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Colonial Wrongs and Access to International Law

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Front cover: *Extraction of resources was a primary engine of colonization. The pictures show teak extraction in Colonial Burma by the British Bombay Burmah Trading Corporation around 1920. Above: A girdled teak tree and two foresters. Below: The Corporation used some 3,000 elephants to move logs. The photographs were taken by Mr. Percival Marshall (an employee of the Corporation). TOAEP thanks his great grandson Mr. Ben Squires for making them available and Professor Jonathan Saha for explanations.*

Back cover: *Storing ground used by the Bombay Burmah Trading Corporation. The photograph was taken by Mr. Percival Marshall around 1920.*

Colonial Crime, Environmental Destruction and Indigenous Peoples: A Roadmap to Accountability and Protection

Joshua Castellino *

18.1. Introduction

The contemporary climate emergency is directly traceable to colonial activities commenced on indigenous territories, continued under post-colonial regimes, with the active support (material and logistic) of the former colonial powers.¹ These practices stimulated demand for ‘products’, treated territories as resource hotbeds,² and ignored the human rights of indigenous peoples³ who were treated as objects rather than sub-

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¹ For general literature that explore this issue, see Marcie Bianco, “Colonialism Meets Climate Change”, in *Stanford Social Innovation Review*, Winter 2019; Kristina Douglass and Jago Cooper, “Archaeology, environmental justice, and climate change on islands of the Caribbean and southwestern Indian Ocean”, in *Proceedings of the National Academy of Sciences*, 2020, vol. 117, no. 15, pp. 8254–8262; Daniel M. Voskoboinik, “To Fix the Climate Crisis, we must face up to our imperial past”, *Open Democracy Net*, 8 October 2018 (available on its web site); and Alex Randall, “When climate change and history spark violent conflict”, *Climate Migration* (available on its web site).

² See, for example, Hussein A. Bulhan, “Stages of Colonialism in Africa: From Occupation of Land to Occupation of Being”, in *Journal of Social and Political Psychology*, 2015, vol. 3, no. 1, pp. 239–256, and Stephen Ocheni and Basil C. Nwankwo, “Analysis of Colonialism and Its Impact in Africa”, in *Cross-Cultural Communication*, 2012, vol. 8, no. 3, pp. 46–54.

³ Erin Blakemore, “What is Colonialism?”, *National Geographic*, 19 February 2019 (available on its web site).

jects of law,⁴ and resulted in the systematic destruction of habitats⁵ hastening the breach of planetary boundaries.⁶

The legal norms and techniques for framing, articulating, demanding and seeking just satisfaction for these past crimes is yet to be fully developed. Yet, two contemporary factors lengthen the impact of these crimes, harming the prospect of a climate justice that pays adequate attention to peoples as well as the planet. The first is the determination of the climate lobby to tackle the loss of biodiversity by establishing ‘protected areas’ further extinguishing native title, and, crucially, removing the environment’s traditional guardians from their territories, leaving them in the exclusive possession of sovereign States who have exacerbated their destruction.⁷ The second, which directly implicates former colonial powers, is the continued support for protected areas, often funded by development funding pledges (0.7 per cent of Gross Domestic Product) despite lack of evidence that such a route encompasses environmental protection.⁸

This chapter seeks to address these issues, casting light on, first, the correlation between historical colonial activities and planetary destruction; second, emphasizing the regimes and techniques used to dispossess indigenous peoples, replacing them with commercial profit generating ventures in home (rather than host) country. This section will conclude by assessing the contemporary push towards ‘protected areas’, showing the causal relationship between this and the past practices. The chapter concludes by articulating a roadmap to achieve the twin goals of environmental protection and protection of indigenous peoples’ rights. It also seeks to

⁴ Russel Barsh, “Indigenous Peoples in the 1990s: From Object to Subject in International Law”, in *Harvard Human Rights Law Journal*, 1994, vol. 7, pp. 33–86.

⁵ Jeremie Gilbert, *Land Grabbing, Investments and Indigenous Peoples’ Rights to Land and Natural Resources: Case Studies and Legal Analysis*, International Work Group for Indigenous Affairs Report 26, Copenhagen, 2017.

⁶ Johan Rockstrom, Will Steffen, Kevin Noone and Asa Persson, “A Safe Operating Space for Humanity”, in *Nature*, 2009, vol. 46, no. 1, pp. 472–475. For a collection of resources developed at the Stockholm Resilience Centre, see “Planetary boundaries research” (available on Stockholm Resilience Centre’s web site).

⁷ For background reading on ‘protected areas’, see Bram Büscher and Webster Whande, “Whims of the Winds of Time? Emerging Trends in Biodiversity Conservation and Protected Area Management”, in *Conservation Society*, 2007, vol. 5, no. 1, pp. 22–43, and Dan Brockington, “Community Conservation, Inequality and Injustice: Myths of Power in Protected Area Management”, in *Conservation Society*, 2004, vol. 2, no. 2, pp. 411–432.

⁸ Joseph Murphy, *Environment and Imperialism: Why Colonialism Still Matters*, Sustainability Research Institute, University of Leeds, 2009, pp. 1–27.

highlight the specific duties and obligations upon the international society, commencing with former colonial powers, to achieve this reality, while offering insights into the specific legal tools and norms necessary to support this venture.

18.2. Colonial Crime and Environmental Degradation

In terms of the Law of Nations developed over centuries, the only territory that can be occupied is *terra nullius*.⁹ As every scholar of public international law is well aware, unoccupied territory may be acquired via specific avenues. *Oppenheim's International Law* suggests a lack of unanimity among members of the international community *vis-à-vis* the modes of territorial acquisition. Yet standard textbooks often present this subject in definitive terms, despite the fact that the concept of State territory has changed considerably from the times of Grotius, through the Middle Ages, and to contemporary society.¹⁰ Therefore:

the acquisition of territory by a state normally means the acquisition of *sovereignty* over such territory. In these circumstances the Roman law scheme of “modes” concerning the acquisition of private property are no longer wholly appropriate.¹¹

Irrespective of distinction between historical acquisition of territory, often based on private modes of acquisition, and contemporary acquisition of territory, usually occurring under greater international scrutiny, the modes of acquisition are still described in the same way in the annals of public international law, consisting:¹²

1. Cession: State acquisition of territory through transfer of sovereignty by ‘owner state’;¹³

⁹ Joshua Castellino, “Territorial Integrity and the ‘Right’ to Self-determination: An Examination of the Conceptual Tools”, in *Brooklyn Journal of International Law*, 2008, vol. 33, no. 2, pp. 503–568.

¹⁰ Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, vol. 1, ninth edition, 1992, pp. 678–79.

¹¹ *Ibid.*, p. 679.

¹² Ian Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopaedia*, Oxford University Press, 1979 (providing a comprehensive view of the theory and practice behind the acquisition of African territory and boundaries in public international law).

¹³ Robert Jennings, *The Acquisition of Territory in International Law*, Manchester University Press, 1963, pp. 16–19.

2. occupation: State appropriation of territory over which another is not sovereign;¹⁴
3. accretion: State acquisition of territory through natural or artificial formations, without violating another State's sovereignty;¹⁵
4. subjugation: State acquisition of territory through conquest and subsequent annexation, where war-making is a sovereign right, and not illegal;¹⁶ and
5. prescription: State acquisition of territory through continuous and undisturbed exercise of sovereignty over the territory.¹⁷

Of these modes of acquisition, the two that are fundamental to understanding contemporary boundary disputes are occupation and subjugation, and the impact of this in determining the nexus between self-determination and the post-colonial territorial State. In any case, the underlying premise for this is nonetheless that the territory would have to be blank or unoccupied. When the question of what constitutes a test for this determination, the *Western Sahara Case* is worth quoting, to the effect that:

It is [...] by reference to the law in force at that period that the legal concept of, *terra nullius* must be interpreted. In law, "occupation" was a means of peaceably acquiring sovereignty over territory otherwise than by cession or succession; it was a cardinal condition of a valid "occupation" that the territory should be *terra nullius*. According to the State practice of that time, territories inhabited by tribes or peoples having a social and political organization were not as *terrae nullius* in their case sovereignty was not generally considered as effected through occupation, but through agreements conclud-

¹⁴ See, generally, Arthur S. Keller, Oliver J. Lissitzyn and Frederick J. Mann, *Creation of Rights of Sovereignty through Symbolic Acts 1400–1800*, Columbia University Press, New York, 1938.

¹⁵ Jennings and Watts, 1992, pp. 696–98, see above note 10.

¹⁶ Ian Brownlie, *International Law and the Use of Force by States*, Oxford University Press, 1963, pp. 112–22. See also International Court of Justice, *Application for Revision of the Judgment of 11 September 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*, 18 December 2003, 2002 I.C.J. 392 (<https://www.legal-tools.org/doc/2f08d7/>) (illustrating a modern revision claim based on avulsion).

¹⁷ Jennings and Watts, 1992, pp. 705–08, see above note 10 (reflecting the views of leading international jurists in the historical evolution of this concept).

ed with local rulers. The information furnished the court shows [...] that at the time of colonization western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.¹⁸

Thus, it was clearly no longer enough for the territory to be physically bereft of people, in addition, any people that may have inhabited it, ought to have been “socially and politically organised”. This blatantly partisan interpretation, which justified *post facto* the spread and lawful (though not legitimate) acquisition of territory, was not a new direction of justification for international law. Ever since Roman law times, the bias has existed which has enabled power to create and interpret norms to suit themselves while offering them up as objective standards.¹⁹ Thus, despite the existence of strong property rights regimes under Roman law, the only territory that could legitimately be acquired by the Roman Empire was territory that was non-Roman.²⁰ The justification given pertained to racist assumptions about whether non-Romans could be considered ‘human enough’ to warrant their presence on a territory as ‘rights earning’.²¹ This trend of course continued well into the colonial era, paving the way for Spanish and Portuguese occupation of ‘the New World’ legitimised by Papal Bulls and the Treaty of Tordesillas which sought ‘equitable’ division of land neither possessed between the parties.²² It was germane to the British Crown’s acquisition of territories in the Pacific,²³ with the Treaty

¹⁸ International Court of Justice, Western Sahara, Advisory Opinion, 16 October 1975, 1975 I.C.J. 12, p. 39 (<https://www.legal-tools.org/doc/512a2a/>).

¹⁹ For a fascinating discussion in a highly cited and well-respected legal text that shows the colonial bias that existed in international law at the time, see Mark F. Lindley, *The Acquisition and Government of Backward Territories in International Law*, Longmans, Green and Co, New York, 1926.

²⁰ See Mohammed Bedjaoui, *Terra Nullius, ‘Droits’ Historiques et Autodétermination*, Exposés oraux prononcés devant la Cour Internationale de Justice en l’affaire du Sahara Occidental, La Haye, 1975.

²¹ In a Native American context see, for instance, Robert Strausz-Hupé, *Geopolitics: The Struggle for Space and Power*, G.P. Putnam’s Sons, New York, 1942; Gregory H. Nobles, “Breaking into the Backcountry: New Approaches to the Early American Frontier, 1750–1800”, in *The William and Mary Quarterly*, 1989, vol. 46, no. 4, pp. 641–70.

²² This is explored in great detail in Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent*, Routledge, London, 2014.

²³ See Joshua Castellino and David P. Keane, *Minority Rights in the Pacific: A Comparative Legal Analysis*, Oxford University Press, 2009.

of Waitangi as a stand out piece of trickery,²⁴ even in a playbook littered with dastardly cheating that has never been fully acknowledged to date.

The story of the illegitimate colonial acquisition of land, peoples, resources, wealth and power is only mutedly acknowledged. Consider for instance the extent to which all the great textbooks of public international law reflect on this in their chapters on title to territory. When entertained at all, quick reference is made to the *intertemporal rule of law* considered sufficient in foreclosing further discussion.²⁵ While that rule may use contemporary legal tenets of dubious value to eliminate questions of reparations, the failure to discuss illegality of acquisitions themselves in educating new international lawyers suggests tacit acceptance of wrongdoing.

Yet while awareness of the illegality of acquisition of territory is known, though ignored or met with knowing glances of ‘oh *that* old argument’, the nexus between colonial rule and climate change is underexplored. The salience of ignoring this reiterates avoidance of liability ascription for past actions whose tort is being felt most acutely in the present. The rest of this section seeks to highlight five ways in which colonial regimes contributed and continue to contribute to climate change. These are:

1. illegal dispossession of climate guardians;
2. wilful destruction of ‘circular economies’;
3. facilitation of commercial exploitation;
4. the drive for over-consumption; and
5. sustaining unsustainability.

It could be argued that the starting point for the route to the current climate crisis arose with the treatment of non-Europeans as objects rather than subjects. ‘Europeans’ did not of course invent colonization or its underlying cruelty, which have existed through history. Indeed, global history is narrated almost exclusively through the process by which one tribe, or ‘nation’ sought to extend their sovereignty over another, acquiring their lands and spreading their power. In instances as different as the Mongol

²⁴ See Nan Seuffert, “Colonising Concepts of the Good Citizen, Law’s Deceptions, and the Treaty of Waitangi”, in *Law Text Culture*, 1998, vol. 4, no. 2, pp. 69–104.

²⁵ For a detailed discussion of this, see Joshua Castellino and Stephen Allen, *Title to Territory in International Law: An Intertemporal Analysis*, Ashgate, 2005.

invasions,²⁶ and the rise and spread of the Ottoman Empire,²⁷ many lives were lost with atrocities perpetrated that were similar to those perpetrated later or simultaneously by European powers.

Yet where European colonization differed from others is captured in the motto of the ‘three Cs’: Civilization, Christianity and Commerce.²⁸ While the first two were common – many hegemonies used the idea of their cultural superiority as an internal spur to justify brutal subjugation, and many justified actions by the ostensible need to ‘save ignorant human beings from their heathen fates’. Though the religion or ideology may have differed, it was in the third ‘C’ that European colonization differed significantly.

While all empire building processes involve theft, European colonization involved theft on a scale rarely before witnessed. Thus, unlike raids from Persia to India in the twelfth century that took wealth back to Ghazni²⁹ (today conveniently cited by some in India to justify Islamophobia),³⁰ European colonization used laws as a weapon to establish sovereignty with a view to establishing a process to systematically extract resources. When indigenous guardians resisted, they were dispossessed through force,³¹ captured as indentured labourers to work on plantations elsewhere, or simply incorporated into new economies set up to absorb them as unskilled workers.³²

²⁶ See, for example, James Chambers, *The Devil’s Horsemen: The Mongol’s Invasion of Europe*, Phoenix Press, 2001 and more generally John J. Saunders, *The History of the Mongol Conquests*, University of Pennsylvania Press, Pittsburgh, 2001.

²⁷ Jem Duducu, *The Sultans: The Rise and Fall of the Ottoman Empire and Their World – A 600 Year History*, Amberley Publishing, 2018.

²⁸ For more, see Henry C. Carey, *Commerce, Christianity and Civilization versus British Free Trade: Letters in Reply to the London Times*, Franklin Classics, 2018.

²⁹ See Muhammad Nazim, *The Life and Times of Sultan Mahmud of Ghazna*, Cambridge University Press, 1931.

³⁰ For early propaganda that predates the modern ‘debate’ on this issue, see this text by a member of the *Rashtriya Sevak Sangh*, Sita Ram Goel, *The Story is Islamic Imperialism in India*, Voice of India, New Delhi, 1982.

³¹ See, for instance, Markus B. Heyder, “International Law Commission’s Draft Articles on State Responsibility: Draft Article 19 and Native American Self-Determination”, in *Columbia Journal of Transnational Law*, 1994, vol. 32, no. 1, pp. 155–178.

³² Andrei Twibell, “Rethinking Johnson v McIntosh (1823): The Root of the Continued Forced Displacement of American Indians Despite Cobell v. Norton (2001)”, in *Georgetown Immigration Law Journal*, 2008, vol. 23, no. 1, pp. 129–200.

This facilitated the second facet that links colonial crime to contemporary environmental destruction. The newly acquired indigenous lands became ‘available’ for the instigation of a new emerging economy. This involved acquisition of any discernible wealth in the now less occupied territories, and its exploitation for export. Thus, when King Leopold of Belgium saw the untouched Congo Basin,³³ he looked past the indigenous forest dwelling peoples, the *Batwa*, and instead saw vast strands of wood that could change the dimension of Belgian and subsequently European furniture industry.³⁴ Similarly, the British in an attempt to quell reliance on Chinese tea that was negatively impacting the balance of trade between the Chinese and British Empires,³⁵ saw fit, after the failure of arguing free trade to justify the sale of opium to China,³⁶ to turn the Himalayan slopes in what is modern North-Eastern India into a large scale tea garden,³⁷ destroying the existing fauna and also completely changing the regional lifestyles.³⁸ That the Democratic Republic of the Congo and India still rely on these activities to sustain their economies shows how long-lasting and continuing the impact of destroying the circular economies was.³⁹ Equally, as in colonial rule, it shows how this exploitation does not generate wealth for the areas, but creates subsistence economies where the extracted resource was not valued until much higher up in the supply chain, and then only to generate profits for the corporations that exploit it.

³³ Deanna M. Wolfire, Jake Brunner and Nigel Sizer, *Forests and the Democratic Republic of Congo: Opportunity in a Time of Crisis*, World Resources Institute, Forest Frontiers Initiative, Washington, DC, 1998.

³⁴ Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa*, Houghton Mifflin Publishers, 1998.

³⁵ See Andrew B. Liu, *Tea War: A History of Capitalism in China and India*, Yale University Press, New Haven, 2020.

³⁶ Stephen R. Platt, *Imperial Twilight: The Opium War and the End of China's Last Golden Age*, Atlantic Books, 2019.

³⁷ See, for example, Utpal Kumar De, “How Successful is India's Look East Policy Under Globalisation?”, in Soumyendra Kishore Datta and Atanu Sengupta (eds.), *Development, Environment and Sustainable Livelihood*, Cambridge Scholars Publishing, 2014, pp. 148–172.

³⁸ Patrick Oskarsson, *Landlock: Paralyzing Dispute over Minerals on Adivasi Land in India*, Australian National University Press, Canberra, 2018.

³⁹ Bernard Waites, *Europe and the Third World: From Colonisation to Decolonisation, c. 1500-1998*, Palgrave Macmillan Springer, New York, 1999.

That supply chain, and especially the private interests that benefited from it, were a key component of this form of exploitation. It is not by accident that a significant part of Britain's global exploitation was under the guise of the East India Company.⁴⁰ Irrespective of the other two 'Cs', it was really the pursuit of wealth that remained a common thread through European colonization. Despite the racist rhetoric in its dismissal of other forms of social interaction, the 'civilising' aspect also sought to spread Enlightenment Era ideas concerning the rule of law. These more progressive strands were accompanied but often dominated by the quest for profit, which saw private enterprise ride and often lead the mission with a view to commandeering vast resources that remain at the heart of contemporary European wealth, and especially in its domination of global trade. It has taken two full of centuries of relatively uncontested domination encompassing the growth of multinational firms with long supply chains in a range of industries from sanitary and phytosanitary products to hard engineering. *En route*, Europe pioneered the deadly arms industry that dominated wealth generation creating a private-public partnership that is key to maintaining hegemony while perpetrating injustices and profiting from distance.⁴¹ In the course of this process, Europe, with its ally the United States of America dominated by European immigrants adhering to European values, has been central to the erection of an unfair trading system that pays scant attention to the raw values of materials, ensuring that they start adding value dramatically once they enter jurisdictions of Organisation for Economic Co-operation and Development ('OECD') countries, furthering global inequality. At a macro level, post-colonial States have had little choice but to participate, and within those States this has spurred significant marginalization of indigenous peoples as State-driven or private entities relying on State patronage, have profited in place of former colonial rulers, while indigenous (and other) territories within the State are stripped of resources. Ironically, the significant competition that has emerged from China, and to a lesser extent from Russia, India and Brazil has furthered this model, with Chinese economic ascendance following

⁴⁰ See William Dalrymple, *The Anarchy: The Relentless Rise of the East India Company*, Bloomsbury Books, London, 2019.

⁴¹ Paul Cornish, *The Arms Trade and Europe*, Chatham House Papers, Royal Institute of International Affairs, London, 1995.

similar patterns of external domination for resources, without the accompanying missions of Civilisation and Christianization (or its equivalent).⁴²

The fourth factor in this domination is a crucial component to the current environmental crisis. The stimulation of demand ‘at home’ through a private public partnership that ensured a steady and at times it seemed insatiable thirst for products. With improving technology it was possible to generate longer lasting, sturdier goods, but instead technologies veered towards creating products of lower durability, pursuing a ‘use and dispose’ idea stimulating bulk exploitation and manufacturing.⁴³ At the commencement of the industrial revolution in Europe, this brought welcome jobs, spurring economic growth, spreading wealth beyond investors, and then contributing momentum towards economic growth by demand and spending stimulation. However, as technology grew and as the ‘worth’ of human capital rose, the manufacturing that dominated European economies began to seek cheaper bases for production. This early optimistic phase of globalization appeared to equalise the global economy as formerly poor countries benefitted from external investment into their economies. This trend continues, but two factors are hastening its demise: the improvement of technology which makes human labour too expensive compared to machines, and resistance to jobs leaving OECD shores as unemployment grows. In developing countries, this trend replicates pre-Industrial Revolution inequalities in Europe as a class of entrepreneurs emerge with incredible wealth, who can generate ever greater wealth without having to factor in a return to human labour. The modern global economy can thus be characterised as automated: movement and reinvestment of capital can create high returns, with no trickle down to employment, or where it does exist, to fair wages. The consequence is an angry global politics and a clearer distinction between the haves and have-nots. The significant investment by global oligarchs in media and communication companies enables old-fashioned control of propaganda disguised as ‘fact’,⁴⁴ concerted attack on human rights to undermine calls for

⁴² Elizabeth C. Economy, *The Third Revolution: Xi Jinping and the New Chinese State*, Oxford University Press, 2018.

⁴³ See Nicholas Stern, *The Economics of Climate Change: The Stern Review*, Cambridge University Press, 2014.

⁴⁴ Melissa Zimdars and Kembrew McLeod, *Fake News: Understanding Media and Misinformation in a Digital Age*, MIT Press, Ann Arbor, 2020.

accountability and fairness,⁴⁵ and a successful quest for political power to maintain hegemony.⁴⁶ This stands in sharp contrast and is near diametrically opposite to circular indigenous economies that relied on sustainable practices, did not seek to stimulate demand and in particular, had a respect for natural resources and their ability to regenerate, of near spiritual proportions.

Finally, despite the claim that colonial crimes took place long ago and that statutes of limitations put them beyond the realm of contemporary law, the fact is that the tort from these activities has been slower to be realised, and they extend into the current period through maintenance of structures that continue to damage. As the climate justice movement has grown, it has highlighted many of the facets that are being discussed here. At its heart lies the obvious antidote: reduce consumption, generate solutions at scale to specific environmental issues, discourage, reduce, ban or tax the quest for unjustifiable profits and reflect the *real* cost (including of regeneration) of natural resources into product supply chains. The nexus between governance and commerce, so long in the making in European colonization is now ‘decentralised’, with nearly every country in the globe harnessing its own domesticized creamy layer of wealth, in nearly all cases gained through exploitation of indigenous peoples and their territories. As a consequence, environmental governance has become a useful rhetoric, but in nearly every case the policies implemented remain fig-leaves for what is really needed. Pushed into a corner by civil society about the lack of action, a new drive has emerged which has its essence in an old colonial practice: the creation of strict targets around protected areas, discussed in the next section.

18.3. Decolonizing Law: The Hand-Maiden to Colonization

There is a quote attributed to Martin Luther King (though its origins are older) that “the arc of the moral universe is long but it bends towards justice”, replicated in the idea that international law has been the gentle civiliser of nations.⁴⁷ The evidence for this seems compelling: the growth of

⁴⁵ Assisted by internal critique which played into the hands of critics. For more, see Elvira Domínguez Redondo, *The Politicization of Human Rights: The UN Special Procedures*, Oxford University Press, 2020.

⁴⁶ See Patrick Porter, *The False Promise of Liberal Order*, Polity Press, Cambridge, 2020.

⁴⁷ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press, 2009.

human rights law, especially over the last century has yielded greater freedoms, seen increased inclusivity, eradicated (at least in law) egregious crimes such as genocide, crimes against humanity, torture and slavery. The rule of law has become a cornerstone to legal systems, and equality and non-discrimination have ascended the hierarchy of norms to take centre stage.

From an indigenous peoples' perspective, these developments never had the same reach towards societies, paid mere lip service to destruction of communities, lands and cultures, and seem in large part, with notable exceptions in some courts and jurisdictions, to actively resist calls to design methods to address historical and present injustices.

18.3.1. Legal Reification of Colonial Injustice

The law, legal institutions and structures seem content to articulate and finesse articulation of progressive norms, taking little responsibility for their implementation and realisation (those were questions for politics and policy making to address apparently). There was no awareness or teaching of the extent to which law has been a hand-maiden to legitimization of colonial enterprises or its failure in reigning in absolute power. Rather it appears to have worked as a 'gentleman's agreement' emphasizing values of decency and moderation which had no answers when political power was seized by those unwilling to play within that 'gentleman's agreement'. This section articulates six key legal themes whose violation heightened the impact of colonial regimes, ending with a sub-section on protected areas that epitomises why and how colonization is a current phenomenon.

1. Impact of the global territorial regimes: As emphasized above, the failure to recognise the personhood of indigenous peoples lies at the heart of the colonial project.⁴⁸ Not only did the violation of the principle of *terra nullius* dispossess swathes of populations outside Europe, it contributed to the disruption of their legitimacy to exist as autonomous entities. While United Nations ('UN') inspired and sponsored decolonization yielded an optically less 'White' world, the rules,

⁴⁸ For an interesting perspective on this in a US context, see Hannah White, "Indigenous Peoples, The International Trend towards Legal Personhood for Nature and the United States", in *American Indian Law Review*, vol. 43, no. 1, 2018, pp. 129–166.

especially *uti possidetis juris*,⁴⁹ constrained modification to the emerging territorial entities. The rule, derived from Roman Law, was originally articulated by the Praetor to determine the possession of movable goods contested by rival claimants. Extended to decolonization in Latin America, it sought to foreclose issues of boundary disputes between rival offspring of colonial rulers in a bid to avoid the spiralling of territorial disputes.⁵⁰ Of course even though that decolonization was famed as an extension of Enlightenment Era oriented principles of consent, it did not factor consent of indigenous peoples, who were treated as chattel handed from one colonial power to another.⁵¹ When extended to Africa and Asia, the overt racial dimensions appeared better respected, but only at a distance. To local populations the quest for decolonization was instigated, voiced and delivered by communities relatively close to the colonial power. These communities, usually dominant (in either numbers or proximity to power) ethnic, linguistic or religious groups, claimed to be legitimate spokespeople for all the population and in some cases made wide outreaches to marginalized communities to support the quest to rid 'White foreigners' from the lands. Externally this legitimized them as new rulers, welcomed into international society as such, while often occupying the very palaces and governing seats of the departing rulers. The external rules around the sanctity of borders⁵² discouraged adjustments between different colonial entities, and their ascendance to notions of sovereignty meant that dissent with regards to their legitimacy could be stemmed.⁵³ In more 'successful' post-colonial States the superficial adoption of a multiculturalist unified 'national'

⁴⁹ Joshua Castellino, "Territorial Integrity and the 'Right' to Self-Determination: An Examination of the Conceptual Tools", in *Brooklyn Journal of International Law*, 2008, pp. 503–568.

⁵⁰ Joshua Castellino and Steve Allen, "The Doctrine of *Uti Possidetis*: Crystallisation of Modern Post-Colonial Identity", in *German Yearbook of International Law*, 2000, vol. 43, pp. 205–226.

⁵¹ See, more generally, James Anaya, *Indigenous Peoples in International Law*, Oxford University Press, 2004.

⁵² Garth Abraham, "Lines upon Maps: Africa and the Sanctity of African Boundaries", in *African Journal of International and Comparative Law*, 2007, vol. 15, no. 1, pp. 61–84.

⁵³ See the work of Robert Jackson which was unfairly criticised at the time, but is particularly salient in examining the track records of post-colonial states: Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, Cambridge University Press, 1990.

narrative appeased those with historical claims for resumption of their own sovereignty, previously suppressed by the arrival of colonial rule. The promising notion of self-determination, articulated by the twin UN declarations in 1960,⁵⁴ was reduced to consisting of, at best, an internal call for autonomy within existing State structures (internal self-determination).⁵⁵ This was sold as good for order, highlighted as the best chance for the claimed unity in the colonial struggle to bear real fruits, or simply forcibly enforced against dissenters. The principle of *jus resistendi ac seccionis* (the right to resistance),⁵⁶ powerful rhetoric against the White colonial rule, was almost dismissed, a trend that continues to this day accompanied by the widespread use of powerful anti-terrorism laws.

2. Treaty making: The subterfuge of Cecil Rhodes in hoodwinking the Shona King⁵⁷ and the unscrupulous officials who deliberately misinterpreted the Treaty of Waitangi⁵⁸ English translation are often forgotten footnotes to history. But the notion of unequal treaties – unfair at the outset, imposed through power, based on what today would be called fake facts with only a thin veneer of accountability while being

⁵⁴ As evidenced by two general Assembly Resolutions on the subject, namely Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/Res/1514(XV), 14 December 1960 (<https://www.legal-tools.org/doc/5de655/>), and Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, UN Doc. A/RES/1541(XV), 15 December 1960 (<https://www.legal-tools.org/doc/hqlf9y/>). This was subsequently strengthened in the Declaration on the Principles of International Law Governing Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV), 24 October 1970 (<https://www.legal-tools.org/doc/5039aa/>).

⁵⁵ Joshua Castellino, “Conceptual Difficulties and the ‘Right’ to Indigenous Self-Determination”, in Nazila Ghanea and Alexandra Xanthaki (eds.), *Minorities, Peoples and Self-Determination*, Martinus Nijhoff, 2004, pp. 55–74.

⁵⁶ Gwilym D. Blunt, “Is There a Human Right to Resistance?”, in *Human Rights Quarterly*, 2017, vol. 39, no. 4, pp. 860–881.

⁵⁷ See Robert I. Rotberg, *The Founder: Cecile Rhodes and the Pursuit of Power*, Oxford University Press, 1988.

⁵⁸ Nan Seuffert, “Contract, Consent and Imperialism in New Zealand’s Founding Narrative”, in *Australia and New Zealand Law and History*, 2015, vol. 2, pp. 1–31; Valmaine Toki, “Tikanga Maori: A Constitutional Right – A Case Study”, in *Commonwealth Law Bulletin*, 2014, vol. 40, no. 1, pp. 32–48; Janet McLean, “Crown, Empire and Redressing the Historical Wrongs of Colonisation in New England”, in *New Zealand Law Review*, 2015, no. 2, pp. 187–212.

dressed up and celebrated as law worthy of veneration – have remained the norm.⁵⁹ Names such as Balfour, Picot, Sykes and Durrand, all key boundary makers of now sovereign States, sit in archives of global history, with little commentary of their impact on modern statehood or the extent to which they effectively sought to maintain European hegemony over lands they felt entitled to. The Black Lives Movement, as a call to consciousness, ought to elicit greater scrutiny not only of these individuals and what drove them, but of the tacit support and effective silence of the entire edifice of international law, in condoning and even celebrating these ‘achievements’.

3. Property rights: At macro level, the principle of self-determination, especially as driven by the UN and that led to decolonization, was an attempt to redress colonial violations that stemmed from failures to respect ancestral domain of indigenous peoples in the decision to unilaterally designate their lands as *terra nullius*. Self-determination has, depending on perspectives, been hailed as a norm of *jus cogens*,⁶⁰ or admonished as “a political tenet of uncertain legal value”.⁶¹ In any case, at the root of the principle of self-determination lie two entrenched principles: the legitimacy of the need for people to consent to their fate, and the duty in law, to create mechanisms to respect and implement that decision. Crucial to that first principle was the return of lands and territories, seized without the consent of ‘the people’ back to them. There are of course several potential contradictions in the doctrine of self-determination that have been highlighted in what is likely to be the most written about area of international law: who are the people, the conflict with territorial autonomy, the modalities of self-determination, whether it is a continuous right, whether it is a right at all, whether it is politics by other means, whether it ought to be crystallised further or left deliberately amorphous. Yet at the heart of this discussion lies the implicit belief that self-determination as achieved against the former colonial State did not extend to discus-

⁵⁹ Charles H. Alexandrowicz, “The Role of Treaties in the European-African Confrontation in the Nineteenth Century (1975)”, in David Armitage and Jennifer Pitts (eds.), *The Law of Nations in Global History*, Oxford University Press, 2017.

⁶⁰ As reviewed in Matthew Saul, “The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Rights”, in *Human Rights Law Review*, 2011, vol. 11, no. 4, pp. 609–644.

⁶¹ Steven R. Ratner, “Drawing a Better Line: *Uti Possidetis* and the Borders of New States”, in *American Journal of International Law*, 1996, vol. 90, no. 4, p. 590.

sions of how that incoming power ought to respect the property rights that were violated. Discussions of land remain at the heart of the politics of many post-colonial States, with well represented arguments concerning the return of ancestral domain.⁶² Yet, the issue of the tort of property rights remains in its infancy despite some stirring jurisprudence from courts and tribunals.⁶³

4. ‘Free trade’: Despite an avowed interest driven by the economic ideology that free trade can create benefits for all,⁶⁴ the world global trading system has not been set up on the grounds of equity.⁶⁵ Raw materials extracted in indigenous territory still gain a fraction of the return due, especially taking into account the opportunity cost they have in terms of the environment. In addition, while there have been developments on the free movements of goods and services, this has been skewed heavily to benefit the richer nations, building their wealth, ensuring that they have the right to both ‘invest’ in new ventures in indigenous lands and extract the bulk of the profits that might result from such a venture. While there have been successful negotiations protecting certain realms of free trade to benefit strong coun-

⁶² See, for example, Valmaine Toki, “Adopting a Maori Property Rights Approach to Fisheries”, in *New Zealand Journal of Environmental Law*, 2010, vol. 14, pp. 197–222; Ross Levine, “Law, Endowments and Property Rights”, in *Journal of Economic Perspectives*, 2005, vol. 19, no. 3, pp. 61–88; Robert Home, “‘Culturally Unsuitable to Property Rights?’ Colonial Land Laws and African Societies”, in *Journal of Law and Society*, 2013, vol. 40, no. 3, pp. 403–419; Brian D. Thom, “Reframing Indigenous Territories: Private Property, Human Rights and Overlapping Claims”, in *American Indian Cultural Research Journal*, 2014, vol. 38, no. 4, pp. 3–28.

⁶³ See, for example, High Court of Australia, *Mabo v. Queensland (No 2)*, Judgment, 3 June 1992, (1992) 175 CLR 1; African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development v. Kenya*, Communication 267/2003, 25 November 2009 (<https://www.legal-tools.org/doc/7201ce/>); Inter-American Court of Human Rights, *Case of Xakmok Kasek Indigenous Community v. Paraguay*, Judgment, 24 August 2010 (<https://www.legal-tools.org/doc/d50c89/>); Inter-American Court of Human Rights, *Kaliña and Lokono Peoples v. Suriname*, Judgment, 25 November 2015; African Court on Human and Peoples’ Rights, *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, Judgment, 26 May 2017. Also see Supreme Court of India, *Wildlife First v. Union of India*, Judgment, 12 February 2019, Writ of Petition(s) (Civil) No(s). 109/2008.

⁶⁴ See Graham Dunkley, *Free Trade: Myths Realities and Alternatives*, The University Press, Dhaka, 2004 (Zed Books, London, 2004).

⁶⁵ Dani Rodrick, *The Globalization Paradox: Why Global Markets, States and Democracies Can’t Coexist*, Oxford University Press, 2011.

tries,⁶⁶ there has been no attempt to regulate spread around harmful goods and services such as the proliferation of arms (see below). Even the attempt to prevent nuclear proliferations is heavily skewed on the basis that the countries that have such weapons will act reasonably.⁶⁷ Political motivations of the powerful States have ensured that the free movement of labour, which would result in significant migration are severely restricted based on national interest. The consequence of these actions adds to the already significant competitive advantage of corporations from European and allied countries who have been involved in indigenous territories over centuries, operating as near monopolies in those economies.⁶⁸

5. The tacit and explicit support for armed conflict: The world's former colonial countries are overrepresented in the top five producers and exporters of arms.⁶⁹ Despite attempts to seek to regulate this trade,⁷⁰ their engagement in a bruising battle against each other to manufacture and sell arms has played a significant role in fostering instability and furthering the interests of the former colonial power in the country of their influence. Decolonization left significant existential threats to the fledgling post-independent State, not least because of the failure to pay adequate attention to contestations within the freedom struggles. Many of these were born out of direct colonial actions including the self-interested carving of territories dividing peoples and communities, the agglomeration of antagonistic communities within a single administrative unit,⁷¹ the attempt to use divide and

⁶⁶ See M. Ataman Aksoy and John C. Beghin, *Global Agricultural Trade and Developing Countries*, World Bank, Washington, DC, 2005.

⁶⁷ See William Potter and Gaukhar Mukhatzhanova, *Nuclear Politics and the Non-Aligned Movement*, Routledge, London, 2017.

⁶⁸ Judy Shelton, "The Case for a New International Monetary System", in *Cato Journal*, 2018, vol. 38, no. 2, pp. 379–390.

⁶⁹ Andrew Feinstein, *The Shadow World: Inside the Global Arms Trade*, Farrar, Straus and Giroux, 2011.

⁷⁰ See Yasuhito Fukui, "The Arms Trade Treaty: Pursuit for the Effective Control of Arms Transfer", in *Journal of Conflict and Security Law*, 2015, vol. 20, no. 2, pp. 301–322.

⁷¹ Lord Salisbury, speaking to the British House of Lords in 1890, stated: "We have been engaged in drawing lines on maps where no white man's foot ever trod; we have been giving away mountains and rivers and lakes to each, only hindered by the small impediment that we never knew where the mountains and rivers and lakes were". As quoted by Judge Ajibola, International Court of Justice, *Libya v. Chad (Territorial Dispute)*, 3 February 1994, ICJ Reports (1994) 6, p. 53 (<https://www.legal-tools.org/doc/054332/>).

rule policies to maintain their hegemony, the failure to achieve decolonisation through a wide enough dialogue, and the signing of preferential agreements, often with both potential parties to a dispute, to supply weapons to cope with real and imagined foes. This strategy generated significant wealth in former colonial countries, sewed uncertainties and divisions sometimes creating a febrile atmosphere with devastating effects in their former colony that continue as a tort. The failure of any emerging regime to tackle the manufacture, sale and proliferation of all kinds of weapons is not only indicative of the kind of ‘free trade’ aspired to, as typified in the Opium Wars of the 1800s; it lies at the heart of the abdication of responsibility that the UN Security Council (‘UNSC’), responsible for threats to the peace, ought to have had custodianship of, but could not due to the extent to which the permanent members were deeply implicated in generating the threats to the peace.⁷²

6. Adjudication of global regimes of law: While the emergence of greater accountability and participation at international level has been significant since the commencement of the UN, two of the former colonial players have retained their pre-eminent role in global regimes of law-making with permanent membership of the UNSC, as mentioned above. This dominance is replicated in key bodies connected with the development and global adjudication of emerging regimes. Thus, the International Court of Justice (until the recent defeat of the UK candidate in an election), the Human Rights Council, the Green Room of the World Trade Organisation, the World Bank, the International Monetary Fund and other leading international organisations are still driven directly and often blatantly by the interests of former colonial powers and their allies. This has not only squeezed out other potentially more progressive European powers who may be keen to develop more equitable global regimes; they have created an environment where the pursuit of national interest continues to drive the agenda forward in the name of the use of expertise thereby weakening both the quality and the legitimacy of global institutions.

⁷² See Lyndal Rowlands, “UN Security Council Seats Taken by Arms Exporters”, *Inter Press Service*, 28 November 2016 (available on its web site).

18.3.2. The Contemporary Case of ‘Protected Areas’

The attempt to seek to protect biodiversity through designating up to thirty per cent of the globe as ‘protected areas’⁷³ is synonymous not only of the continuing legacy of colonial activities, but their ability to generate damage in a contemporary context.

The ostensible justification that drives this objective is uncontested.⁷⁴ The proclivity towards profit-making driven by human greed has, mainly in the form of logging of forests and extraction of minerals in bio diverse areas, depleted the globe’s flora and fauna to a point of no return for some species.⁷⁵ Spiralling human population growth has been a significant contributing factor to this demise with the exponential spread of human settlements into previously untouched areas, signally devastating contact for biodiversity.⁷⁶

In an attempt to seek to bring in much needed protection against the further loss of biodiversity some climate scientists in conjunction with large scale conservation civil society organisations with the support of significant sections of civil society have sought to throw, what in their view is a protective ring around the remaining biodiversity, seeking to safeguard this from further harm.⁷⁷ Under this theory ensuring that some parts of the globe can thrive as wilderness is key to off-setting carbon emissions and curbing the widespread destruction that has occurred across the globe from human activity. The proposal currently being considered is that 30 per cent of the globe will consist such ‘protected areas’. Expressed against an overt anthropogenic domination that has assumed that the

⁷³ For the aspiration, explanation and statements on Protected Areas, see “About”, *International Union for Conservation of Nature* (available on its web site).

⁷⁴ For more on impact of climate change on biodiversity, see “Climate Change”, *International Union for Conservation of Nature* (available on its web site).

⁷⁵ Meron Tekalign, Koenraad van Meerbeek, Raf Aerts, Lindsey Norgrove, Jean Poesen, Jan Nyssen, and Bart Muys, “Effects of biodiversity loss and restoration scenarios on tree-related ecosystem services”, in *International Journal on Biodiversity Science, Ecosystem Services and Management*, 2017, vol. 13, no. 1, pp. 434–443.

⁷⁶ Hannes Weber and Jennifer D. Scubba, “The Effect of Population Growth on the Environment: Evidence from European Regions”, in *European Journal on Population*, 2019, vol. 35, no. 2, pp. 379–402

⁷⁷ Jaime R. Garcia Marquez, Tobias Krueger, Carlos A. Paez *et al.*, “Effectiveness of conservation areas for protecting biodiversity and ecosystem services: a multi-criteria approach”, in *International Journal of Biodiversity Science, Ecosystem Services and Management*, 2016, vol. 13, no. 1, pp. 1–13.

world's resources should be exclusively available to human consumption, this policy ought to be lauded at face value.

However, significant problems exist with it. First the areas that would immediately come under such protection, which are truly rich in biodiversity are almost exclusively the homes and territories of indigenous peoples.⁷⁸ The policy would require and justify their eviction, reducing them to penury on the edges of peri-urban areas. Though many of these communities existed in pre-colonial times, their 'ownership' of the lands has often not been documented according to any colonial or post-colonial lexicon, and they are thus simply treated as illegal settlers who can be removed without compensation.⁷⁹ But even this egregious human rights violation is only a small part of the problem.

Indigenous peoples, in their traditions and lifestyles have often acted as the planet's *guardians* over millennia.⁸⁰ They have not been responsible for large scale biodiversity loss, but have instead been calling this out regularly over the last century as 'settled' ways of life first visited, (uninvited), before going on to dominate their lands on a permanent basis. They have sought to find ways to continue to live in harmony with nature, including by utilising the benefits of their environs, in a sustainable manner that promotes regeneration. Thus, the second, more crucial problem with this strategy from the perspective of the protection of biodiversity and the environment, is that it removes from the site of its greatest necessity, the traditional knowledge gained from living in close proximity with nature. The rampaging fires in Aboriginal areas in Australia is a clear manifestation of this. Aboriginal Australian knowledge gained over centu-

⁷⁸ Dan Brockington, "Community Conservation, Inequality and Injustice: Myths of Power in Protected Area Management", in *Conservation and Society*, 2004, vol. 2, no. 2, pp. 411–432.

⁷⁹ M.D. Madhusudan, "Of Rights and Wrongs: Wildlife Conservation and the Tribal Bill", in *Economic and Political Weekly*, 2005, vol. 40, no. 47, pp. 4893–4895.

⁸⁰ Victoria Tauli-Corpuz, Janis Alcorn and Augusta Molnar, "Cornered by Protected Areas: Replacing 'Fortress' Conservation With Rights-Based Approaches Helps Bring Justice for Indigenous Peoples and Local Communities, Reduces Conflict, and Enables Cost-Effective Conservation and Climate Action", *Cornered by Protected Areas*, Rights and Resources Initiative, Washington, DC, 2018 (available on its web site); Alain Frechette, Katie Reytar, S. Saini and Wayne Walker, "Toward a Global Baseline of Carbon Storage in Collective Lands: An Updated Analysis of Indigenous Peoples' and Local Communities' Contributions to Climate Change Mitigation", *Rights and Resources Initiative*, Washington, DC, 2016 (available on its web site); Liz Alden Wily, "Collective Land Ownership in the 21st Century: Overview of Global Trends", in *Land*, 2018, vol. 7, no. 2, p. 68;

ries and passed down through generations orally, has always understood the importance of using controlled fires to clear debris from the floor of the forest. Western scientific models preached that fires in the forest would create environmental damage and so they were banned, with the community told that their bushfires were (another) sign of their primitiveness. When the fires flared in January 2020, the flames lived off the forest debris to spread across Australia, destroying 12.1 million hectares and annihilating forest life.⁸¹ The discarding of local knowledge on the basis of a science that has been poorly equipped to seek to understand traditional knowledge, and whose doors have often, through direct and indirect discrimination, been closed to members of these communities contributed to that devastation. The ‘protected areas’ scheme regularises this marginalisation at the cost of the environment, in the name of the environment.⁸²

A third significant problem looms into the future. As developing countries continue to seek growth while coping with the world’s unequal trading systems, they are likely to increasingly rely on their natural resources. With indigenous peoples out of the way (they have presented formidable obstacles to date), the well-established nexus between the State and corporations who it can license to generate national growth will become centre-stage. Many indigenous communities have witnessed this phenomenon at scale, and while the ‘protected areas’ schemes might create a strong international legislative backdrop against such practice, the lack of enforcement measures against States that exploit these is likely to be as weak as other global governing regimes. The result is a continuation and reification of a colonial practice.⁸³ This time, the post-colonial State will be in the driving seat; the former colonial economies will access benefits at a price only slightly higher than in the past. For indigenous peoples the outcome will be the same; for biodiversity and the planet it will fatally increase current precarities.

Current research shows that there have been significant actors, with dubious credentials that have been engaged in, and that benefit from the ‘protected areas’ scheme. Chief among these is the World Wildlife Fund,

⁸¹ Pierre Wiart, “Australia Bushfires: A New Normal?”, *RMS*, 10 January 2020 (available on its web site).

⁸² See Bill Tripp, “Our land was taken. But we still hold knowledge of how to stop mega fires”, *The Guardian Newspaper*, 16 September 2020 (available on its web site).

⁸³ Ngambouk V. Pemunta, “Fortress Conservation, wildlife legislation and the Baka Pygmies of southeast Cameroon”, in *GeoJournal*, 2019, vol. 84, pp. 1035–1055.

known across the world for its protection of biodiversity, but less known for its links to organised businesses that have profited out of nature.⁸⁴ An ongoing internal investigation into its role in the funding of eco-guards who have been accused of significant violations, including unlawful killings, is ongoing.⁸⁵ Global development agencies of powerful countries may also be implicated in these crimes since they may have sought to use their 0.7 per cent of Gross Domestic Product in support of such ventures that are now evidenced as being fatal for both nature and indigenous communities.

It needs to be stressed that protected areas *per se* are not the problem. Such areas may be significant to planetary regeneration, especially if envisaged as safeguarding territories from commercial exploitation and illegal settlement, and creating zones where flora and fauna may once again flourish. But seeking to create these without indigenous peoples at their very core amounts to no more than dereliction in the hope that damaged nature will be able to heal itself. Many progressive options exist: to have indigenous peoples work hand in hand with conservationists with the latter learning from the former; creating conditionalities for indigenous habitation within protected areas; articulating responsibilities upon tenure holders to regenerate the environment, and providing them with the means and resources necessary to achieve these aims.⁸⁶ These tenets are under-explored and inadequately framed in the current protected areas policy. The supreme irony in terms of this chapter is that protected areas were first constructed by colonial rulers, to ensure exclusive zones where they

⁸⁴ The organisation is currently subject to a self-commissioned independent review related to killings alleged. See Tripp, “Our land was taken. But we still hold knowledge of how to stop mega fires”, see above note 82.

⁸⁵ Nils Klawitter, “A Killing in Congo Reveals Human Cost of Conservation”, *Der Spiegel*, 1 November 2017 (available on its web site).

⁸⁶ W. Adams, and M. Mulligan, “Introduction”, in William Adams and Martin Mulligan (eds.), *Decolonizing Nature Strategies for Conservation in a Post-Colonial Era*, Routledge, 2012, pp. 1–15; also Val Plumwood, “Decolonizing Relationships with Nature”, in Adams and Mulligan (eds.), *Decolonizing Nature Strategies for Conservation in a Post-Colonial Era*, Routledge, 2012, pp. 51–78; Kyle A. Artelle, Janet Stephenson, Merata Kawharu and Nancy Turner, “Values-led management: the guidance of place-based values in environmental relationships of the past, present, and future”, in *Ecology and Society*, 2018, vol. 23, no. 3, p. 35; Allen Blackman, Leonardo Corral, Eirivelthon S. Lima and Gregory P. Asner, “Titling indigenous communities protects forests in the Peruvian Amazon”, in *Proceedings of the National Academy of Science*, 2017, vol. 114, no. 4, pp. 4123–4128.

could carry out their pastime of hunting unmolested.⁸⁷ At that time, the indigenous peoples were a nuisance that got in the way of ‘fun’. Those practices over time depleted resources and dismantled communities. That the world may be stumbling towards this as a solution reflects the collective failure of humanity to understand and appreciate human diversity of lived experience. It could prove fatal to the environment.

18.4. Conclusion

Indigenous peoples have been victimised twice by colonization in the past two centuries. The first, at the often-deadly arrival of colonial rulers;⁸⁸ the second, in the manner of their departure, which usually encompassed a lasting legacy of systems that proved harmful to the natural environment, with quasi-colonial rulers trained in the system of continued exploitation and domination.⁸⁹

Today, at the edge of the climate change precipice, it is abundantly clear that the lifestyles fuelled by anthropogenic domination encompassed a belief that all of nature was an exclusive human legacy to be expended without limit. Worse, the dominant worldview remains one that views profit-making as heroic, and the flow of rewards to such enterprise as admirable. For many parts of the world that view became centre-stage with the arrival and subsequent departure of European colonial rulers, and the global environment they created. Like their predecessors, post-colonial States are equally culpable in maintaining hegemonies, and equally at fault for their continued domination and subjugation of indigenous peoples.⁹⁰ However, as awareness of these continuing destructive

⁸⁷ For more on the origins of protected areas, see Paul Robbins and Amity A. Doolittle (eds.), “Fortress conservation”, *Encyclopaedia of Environment and Society*, Sage Publications, Thousand Oaks, 2012.

⁸⁸ Elizabeth Colson, “The Impact of the Colonial Period on the Definition of Land Rights”, in Peter Duignan, Lewis H. Gann and Victor Turner (eds.), *Colonialism in Africa, 1870–1960*, vol. 3, Cambridge University Press, 1971.

⁸⁹ See Christina Folke Ax, Niels Brimmes, Niklas Thode Jensen and Karen Oslund, *Cultivating the Colonies: Colonial States and Their Environmental Legacies*, Ohio University Press, Athens, 2011, and Yogi Hendlin, “From *Terra Nullius* to *Terra Communis*: Reconsidering Wild Land in an Era of Conservation and Indigenous Rights”, in *Environmental Philosophy*, 2014, vol. 11, no. 2, pp. 141–174.

⁹⁰ Graham Huggan and Helen Tiffin, “Green Postcolonialism”, in *Interventions*, 2007, vol. 9, no. 1, pp. 1–11.

pathways becomes clear, there are a number of solutions that suggest themselves as ways forward. This chapter ends by articulating six of these.

First, full recognition of the personhood of indigenous peoples and the recognition and full return of all ancestral territories.⁹¹ Courts of law across the world have already been showing the way on this issue, but ensuring full implementation of this remains key to a more sustainable future.

Second, the installation and equipping of indigenous peoples on the basis of their right to self-determination, with the knowhow gained from modern technology in environmental regeneration.⁹² This may still involve throwing a protective ring around such territories, but would restore indigenous knowledge gleaned from the legitimate title holders to their territories, as the key driver to environmental regeneration.⁹³

Third, the continued regulation and eventual phasing out of reliance on any natural asset that is exploited without adequate opportunity for regeneration.⁹⁴ Indigenous communities have lived for centuries off their

⁹¹ Joshua Castellino, “Righting colonial-era wrongs in land rights”, *Place*, Thomson Reuters Foundation, 9 April 2019 (available on its web site).

⁹² For an authoritative piece that makes this argument, see Lara Dominguez and Colin Luoma, “Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment”, in *Land*, 2020, vol. 9, no. 3, p. 65.

⁹³ There are significant models that are in place around the world that merit significant attention. See Janeth Warden-Fernandez, “Indigenous Communities’ Rights and Mineral Development”, in *Journal of Energy and Natural Resources Law*, 2005, vol. 23, no. 4, pp. 395–426; Emmanuel Freudenthal, Maurizio F. Ferrari, Justin Kenrick, and Adrian Mylne, “The Whakatane Mechanism: Promoting Justice in Protected Areas”, in *Nomadic Peoples*, 2012, vol. 16, no. 2, pp. 84–94; Victoria Tauli-Corpuz, Janis Alcorn and Augusta Molnar, “Violations of Indigenous Peoples’ and Local Communities’ Rights and Steps Towards Reform in 27 Countries”, *Indigenous Peoples’ Major Group for Sustainable Development* (available on its web site); Liz Alden Wily, “Could collective title become a new norm?”, in *RICS Land Journal*, 2019, pp. 15–17; Ross A. Clarke, “Securing Communal Land Rights to Achieve Sustainable Development in Sub-Saharan Africa: Critical Analysis and Policy Implications”, in *Law Environmental Development Journal*, 2009, vol. 5, no. 2, pp. 132–150.

⁹⁴ Kyra Bos and Joyeeta Gupta, “Stranded assets and stranded resources: Implications for climate change mitigation and global sustainable development”, in *Energy Resource and Social Science*, 2019, vol. 56.

environment. This has involved benefitting from nature, but in a manner that pays adequate attention to its regeneration.⁹⁵

Fourth, returning to the debate around reparations, but this time seeking out corporations rather than former colonial States that have historically benefitted from the exploitation of nature and whose current operations continue to deplete it. This goes beyond the *polluter pays* principle, to understanding how the importance of legacy firms with hundreds of years of history who have profited from unfettered access to resources, paid negligible return for the resource and sought to generate vast profit edifices off this.

Fifth, to pay significantly more attention to ensuring that product supply chains see monetary value distributed more evenly across the process. These supply chains need to also include replacement costs for natural assets removed, and monetary compensation to the owners of the territory from which it may emanate.

Sixth, active consideration needs to be given to the list of activities that should be proscribed completely. Fossil fuels would be high on such a list, but equal consideration should be given to restricting the extent to which other products are sourced, produced, manufactured, sold and disposed of. Eliminating current consumption cycles is vital to taking the steps towards sustainability.

Public international lawyers and others concerned with questions of order and justice need to take a hard look at ourselves to locate the extent to which we may be implicated in the maintenance of our colonial present. The punishment of individuals for genocide, war crimes and crimes against humanity has dominated recent efforts to secure accountability. These amply demonstrate how lawyers can respond to the need to ensure inter-generational justice. Yet these limited instruments of criminal law have fallen significantly short of seeking accountability for crimes perpetrated against entire communities that have also resulted in the erections of endemic structural discrimination. The six points above seek a limited objective: to restore indigenous peoples to the centre of the critical fight for climate justice initially perpetrated by colonial rule that has left a lasting legacy of tort. Along the way, this lens, if adopted without bias, will also

⁹⁵ Helen Ding, Peter Veit, Erin Gray and Katie Reytar, *Climate Benefits, Tenure Costs: The Economic Case for Securing Indigenous Land Rights in the Amazon*, World Resources Institute, Washington, DC, 2016.

enable a review of the role of profiteers and their handmaidens in governance, including international lawyers currently venerated with respect, to the way that indigenous peoples often view them: as armed thieves who came in the dark, tricked their way to profit, used law to justify themselves, and devastated the people and planet.

Publication Series No. 40 (2020):

Colonial Wrongs and Access to International Law

Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (editors)

This eye-opening book invites careful reflection on how we should respond to colonial and post-colonial wrongs from the perspective of international law, in particular international criminal law. In addition to a dozen case studies, the book offers analyses based on legal concepts such as subjugation, *debellatio*, continuing crime, and transfer of civilians, as well as on the discourses of Third World Approaches to International Law and transitional justice. It contains a number of practical suggestions for what can be done to enhance a sense of access to international law in connection with colonial wrongs.

The book has eighteen chapters organised in five parts, addressing the context of the discussion on colonial wrongs and access to international law, legal notions, Colonial Burma, other former colonial territories, and indigenous populations. You find contributions by Morten Bergsmo, Joshua Castellino, Kevin Crow, Christophe Deprez, Shannon Fyfe, Gregory S. Gordon, Brigid Inder, Wolfgang Kaleck, Asad Kiyani, Kyaw Yin Hlaing, Jacques P. Leider, LING Yan, Christophe Marchand, Hugo van der Merwe, Ryan Mitchell, Annah Moyo, Mutoy Mubiala, Matthias Neuner, Narinder Singh, Gunnar Ekeløve-Slydal, Derek Tonkin, Crépine Uwashema and YANG Ken.

In their foreword, the co-editors explain – with reference to lingering consequences of the slave-based economy – why the book is dedicated to “those who will transmute the legacies of colonial wrongs and slavery into a wider, world-embracing solidarity and unity”. The book calls for renewed leadership in this area.

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