovene, 1991) 194. Also see Paolo Gallo, 'Unjust Enrichment: A Comparative Analysis' 40 American Journal of Comparative Law (1992) 431.

[42] It appears that it 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 & Dieter Reuter, *Ungerechtfertigte Bereicherung* (1983). Also see Berthold Kupisch, 'Ungerechtfertigte Bereicherung' in *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* [Eltjo J. H. Schrage ed., 2nd ed., vol. 15] (Duncker & Humblot GmbH, 1999) 237–74.

[43] Dickson (1995) *Ibid.*

[44] David N. Fagan, 'Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations', 76 New York University Law Review (2001) 626.

[45] Notable among these are the Ogiek case *African Commission of Human & Peoples' Rights v Kenya* (Application 006/2012) 17 May 2017 and subsequent reparations judgment 23 June 2022.

[46] See e.g. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Nat'l Coalition Gov't v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Sequihua v. Texaco, Inc., 847 F. Supp. 61* (S.D. Tex. 1994) among many others in US jurisdictions.

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 has yielded compensatory settlements that have neither restored the natural 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.[47] Further tactics include the passing off of responsibility to local subsidiaries to avoid claims, or to declare bankruptcy to avoid clean-up and restoration.

Conclusion

The need for structural change has struck a chord among populations in the midst of the climate emergency and the more time-bound Covid-19 pandemic. The palpable growth in inequality and slow decimation of public services in societies feed a simmering anger, that has come to the fore in the form of scapegoat politics. This type of politics, often conducted at the instigation of the super-wealthy who control media and messaging, aims to rile mass populations into a frenzy designed to distract from the continued overexploitation of resources accompanied by an unwillingness to embark on the wholescale structural changes needed. 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 much fanfare, often do no more than system tinkering avoiding the system overhaul that climate scientists and civil society are demanding. The nexus between modern governments and big businesses, especially from 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.[48]

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 have been the biggest beneficiaries of colonial crime. Focussing on the forensic assessment of 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 that is 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 their willingness to act for system overhaul over sombre sounding sound-bites.

[47] See *Getting Away with Murder: Shell's Complicity with Crimes Against Humanity in Nigeria* (Earthrights Brief) available https://earthrights.org/case/wiwa-v-royal-dutch-shell/ [law consulted October 18, 2022].
[48] See *Big Oil versus the World* (3-part BBC Production, 2022).