

RACIAL CAPITALISM, CLIMATE CHANGE, AND ECOCIDE

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ABSTRACT

Lawyers, scholars, and activists have long sought to incorporate ecocide into the Rome Statute of the International Criminal Court to address corporate and governmental impunity for massive and severe ecological damage, including the harms caused by climate change. This Article uses the framework of racial capitalism to examine and critique the proposed criminalization of ecocide. Coined by South African scholars and activists and refined by political theorist Cedric Robinson, the theory of racial capitalism offers valuable insights on the root causes of the climate crisis and the manifold injustices it inflicts on marginalized states and peoples. While most discussions of climate justice focus on the disproportionate impacts of climate change on those who contributed least to the problem, this Article examines the processes through which racial capitalism plunders the land, labor, and natural wealth of states and peoples racialized as inferior to generate profits for global elites. These processes immiserate most of the world's population, subject marginalized communities to the "slow violence" of polluting industry, destabilize the planet's ecosystems, generate prodigious quantities of greenhouse gases, and deprive subaltern populations of the resources needed to adapt to climate change and other socio-ecological crises. In other words, the fossil fuel-based capitalist world economy that caused the climate crisis was sparked and sustained by slavery, colonialism, and neocolonialism (including its latest incarnation, neoliberalism). The Article highlights two core features of racial capitalism: its racial stratification of humans for the purpose of profit making and its eco-destructive logic. It explains international law's complicity with these core features through legal doctrines that construct nature as property and justify the subordination of non-European peoples by portraying them as the backward and barbaric "other" who must be civilized through continuous economic, political, and military interventions. Applying these insights to the proposal to codify ecocide, the Article concludes that the proposed definition of ecocide may reinforce rather than subvert racial capitalism's core features by (1) focusing on individual

culpability and spectacular acts of ecological destruction while obscuring racial capitalism’s inherently predatory, eco-destructive logic; (2) perpetuating international law’s civilizing mission through the selective prosecution of the racialized “other”; and (3) devaluing nature, subaltern communities, and world views antithetical to racial capitalism through the incorporation of cost-benefit analysis into the definition of ecocide. Recognizing the interconnectedness of slavery, colonialism, neocolonialism, and climate change, the Article calls for reparative and restorative forms of justice instead of punitive approaches that scapegoat individuals for the structural ills of racial capitalism.

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INTRODUCTION

Lawyers, scholars, and activists have long sought the recognition of ecocide as either a method of genocide or as an independent crime under the Rome Statute of the International Criminal Court (ICC).¹ The term “ecocide” generally refers to human activities that cause massive and severe environmental degradation.² In 1973, Richard Falk was among the

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¹ See Polly Higgins et al., *Protecting the Planet: A Proposal for a Law of Ecocide*, 59 CRIME L. & SOC. CHANGE 251, 256–62 (2013).

² See EUR. L. INST., ELI REPORT ON ECOCIDE 6 (2023), https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Ecocide.pdf [<https://perma.cc/ZE2V-MXVN>] (discussing multiple legal definitions of ecocide).

earliest scholars to call for the criminalization of ecocide in response to the devastating impacts of US environmental warfare in Vietnam.³ In 2010, international lawyer and environmental activist Polly Higgins proposed that the Rome Statute be amended to incorporate ecocide as a fifth stand-alone international crime, along with genocide, crimes against humanity, war crimes, and the crime of aggression.⁴ While these proposals were unsuccessful, the call for the criminalization of ecocide was reinvigorated in 2021, when the Independent Expert Panel, established by the Stop Ecocide Foundation, proposed a definition of the crime of ecocide for inclusion in the Rome Statute. The panel defined ecocide as “unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.”⁵

The effort to criminalize ecocide was motivated, at least in part, by the unprecedented threats to humans and nature caused by climate change and by the failure of international environmental law to adequately respond to the climate crisis.⁶ Describing climate change and environmental degradation as “the greatest threat to human rights in the Pacific,” the Republic of Vanuatu joined forces with other Pacific Island nations to advocate for the criminalization of ecocide.⁷ In March 2023, the EU parliament added ecocide to its draft list of environmental crimes, providing momentum to the campaign to amend the Rome Statute.⁸ Advocates for the incorporation of ecocide into international criminal law have argued that the criminal prosecution of corporate officers and high-level

³ See generally Richard Falk, *Environmental Warfare and Ecocide – Facts, Appraisal, and Proposal*, 4 BULL. PEACE PROPOSALS 80 (1973).

⁴ See generally POLLY HIGGINS, *ERADICATING ECOCIDE: LAWS AND GOVERNANCE TO PREVENT DESTRUCTION OF THE PLANET* (1st ed. 2010).

⁵ *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text*, STOP ECOCIDE FOUND. (2021), <https://www.stopecocide.earth/legal-definition> [<https://perma.cc/78BY-44LB>].

⁶ See Haroon Siddique, *Legal Experts Worldwide Draw Up ‘Historic’ Definition of Ecocide*, GUARDIAN (June 22, 2021, 12:00 PM), <https://www.theguardian.com/environment/2021/jun/22/legal-experts-worldwide-draw-up-historic-definition-of-ecocide> [<https://perma.cc/Y34M-PVU9>]; Daimeon Shanks, *The Ideological Functions of Ecocide*, 35 HAGUE Y.B. INT’L L. 1, 2–3 (2024).

⁷ Liana Georgieva Minkova, *The Fifth International Crime: Reflections on the Definition of “Ecocide”*, 25 J. GENOCIDE RSCH. 62, 64 (2023).

⁸ See Valentina Romano, *Parliament Adds Ecocide to EU’s Draft List of Environmental Crimes*, EURACTIV (Mar. 30, 2023), <https://www.euractiv.com/section/energy-environment/news/parliament-adds-ecocide-to-eus-draft-list-of-environmental-crimes/> [<https://perma.cc/QU7W-JHSS>].

government officials may at long last end state and corporate impunity for climate change.⁹

While the campaign to criminalize ecocide has produced lively legal and policy debates, the colonial origins of the fossil fuel-based world economy and the disparate impact of the climate crisis on racialized, colonized, and marginalized populations has often been overlooked in ecocide-related legal scholarship.¹⁰ This omission has produced depoliticized narratives about ecocide disconnected from the struggles of communities and states on the frontlines of climate change and other ecological crises.¹¹

This Article seeks to center the experiences of the racialized and the colonized by using the framework of racial capitalism to examine the climate crisis and the proposal to codify the crime of ecocide. Coined by South African scholars and activists and popularized by political theorist Cedric Robinson,¹² the theory of racial capitalism offers valuable insights on the ways that capitalism's profit-making imperatives systematically degrade and plunder the land, labor, and natural wealth of persons racialized as inferior and the ecosystems upon which human and nonhuman life depend.¹³ Robinson's pioneering work draws upon the insights of what he called the Black radical tradition, including the scholarship of W.E.B. Du Bois,¹⁴ Eric Williams,¹⁵ Oliver Cromwell Cox,¹⁶ and C.L.R. James.¹⁷ Robinson argued that capitalism did not homogenize the social hierarchies of

⁹ Rob White, *Ecocide and the Carbon Crimes of the Powerful*, 37 UNIV. TASMANIA L. REV. 95, 113–14 (2018); see generally DAVID WHYTE, ECOCIDE: KILL THE CORPORATION BEFORE IT KILLS US (2020) (analyzing the inherently ecocidal nature of the corporate pursuit of profit).

¹⁰ See Eliana Cusato & Emily Jones, *The 'Imbroglia' of Ecocide: A Political Economic Analysis*, 37 LEIDEN J. INT'L L. 42, 53 (2023).

¹¹ See *id.*

¹² See generally Zachary Levenson & Marcel Paret, *The South African Tradition of Racial Capitalism*, 46 ETHNIC & RACIAL STUD. 3403 (2023) (discussing the South African origins and continuing relevance of the theory of racial capitalism); Robin D.G. Kelley, *Racial Capitalism: An Unfinished History*, 46 ETHNIC & RACIAL STUD. 3562 (2023) (reflecting on Cedric Robinson's concept of racial capitalism in relation to the South African tradition); Kayihan Cirakoglu et al., *Brutal Expropriation, Environmental Racism and Racial Capitalism in Nigeria*, 50 POLITIKON 224 (2023) (applying Cedric Robinson's theory of racial capitalism to Nigeria).

¹³ See Carmen G. Gonzalez, *Racial Capitalism and the Ecological Crises of the Anthropocene*, 21 PERSPS. ON GLOB. DEV. & TECH. 323, 325–31 (2022) (explaining how the profit-making processes of exploitation, expropriation, and expulsion have destabilized the planet's ecosystems and consigned vast segments of humanity to the status of waste).

¹⁴ See generally W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860–1880* (2d ed. 1998).

¹⁵ See generally ERIC WILLIAMS, *CAPITALISM AND SLAVERY* (2d ed. 2018).

¹⁶ See generally OLIVER CROMWELL COX, *CASTE, RACE, AND CLASS: A STUDY OF SOCIAL DYNAMICS* (2018).

¹⁷ C.L.R. JAMES, *THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION* (2d ed. 1989).

feudalism, but instead intensified and reconfigured them as “racial” distinctions for the purpose of profit-making, initially in Europe and later globally.¹⁸ Following decades of relative neglect among critical social theorists, the theory of racial capitalism has experienced a resurgence in recent years across a variety of disciplines, including law.¹⁹ This Article draws upon the burgeoning racial capitalism literature to reframe the debates on climate change and ecocide and to provide context for the other articles published as part of this issue.

The Article proceeds in three parts. Part I explains the relationship between the theory of racial capitalism and the climate crisis and highlights two core features of racial capitalism: its racial stratification of humans for the purpose of profit making and its eco-destructive logic. Part II examines international law’s complicity with racial capitalism’s extraction of wealth from nature and from persons racialized as inferior. Part III draws upon the insights of the theory of racial capitalism to offer some preliminary observations on the movement to criminalize ecocide. The Article’s conclusion confronts the possibility that the criminalization of ecocide may inadvertently reinforce rather than subvert the core features of racial capitalism, and it recommends alternative approaches grounded in reparative and restorative justice.

I. RACIAL CAPITALISM AND THE CLIMATE CRISIS

Climate change is a direct consequence of racial capitalism’s insatiable demand for cheap raw materials, cheap labor, and cheap waste disposal in its ceaseless quest for profit.²⁰ Caused primarily by the greenhouse gas emissions of the world’s most affluent populations, climate change is an injustice rather than a misfortune because it imposes its worst impacts on the racialized and impoverished states and peoples who contributed least to the problem and have the fewest resources to protect

¹⁸ See CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 2, 26, 66–67 (2d ed. 2000).

¹⁹ See Carmen G. Gonzalez & Athena D. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127, 129–30 (2022) (discussing the origins and resurgence of the theory of racial capitalism and some of the legal scholarship that has engaged with this framework).

²⁰ See Nancy Fraser, *Climates of Capital: For a Trans-Environmental Socialism*, 127 NEW LEFT REV. 94, 100–01 (2021) (describing the ecological consequences of capitalism’s “predatory, extractive” relationship to nature); Jason W. Moore, *The Rise of Cheap Nature*, in *ANTHROPOCENE OR CAPITALOCENE? NATURE, HISTORY, AND THE CRISIS OF CAPITALISM* 78, 86–87, 101–02, 112 (Jason W. Moore ed. 2016) (discussing capitalism’s endless quest for cheap labor, food, energy, and raw materials).

themselves from harm.²¹ These include Indigenous peoples, the small island states, the least developed countries, small-scale farmers, low-income households, and persons marginalized due to race, ethnicity, gender, disability, age, or other markers of identity.²²

While discussions of climate justice often emphasize the racialized outcomes of climate change, an analysis grounded in racial capitalism must also consider the ways that capitalism's profit-making processes create and intensify racial distinctions to facilitate the extraction of wealth and externalization of waste at the expense of marginalized states and communities. Racial capitalism deploys racial classifications to single out certain groups for plunder, and then it naturalizes and rationalizes their subordination by constructing them as racially inferior.²³ Through its unbridled extraction of land, labor, and raw materials, racial capitalism simultaneously destabilizes the planet's ecosystems and impoverishes persons racialized as inferior, increasing their vulnerability to climate change.²⁴ The remainder of this part discusses two interrelated core features of racial capitalism: its instrumentalization of racial hierarchies to facilitate profit making and its inherently eco-destructive logic.

A. RACIALIZATION AND PROFIT MAKING

The first core feature of racial capitalism is its deployment of racial hierarchies for the purpose of profit making. The fossil fuel-based, capitalist world economy that created the climate crisis has its origins in

²¹ See, e.g., Archana Ramanujam, *Climate Scholarship Needs Du Bois: Climate Crisis through the Lens of Racial and Colonial Capitalism*, 93 SOCIO. INQUIRY 273, 279 (2023); Jason Hickel, *Quantifying National Responsibility for Climate Breakdown: An Equality-Based Attribution Approach for Carbon Dioxide Emissions in Excess of the Planetary Boundary*, 4 LANCET PLANETARY HEALTH e399, e403 (2020); Maxine Burkett, *Climate Reparations*, 10 MELBOURNE J. INT'L L. 509, 510, 513–14 (2009); J. TIMMONS ROBERTS & BRADLEY C. PARKS, A CLIMATE OF INJUSTICE: GLOBAL INEQUALITY, NORTH-SOUTH POLITICS, AND CLIMATE POLICY 103–84 (2007).

²² See Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2023 Synthesis Report: Summary for Policy Makers*, at 5, 31 (2023). https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf [<https://perma.cc/4WPP-R42U>]; U.S. ENV'T PROT. AGENCY, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES: A FOCUS ON SIX IMPACTS (2021), https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf [<https://perma.cc/C2LY-2EZ5>] (explaining why populations marginalized based on income, educational attainment, race and ethnicity, and age are exposed to the highest impacts of climate change in the U.S.).

²³ Destin Jenkins & Justin Leroy, *Introduction: The Old History of Capitalism*, in HISTORIES OF RACIAL CAPITALISM 1, 3 (Destin Jenkins & Justin Leroy eds., 2021).

²⁴ Gonzalez & Mutua, *supra* note 19, at 148, 173; Farhana Sultana, *The Unbearable Heaviness of Climate Coloniality*, 99 POL. GEOGRAPHY 1, 4–5 (2022).

slavery and colonialism.²⁵ European colonizers commandeered the land, labor, and natural wealth of non-European peoples to provide the capital and other inputs needed for industrialization, including gold and silver extracted from the Americas, arable lands stolen from Indigenous peoples, and cotton and sugar produced by enslaved Africans.²⁶ As Karl Marx famously observed:

The discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the indigenous population of that continent, the beginnings of the conquest and plunder of India, and the conversion of Africa into a warren for the commercial hunting of blackskins, are all things which characterize the dawn of the era of capitalist production.²⁷

The colonization of the Americas and the enslavement of Africans inaugurated two systems of economic and political domination that remain key features of contemporary racial capitalism: white supremacy and a racialized international division of labor.²⁸ First, Europeans justified the colonial enterprise by constructing the colonizer and the colonized as distinct superior and inferior “races.”²⁹ Race became “the fundamental criterion for the distribution of the world population into the new [colonial] society’s structure of power.”³⁰ Second, Europeans created a racialized international division of labor to produce commodities for a world market dominated by European elites.³¹ This globalized system of production assigned different forms of labor (such as waged labor, enslaved labor, and petty commodity production) to different groups on the basis of racial classification.³² As capitalism expanded globally, racial hierarchies and the

²⁵ See generally Sultana, *supra* note 24; Carmen G. Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, 11 OÑATI SOCIO-LEGAL SERIES 108 (2021); Leon Sealey-Huggins, “The Climate Crisis is a Racist Crisis”: *Structural Racism, Inequality and Climate Change*, in THE FIRE NOW: ANTI-RACIST SCHOLARSHIP IN TIMES OF EXPLICIT RACIAL VIOLENCE 99, 99–133 (Azeezat Johnson et al. eds., 2018); Kyle Whyte, *Indigenous Climate Change Studies: Indigenizing Futures, Decolonizing the Anthropocene*, 55 ENG. LANGUAGE NOTES 153 (2017).

²⁶ See JASON HICKEL, THE DIVIDE: A BRIEF GUIDE TO GLOBAL INEQUALITY AND ITS SOLUTIONS 19, 69–75, 83–85 (2017). See generally SVEN BECKERT, EMPIRE OF COTTON: A GLOBAL HISTORY (2014); WILLIAMS, *supra* note 15; EDUARDO GALEANO, OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT (2d ed. 1997).

²⁷ KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 915 (Ben Fowkes trans., 1992).

²⁸ See Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA: VIEWS FROM THE SOUTH 533, 533–34 (2000).

²⁹ *Id.* at 535.

³⁰ *Id.*

³¹ See *id.* at 535–37.

³² See *id.* at 538–39.

international division of labor remained “structurally linked and mutually reinforcing.”³³

Colonial control over much of the planet enabled European states to industrialize and prosper by appropriating the wealth extracted from the colonies while inflicting misery on colonized populations.³⁴ As Walter Rodney and Eduardo Galeano noted in their classic studies of colonialism and its aftermath, the Global North systematically “underdeveloped” the Global South.³⁵ When national liberation movements succeeded in defeating colonialism, states throughout the Global South achieved political independence but remained enmeshed in a world economy dominated by the Global North.³⁶ In other words, formal colonialism was replaced by a system of “political independence minus economic independence” known as neocolonialism.³⁷ The transfer of wealth from the Global South to the Global North intensified in the decades following World War II due to the North’s voracious demand for raw materials and to the Global South’s ongoing economic dependence on the export of commodities.³⁸

New racialized discourses emerged in the second half of the twentieth century to facilitate and justify the ongoing plunder of the Global South’s wealth. Chief among these was the ideology of development, which portrayed the Global South as backward and in need of modernization while depicting the Global North as the standard of civilization to which all should aspire.³⁹ “These assumptions were a natural extension of a colonial discourse that emphasized Third World cultural, political, social, and racial inferiority.”⁴⁰ Instead of questioning the inequities of the global capitalist system, these narratives reinforced racial hierarchies by attributing poverty in the Global South to inept, parasitic, and corrupt

³³ *Id.* at 536.

³⁴ See CLIVE PONTING, *A NEW GREEN HISTORY OF THE WORLD: THE ENVIRONMENT AND THE COLLAPSE OF GREAT CIVILIZATIONS 196–98* (2d ed. 2007).

³⁵ See generally WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1972); GALEANO, *supra* note 26.

³⁶ See B.S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 496–97* (2d ed. 2017).

³⁷ KWAME NKRUMAH, *ADDRESS AT THE FIRST SEMINAR AT THE WINNEBA IDEOLOGICAL SCHOOL, reprinted in REVOLUTIONARY PATH 172* (1973).

³⁸ See CHRISTOPHE BONNEUIL & JEAN-BAPTISTE FRESSOZ, *THE SHOCK OF THE ANTHROPOCENE: THE EARTH, HISTORY AND US 242–52* (David Fernback trans., 2015).

³⁹ Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT’L L.J. 1, 15–18, 74–79 (2004). For a history of the concept of the development, see GILBERT RIST, *THE HISTORY OF DEVELOPMENT: FROM WESTERN ORIGINS TO GLOBAL FAITH* (Patrick Camiller trans., 4th ed. 2014); ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (1995).

⁴⁰ Gordon & Sylvester, *supra* note 39, at 77.

postcolonial states and prescribing neoliberal economic reforms as the cure for these pathologies.⁴¹

The discourse of development legitimized and facilitated new forms of racialized extraction in the Global South. Northern states and transnational corporations deployed trade, finance, and investment to produce “a movement of wealth from poor to rich, and from the public to the private, all the while leaving behind a host of ensuing immiserations.”⁴² For example, instead of receiving reparations for centuries of colonial exploitation, Global South states were encouraged to borrow money from commercial banks headquartered in the Global North to finance development.⁴³ When this debt proved unpayable due to rising oil prices, skyrocketing interest rates, and a sharp decline in commodity prices (creating revenue shortages for states dependent on the export of raw materials), the International Monetary Fund (IMF) and the World Bank conditioned debt repayment assistance on the implementation of a standard package of neoliberal economic reforms.⁴⁴ These reforms included privatization of state-owned enterprises, currency devaluation, reduction of trade barriers, cuts to government spending, and investment liberalization.⁴⁵ States that implemented these measures experienced economic stagnation, rising consumer prices, declining wages, and the sudden loss of state subsidies for basic necessities.⁴⁶ Ultimately, this triggered massive and often violent protests, strikes, and riots.⁴⁷ The economic reforms imposed by the IMF and the World Bank devastated Global South economies,⁴⁸ leaving Southern states “poorer, more debt-ridden, and even less able to provide services

⁴¹ See generally James Thuo Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neoliberalism*, 18 *THIRD WORLD LEGAL STUD.* 65, 68–70 (1998–99).

⁴² JOHN LINARELLI, MARGOT E. SALOMON & M. SORNARAJAH, *THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY 2* (2018).

⁴³ See Gordon & Sylvester, *supra* note 39, at 68–69; see, e.g., Adom Getachew, *Holding Ourselves Responsible*, *BOS. REV.* (Sept. 11, 2019), <https://www.bostonreview.net/articles/adom-getachew-holding-ourselves-responsible/> [<https://perma.cc/A42B-KHRB>] (discussing the crippling sovereign debt incurred by Caribbean states to overcome the legacy of slavery and colonialism in the absence of European reparations).

⁴⁴ See RICHARD PEET, *UNHOLY TRINITY: THE IMF, THE WORLD BANK, AND THE WTO* 82–91, 141–45 (2d ed. 2010); Gordon & Sylvester, *supra* note 39, at 37–44.

⁴⁵ See PEET, *supra* note 44, at 88–89.

⁴⁶ See *id.* at 94–104.

⁴⁷ See *id.* at 88–104.

⁴⁸ See generally MICHEL CHOSSUDOVSKY, *THE GLOBALISATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS* (1997) (describing the loan conditionalities imposed by the IMF and the World Bank and analyzing how these reforms increased poverty and inequality in a variety of countries).

such as education and health care.”⁴⁹ Today, many highly-indebted states in the Global South are allocating more than half of their budgets to foreign debt servicing.⁵⁰

Starved of capital and desperate for foreign investment, states in the Global South became parties to investment agreements that significantly constrained their regulatory authority over foreign investors.⁵¹ These agreements permitted foreign investors to seek monetary compensation in arbitration tribunals for the diminution in the value of their investment caused by host state regulation.⁵² For example, when Ecuador increased its windfall profits tax on foreign oil operations in 2007, US and French oil companies filed arbitration claims seeking \$3.1 billion in lost profits and were ultimately awarded over \$800 million.⁵³ Concerned about significant potential liability, Southern states have often hesitated to enact environmental, human rights, labor, and tax legislation that might impact investor profits.⁵⁴ In 2023, the UN Special Rapporteur on the right to a healthy environment issued a special report explaining that these arbitration proceedings produce regulatory chill and impede the actions needed to address global climate and human rights crises.⁵⁵ Indeed, the combination of weak environmental regulation, tax advantages, cheap labor, and abundant natural resources have encouraged transnational corporations to relocate polluting industry to the Global South,⁵⁶ subordinating “the well-being of nature and local populations to the interests of foreign capital.”⁵⁷

⁴⁹ Gordon & Sylvester, *supra* note 39, at 43; *see generally* CHOSSUDOVSKY, *supra* note 48.

⁵⁰ James Thuo Gathii, *Sovereign Debt as a Mode of Colonial Governance: Past, Present, and Future Possibilities*, JUST MONEY (May 13, 2022), <https://justmoney.org/james-thuo-gathii-sovereign-debt-as-a-mode-of-colonial-governance-past-present-and-future-possibilities/> [<https://perma.cc/42SR-P8UW>].

⁵¹ *See generally* David Boyd (Special Rapporteur), UNHRC, *Report of the Special Rapporteur on right to a healthy environment: Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights*, ¶¶ 1–9, U.N. Doc. A/78/168 (July 13, 2023) (describing the proliferation of investment agreements that impose liability on states for climate, environmental and human rights regulations that diminish foreign investor profits).

⁵² *See* LINARELLI, SALOMON & SORNARAJAH, *supra* note 42, at 159–69.

⁵³ Nicholas Kusnetz & Katie Surma, *How Wealthy Corporations Use Investment Agreements to Extract Millions From Developing Countries*, INSIDE CLIMATE NEWS (Jan. 14, 2024), <https://insideclimatenews.org/news/14012024/wealthy-corporations-extract-millions-from-developing-countries-ids/> [<https://perma.cc/SNR3-JQQZ>].

⁵⁴ *See* LINARELLI, SALOMON & SORNARAJAH, *supra* note 42, at 161.

⁵⁵ *See* Boyd, *supra* note 51, ¶¶ 49–60.

⁵⁶ DANIEL FABER, CAPITALIZING ON ENVIRONMENTAL INJUSTICE: THE POLLUTER-INDUSTRIAL COMPLEX IN THE AGE OF GLOBALIZATION 172 (2008).

⁵⁷ Gonzalez & Mutua, *supra* note 19, at 150.

The contemporary neoliberal phase of racial capitalism has been marked by deindustrialization in the Global North and the transfer of export-oriented manufacturing to the Global South.⁵⁸ The commodities, energy, and raw materials produced in the Global South are then consumed in the Global North.⁵⁹ The resulting pollution, however, remains in the Global South—and is compounded by the discarded consumer goods and hazardous waste exported by the Global North to the Global South.⁶⁰ De-nounced by environmental activists as “toxic colonialism,”⁶¹ this dumping of pollution in places inhabited by racialized and formerly colonized persons has created “an ecological crisis of global dimensions.”⁶² It is an example of racial capitalism’s tendency to accumulate profits by using marginalized communities for cheap waste disposal.⁶³

In sum, the goal of this part is not to provide an exhaustive historical account of racial capitalism’s techniques of extraction, but to illustrate, with concrete examples, the ways that racialization serves as a tool for profit making. Persons and societies racialized as inferior are subjected to ongoing processes of racialized plunder that deepen their poverty and render them vulnerable to the next round of extraction “because they lack the resources to resist it.”⁶⁴ In addition, their status as stigmatized and

⁵⁸ FABER, *supra* note 56, at 172–73.

⁵⁹ *Id.*

⁶⁰ *Id.* at 172; see also David Boyd (Special Rapporteur on Human Rights and the Environment), *The right to a clean, healthy, and sustainable environment: non-toxic environment – Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, ¶ 24, U.N. Doc. A/HRC/49/53 (Jan. 12, 2022) (describing the ongoing export of hazardous materials from the Global North to the Global South, including pesticides, used oil, electronic waste, derelict ships and vehicles, and plastic waste).

⁶¹ Jennifer Allan, *How to Regulate Our Waste-Full World*, INT’L INST. SUSTAINABLE DEV. (July 26, 2021), <https://www.iisd.org/articles/deep-dive/how-regulate-our-waste-full-world> [https://perma.cc/87RN-KQAL].

⁶² FABER, *supra* note 56, at 173.

⁶³ Gonzalez & Mutua, *supra* note 19, at 149. There is an environmental treaty governing the hazardous waste trade: the Basel Convention on the Control of the Transboundary Movement of Hazardous Wastes and Their Disposal. While this treaty has generally failed to curb the export of hazardous waste to the Global South, an amendment to the Basel Convention prohibiting the North-South trade in hazardous waste entered into force in 2019. It remains to be seen whether this amendment will protect states and communities in the Global South from toxic colonialism. See Allan, *supra* note 61, at 4–7. In 2022, for example, 65 percent of all electronic waste exported across national borders consisted of “uncontrolled and undocumented” shipments from the Global North to the Global South, including shipments that took advantage of the failure of international trade codes to distinguish between electronic waste and used electronic equipment. See CORNELIS P. BALDÉ ET AL., *THE GLOBAL E-WASTE MONITOR 2024*, at 15 (2024), https://ewastemonitor.info/wp-content/uploads/2024/03/GEM_2024_18-03_web_page_per_page_web.pdf [https://perma.cc/DPT5-MD99].

⁶⁴ Gonzalez & Mutua, *supra* note 19, at 162.

impoverished groups “places them outside the realm of moral concern.”⁶⁵ For example, as explained in this part, colonialism, neocolonialism, the neoliberal economic reforms mandated by the IMF and the World Bank, and the regulatory constraints imposed on the Global South by investment agreements facilitated the extraction of wealth from racialized and formerly colonized states and people and created new opportunities for plunder.⁶⁶ The impoverishment of Southern states and peoples was naturalized and rendered acceptable by stigmatizing them as culturally and racially inferior.⁶⁷

The Global North’s historic and ongoing appropriation of the Global South’s natural resources fueled the climate crisis by emitting prodigious amounts of greenhouse gases⁶⁸ and enabling the Global North to maintain unsustainable levels of economic growth and material consumption.⁶⁹ This extraction of wealth impoverished the Global South and deprived climate-vulnerable states and communities of the resources to adapt to climate change and to recover from climate change–induced disasters.⁷⁰ For example, when the tourism-dependent economy of The Bahamas was battered by five major hurricanes in the last decade, including Hurricane Dorian in 2019, the government of The Bahamas was forced to borrow billions of dollars for disaster recovery, increasing its debt burden and limiting its ability to provide basic services to its population.⁷¹

The colonial and neocolonial transfer of wealth from the South to the North has implications for the allocation of responsibility for climate change. Because carbon dioxide remains in the atmosphere for hundreds of years, historic carbon dioxide emissions are relevant to assessing the

⁶⁵ *Id.* at 161.

⁶⁶ See discussion *infra* Part I.A.

⁶⁷ See Gordon & Sylvester, *supra* note 39, at 77.

⁶⁸ Global Resources Outlook 2019: Natural Resources for the Future We Want, U.N. Env’t Programme, Int’l Res. Panel, at 27, 68, 126 (2019) (explaining that the extraction of natural resources accounts for approximately half of the world’s carbon emissions).

⁶⁹ See Jason Hickel, Dylan Sullivan, & Huzaifa Zoomkawala, *Plunder in the Post-Colonial Era: Drain from the Global South Through Unequal Exchange, 1960–2019*, 26 NEW POL. ECON. 1030, 1042 (2021) (quantifying the resources extracted by affluent nations from the Global South between 1960 and 2018 “to facilitate their economic growth and to sustain high levels of income and material consumption”).

⁷⁰ Gonzalez, *supra* note 25, at 118; Aaron Saad, *Toward a Justice Framework for Understanding and Responding to Climate Migration and Displacement*, 10 ENV’T JUST. 98, 100 (2017); HAAS INST., MOVING TARGETS: AN ANALYSIS OF GLOBAL FORCED MIGRATION 29–30 (2017).

⁷¹ Katie Surma, *How Developing Nations Battered by Climate Change are Crushed by Debt From International Lenders*, INSIDE CLIMATE NEWS (Mar. 6, 2024), <https://insideclimate-news.org/news/06032024/developing-nations-battered-by-climate-change-crushed-by-debt/> [<https://perma.cc/SN4J-L6YY>].

contribution of different states to the climate crisis.⁷² Analysts have developed several methodologies to quantify the historic greenhouse gas emissions of individual states.⁷³ The most common approach is based on economic activity within national borders (territory-based emissions).⁷⁴ However, this calculation understates the Global North's contribution to climate change in three distinct ways. First, it attributes colonial-era emissions to contemporary Global South states, even though the former colonial powers conducted and profited from the resource-extractive activities that generated these emissions.⁷⁵ The reallocation of these emissions from the former colonies to the former colonial powers significantly increases the historic emissions of the Global North and reduces those of the Global South.⁷⁶ Second, this calculation fails to account for the outsourcing of carbon-intensive industry to the Global South in recent decades to produce goods consumed in the Global North (consumption-based emissions).⁷⁷ For example, many of the greenhouse gas emissions attributed to China have been driven by export-oriented production to satisfy the needs and desires of Northern consumers rather than local consumption in China.⁷⁸ Third, from a fairness perspective, this territory-based calculation understates the Global North's responsibility for climate change by failing to account for the extremely high per-capita emissions of affluent countries and the relatively low per-capita emissions of poor countries made possible by colonialism and its aftermath.⁷⁹ In response, analysts have developed alternative methods of quantification that address these concerns.⁸⁰ Some of these methodologies hold the Global North responsible for as much as 92 percent of global climate breakdown.⁸¹

However, even using the flawed territory-based calculations that understate the contribution of affluent states to the climate crisis, the

⁷² Mason Inman, *Carbon is Forever*, 1 NATURE CLIMATE CHANGE 156, 156–58 (2008).

⁷³ See generally Arnold Tukker et al., *Consumption-Based Carbon Accounting: Sense and Sensibility*, 20 CLIMATE POL'Y 51 (2020); Simon Evans, *Revealed: How Colonial Rule Radically Shifts Historical Responsibility for Climate Change*, CARBON BRIEF (Nov. 26, 2023, 7:00 PM), <https://www.carbonbrief.org/revealed-how-colonial-rule-radically-shifts-historical-responsibility-for-climate-change/> [<https://perma.cc/5YVG-GR7L>].

⁷⁴ Tukker et al., *supra* note 73, at 54–55.

⁷⁵ Evans, *supra* note 73.

⁷⁶ *Id.*

⁷⁷ Tukker et al., *supra* note 73, at 54.

⁷⁸ *Id.*; see also Yuantao Yang et al., *Mapping Global Carbon Footprint in China*, 11 NATURE COMM'NS 2237, 2239 (2020).

⁷⁹ Evans, *supra* note 73.

⁸⁰ *Id.*

⁸¹ Hickel, *supra* note 21, at e403.

Global North—including the United States, the European Union, the United Kingdom, Canada, and Japan—is responsible for over 50 percent of the carbon dioxide emitted from 1850 to 2015.⁸² Nevertheless, the Global North has resisted responsibility for historic wrongs,⁸³ has failed to take aggressive steps to reduce its greenhouse gas emissions,⁸⁴ and has made little progress on its commitments to provide financing to the Global South for climate change mitigation and adaptation.⁸⁵ Instead, as explained in the article in this issue by James Gathii, Northern states are using the climate crisis as an opportunity to extract additional wealth from debt-burdened states in the Global South by offering them loans (rather than grants or reparations) to finance climate change adaptation.⁸⁶

Finally, the foregoing narrative illustrates the ways that the framework of racial capitalism differs from more conventional Marxist accounts of the nature of capitalism. The exploitation of workers to generate surplus value for the owners of the means of production is often understood as the heart of capitalism under orthodox Marxist theory.⁸⁷ Exploited workers are compelled to sell their labor at a fraction of what their work is worth to

⁸² *Id.* at e400. The Global North's responsibility for climate change remains the same when these figures are updated to account for carbon dioxide emissions from 1850 to 2022. The Global North—including the United States, Canada, Australia, Japan, and the European Union (plus the United Kingdom)—accounts for over 50 percent of territorial carbon dioxide emissions from fossil fuels during this period. See Hannah Ritchie et al., *CO2 and Greenhouse Gas Emissions*, OUR WORLD IN DATA, <https://ourworldindata.org/co2-and-greenhouse-gas-emissions> [<https://perma.cc/DVW8-GXML>].

⁸³ See CARMEN G. GONZALEZ & SUMUDU ATAPATTU, *The North-South Divide in International Environmental Law: Framing the Issues*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 1, 10 (Shawkat Alam et al. eds., 2015) (discussing the Global North's unwillingness to accept responsibility for its disproportionate contribution to global environmental degradation); Nadja Popovich & Brad Plumer, *Who Has the Most Historic Responsibility for Climate Change?*, N.Y. TIMES (Nov. 12, 2021), <https://www.nytimes.com/interactive/2021/11/12/climate/cop26-emissions-compensation.html> [<https://perma.cc/XYA3-7L3H>] (describing the Global North's failure to provide financial assistance to poorer countries to help them cope with climate change despite its historic responsibility for the problem).

⁸⁴ See generally CEECEE HOLZ, OXFAM INT'L, ARE G-20 COUNTRIES DOING THEIR FAIR SHARE OF GLOBAL CLIMATE MITIGATION? (2023), <https://policy-practice.oxfam.org/resources/are-g20-countries-doing-their-fair-share-of-global-climate-mitigation-comparing-621540/> [<https://perma.cc/F7LC-LLBE>].

⁸⁵ See generally BERTRAM ZAGEMA, OXFAM INT'L, CLIMATE FINANCE SHADOW REPORT 2023: ASSESSING THE DELIVERY OF THE \$100 BILLION COMMITMENT (2023), <https://policy-practice.oxfam.org/resources/climate-finance-shadow-report-2023-621500/> [<https://perma.cc/ZT98-L7EE>].

⁸⁶ James Thuo Gathii, *Financing Climate Change Through a Racial Capitalism Lens*, 41 WIS. INT'L L.J. 521, 536 (2024).

⁸⁷ See SUSAN MARKS, *Exploitation as an International Legal Concept*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 281, 284–86 (Susan Marks ed. 2008); Gonzalez, *supra* note 13, at 325.

earn just enough to satisfy the basic necessities of life—while their employer appropriates most of the value their work produces.⁸⁸ The theory of racial capitalism emphasizes that the profit-making process of exploitation has always operated in conjunction with a second process: expropriation (what Marx called “primitive accumulation”).⁸⁹ Expropriation is the (often violent) commandeering of nature, land, and labor for profit “without paying for them, without paying enough to cover the cost of their reproduction, or without ensuring their regeneration and replenishment.”⁹⁰ The global color line frequently determines which populations are disproportionately subjected to the profit-making process of exploitation and which ones are disproportionately targeted for expropriation.⁹¹ Racially subordinated persons are disproportionately expropriated—colonized, enslaved, dispossessed, grossly undercompensated for their labor, and treated as repositories for waste.⁹² As the next part illustrates, the domination of nature and the expropriation of racialized communities are deeply interconnected.

B. RACIAL CAPITALISM’S ECO-DESTRUCTIVE LOGIC

Along with racialized extraction, a second and related core feature of racial capitalism is its inherently eco-destructive logic. The capitalist imperative for companies to expand the production of commodities to increase profits and compete with rival firms creates a treadmill of overproduction and overconsumption that is harmful to nature and to marginalized

⁸⁸ See Gonzalez & Mutua, *supra* note 19, at 130 (defining exploitation as “the commodification of labor and its ‘free’ exchange on markets for incomes that are less than the value produced, but nonetheless sufficient to meet life’s basic needs”).

⁸⁹ See *id.* at 145–46.

⁹⁰ See *id.* at 144.

⁹¹ See Fraser, *supra* note 20, at 106. The global color line refers to the racial divide between the Euro-descendent populations in the Global North and the rest of humanity (racialized as inferior). The concept of the global color line was coined by sociologist W.E.B. Du Bois, who perceived racism as a global phenomenon. See generally KATRINA QUISUMBING KING, *The Global Color Line and White Supremacy: W. E. B. Du Bois as a Grand Theorist of Race*, in THE OXFORD HANDBOOK OF W.E.B. DU BOIS (Aldon Morris et al. eds., 2022). As Du Bois famously declared, “the problem of the twentieth century is the problem of the color line, the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea.” W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 9 (Dover ed. 1994) (1903).

⁹² See Fraser, *supra* note 20, at 106; Gonzalez & Mutua, *supra* note 19, at 130 (defining expropriation as an intensification of exploitation that involves “dispossessing and/or commandeering human, non-human, material and natural resources for the purpose of creating and expanding economic profits – but doing so without paying enough to cover the cost of replenishment or reproduction, or without ensuring their regeneration”); Gonzalez & Mutua, *supra* note 19, at 149 (discussing the commodification of waste and its disposal in marginalized communities).

communities.⁹³ To survive in the marketplace, companies commandeer human labor and the wealth of nature as cheaply as possible without replenishing or repairing the damage they cause.⁹⁴ They accomplish this through various means, including “low wages, casual work, unsustainable extraction, irresponsible handling of waste and periodic as well as localized crises that tend to be borne by the worst-off.”⁹⁵

In addition to local environmental catastrophes (such as oil spills and chemical plant explosions), racial capitalism’s predatory, extractive relationship with nature has produced ecological destruction on a planetary scale. This includes deforestation, loss of biodiversity, extinction, depletion of the ozone layer, and widespread chemical contamination—as well as climate change—induced heat waves, wildfires, floods, superstorms, megadroughts, melting glaciers, crumbling ice sheets, and rising sea levels.⁹⁶ Indeed, one of the key features of racial capitalism is its tendency to destabilize the ecological conditions upon which capitalism and life depend through its demand for infinite expansion on a finite planet.⁹⁷

Racial capitalism’s ecocidal dynamics are structural. They are not simply the products of individual “bad actors” and not limited to spectacular acts of ecological destruction, such as detonation of a nuclear bomb. Environmental degradation is built into the logic of the system.⁹⁸ Rob Nixon coined the term “slow violence” to describe this “incremental and accretive” destruction⁹⁹—the environmental catastrophes that unfold gradually over time and are most often borne by the planet’s most marginalized communities who are treated as disposable and expendable.¹⁰⁰

⁹³ See Karen Bell, *Can the Capitalist Economic System Deliver Environmental Justice?*, 10 ENV’T RSCH. LETTERS 1, 2–3 (2015); NANCY FRASER, CANNIBAL CAPITALISM: HOW OUR SYSTEM IS DEVOURING DEMOCRACY, CARE, AND THE PLANET—AND WHAT WE CAN DO ABOUT IT 79–85 (2022).

⁹⁴ See Fraser, *supra* note 20, at 100.

⁹⁵ Bell, *supra* note 93, at 2.

⁹⁶ Fraser, *supra* note 20, at 101; see generally Will Steffen et al., *The Trajectory of the Anthropocene*, 2 ANTHROPOCENE REV. 1 (2015) (charting the damage to the planet’s ecosystems from 1750 to 2010 and its acceleration in the decades following World War II).

⁹⁷ See generally JAMES O’CONNOR, NATURAL CAUSES: ESSAYS IN ECOLOGICAL MARXISM 158–77 (1998); Fraser, *supra* note 20, at 101–03.

⁹⁸ See Timothy Lindgren, *Ecocide, Genocide, and the Disregard of Alternative Life-Systems*, 22 INT’L J. HUM. RTS. 525, 529–31 (2018) (explaining how ecocide is the inevitable consequence of capitalism’s demand for endless economic growth).

⁹⁹ ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 2 (2011).

¹⁰⁰ See *id.* at 4. Many of these gradually unfolding catastrophes are directly linked to the fossil fuel industry. For example, a recent study concluded that environmental and workplace exposure to chemical pollution is the leading cause of premature death globally and that one major driver is the explosive increase in fossil fuel consumption and petrochemical and plastic production since

Throughout the world, persons racialized as inferior live in the shadows of oil drilling operations, petroleum refineries, chemical plants, power plants, pipelines, and other polluting industry.¹⁰¹ These persons are subjected to “eviction from ancestral lands; desecration of sacred sites; poisoning of air, land, and water; fires, explosions, and industrial accidents; loss of subsistence fishing and hunting rights; and exposure to significant health hazards.”¹⁰² Additionally, fossil fuel-rich countries and regions, such as the Middle East, have been repeatedly invaded and occupied to extract and expropriate their oil wealth. The bloody resource wars instigated by Europe and the United States and the resulting death and displacement of racialized Arab and Muslim populations are among the most violent manifestations of racial capitalism.¹⁰³

The fossil fuel industry has created “sacrifice zones” all over the world where racially subordinated communities are abandoned and “left to sicken and die because they and the degraded lands they occupy are no longer profitable.”¹⁰⁴ The US government coined the term “sacrifice zone” to describe places subjected to catastrophic levels of radiation due to the production of nuclear weapons.¹⁰⁵ Today, the term “sacrifice zone” refers

the 1980s. Tracey J. Woodruff, *Health Effects of Fossil Fuel-Derived Endocrine Disruptors*, 390 *NEW ENG. J. MED.* 922, 922–23 (2024).

¹⁰¹ See Nixon, *supra* note 99, at 68–102; NAOMI KLEIN, *THIS CHANGES EVERYTHING: CAPITALISM VS THE CLIMATE* 302–34 (2014). In the United States, the National Association for the Advancement of Colored People (NAACP) has documented the impact of the fossil fuel industry on marginalized communities, including those who work in the industry and those who reside near coal mines, power plants, and oil and gas facilities. See NAACP, *COAL-BLOODED: PUTTING PROFITS OVER PEOPLE* (2016), <https://naacp.org/resources/coal-blooded-putting-profits-people> [<https://perma.cc/C6RF-64Q8>]; NAACP, *FUMES ACROSS THE FENCE-LINE: THE HEALTH IMPACTS OF AIR POLLUTION FROM OIL & GAS FACILITIES ON AFRICAN AMERICAN COMMUNITIES* (2017), <https://naacp.org/resources/coal-blooded-putting-profits-people> [<https://perma.cc/QJS8-A3C6>]; see also Cirakoglu et al., *supra* note 12, at 230–31 (describing the consequences of oil drilling in the Niger Delta).

¹⁰² Gonzalez, *supra* note 25, at 118.

¹⁰³ See generally MICHAEL R. KLARE, *BLOOD AND OIL: THE DANGERS AND CONSEQUENCES OF AMERICA’S GROWING DEPENDENCY ON IMPORTED PETROLEUM* (2004). A report by Greenpeace revealed that almost two-thirds of European Union military operations around the world monitor and protect the production and transportation of oil and gas destined for European markets. GREENPEACE, *THE SIRENS OF OIL AND GAS IN THE AGE OF CLIMATE CRISIS: EUROPE’S MILITARY MISSIONS TO PROTECT FOSSIL FUEL INTERESTS* 4 (2021), https://www.greenpeace.org/static/planet4-italy-stateless/2021/12/fe69cc13-2021_the_sirens_of_oil_and_gas_report_final_cfp.pdf [<https://perma.cc/M9K8-P9TY>].

¹⁰⁴ Gonzalez & Mutua, *supra* note 19, at 170; Timothy Q. Donaghy et al., *Fossil Fuel Racism in the United States: How Phasing Out Coal, Oil, and Gas Can Protect Communities*, 100 *ENERGY RSCH. & SOC. SCI.* 1, 3 (2023) (explaining that the fossil fuel economy requires “land, air, water, or racially devalued bodies where pollution can be deposited”).

¹⁰⁵ See STEVEN LERNER, *SACRIFICE ZONES: THE FRONT LINES OF TOXIC CHEMICAL EXPOSURE IN THE UNITED STATES* 2 (2010).

more broadly to contaminated spaces inhabited by racially subordinated communities.¹⁰⁶ In both the Global North and the Global South, marginalized communities bear a disproportionate share of the ecological damage inflicted by the fossil fuel-based global economy.¹⁰⁷ As the UN Special Rapporteur on contemporary forms of racism observed in her 2022 report on the global ecological crisis, “the territories subject to the most rapacious forms of extraction are those belonging to groups and nations that were colonially designated as racially inferior.”¹⁰⁸ She proceeds to refer to these places as “racial sacrifice zones.”¹⁰⁹

These racial sacrifice zones are the outcome of a third process through which racial capitalism operates: expulsion.¹¹⁰ Expulsion entails treating persons as “waste” or “surplus humanity” because they are no longer profitable as workers and consumers.¹¹¹ Examples include “incarcerated persons, persons confined in refugee camps and detention centers, and persons warehoused in ghettos, slums, and reservations” with no employment prospects.¹¹² Constructed as expendable and disposable, these populations are “subjected to conditions of life conferring upon them the status of the living dead.”¹¹³

The expulsion of racialized persons to the margins of society is highly lucrative. For example, communities relegated to the racial sacrifice zones of the global economy subsidize racial capitalism by providing extremely cheap sites for the disposal of pollution and waste.¹¹⁴ Similarly, private prisons profit handsomely from the labor of grossly underpaid inmates, from the high prices prisoners must pay for basic necessities, and from the significant public funds expended to construct and staff prisons and to house and punish large numbers of incarcerated persons.¹¹⁵

¹⁰⁶ Gonzalez & Mutua, *supra* note 19, at 170; *see also* Boyd, *supra* note 60, ¶¶ 21, 27 (describing sacrifice zones as places where residents suffer the devastating consequences of living in pollution hotspots and explaining that these residents are most often “individuals, groups and communities that are already enduring poverty, discrimination, and systemic marginalization”).

¹⁰⁷ Gonzalez, *supra* note 25, at 118.

¹⁰⁸ E. Tendayi Achiume (Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance), *Ecological Crisis, Climate Justice and Racial Justice*, ¶ 15, U.N. Doc. A/77/549 (Oct. 25, 2022).

¹⁰⁹ *Id.* ¶ 19.

¹¹⁰ *See generally* SASKIA SASSEN, *EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY* (2014).

¹¹¹ Gonzalez, *supra* note 13, at 330–31.

¹¹² *Id.* at 330.

¹¹³ Achille Mbembe, *Necropolitics*, 15 *PUB. CULTURE* 11, 40 (2003).

¹¹⁴ *See* FABER, *supra* note 56, at 15–55, 178–210; Gonzalez & Mutua, *supra* note 19, at 149.

¹¹⁵ James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 *N.Y.U. L. REV.* 1465, 1530 (2019); Michael McIntyre & Heidi J. Nast,

However, as racial capitalism's intensifying social and ecological crises trap growing numbers of people in racial sacrifice zones,¹¹⁶ racial capitalism threatens to inflict "ecologically-induced genocide" on racialized populations deemed disposable and expendable.¹¹⁷

The climate crisis is creating new sacrifice zones as the lands occupied by racially and ethnically marginalized communities become increasingly uninhabitable due to hurricanes, droughts, wildfires, desertification, and rising sea levels, producing mass displacement.¹¹⁸ These communities have been rendered vulnerable to climate change not only by the greenhouse gas emissions of the affluent and powerful, but also by the colonial and neocolonial policies and practices (discussed in Part I.A of this Article) that impoverished them and deprived them of the resources to adapt to climate change.¹¹⁹ When these racialized, climate-displaced persons attempt to migrate to the United States, Europe, Australia, or other affluent states, they are classified as "illegal," criminalized, detained, and deported.¹²⁰ And those most susceptible to premature death from climate disasters are often the "trapped populations" unable to migrate from dangerous geographic locations, including a disproportionate number of women, children, older people, the poor, and the disabled.¹²¹ Scholars, activists, and climate-vulnerable states are increasingly recognizing that the call for reparations for slavery and colonialism must be joined with the call for reparations for climate change because these injustices are causally interconnected.¹²²

Finally, racial capitalism's rapacious and eco-destructive logic is creating "green sacrifice zones" where marginalized communities are

Bio(necro)polis: Marx, Surplus Populations, and the Spatial Dialectics of Reproduction and "Race", 43 ANTIPODE 1465, 1479 (2011).

¹¹⁶ Gonzalez & Mutua, *supra* note 19, at 172–74.

¹¹⁷ *Id.* at 174.

¹¹⁸ *Id.* at 173.

¹¹⁹ See Carmen G. Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOY. L. REV. 401, 434–40 (2020); Saad, *supra* note 70, at 100.

¹²⁰ See Gonzalez, *supra* note 25, at 111, 123–24.

¹²¹ *Id.* at 127; GOV'T OFF. SCI., LONDON, FORESIGHT: MIGRATION AND GLOBAL ENVIRONMENTAL CHANGE 9, 14, 21–22, 126 (2011); see generally Gopal Datt Bhatta et al., *Climate-Induced Migration in South Asia: Migration Decisions and the Gender Dimensions of Adverse Climatic Events*, 10 J. RURAL & CMTY. DEV., no. 4, 2015, at 1; Sonja Ayeb-Karlsson, *When the Disaster Strikes: Gendered Im(mobility) in Bangladesh*, 29 CLIMATE RISK MGMT. 1 (2020).

¹²² See Sarah Riley Case, *Looking to the Horizon: The Meanings of Reparations for Unbearable Crises*, 117 AJIL UNBOUND 49, 53–54 (2023) (discussing the reparations claims of Caribbean states); see also Leon Sealey-Huggins, '1.5° to Stay Alive': *Climate Change, Imperialism, and Justice for the Caribbean*, 38 THIRD WORLD Q. 2444, 2452 (2017) (describing the climate crisis as an outgrowth of colonial and imperial wealth extraction and calling for reparations).

again being expropriated of their land, labor, and natural wealth, but this time in the name of the green energy transition.¹²³ Examples include the ecologically devastating extraction of minerals such as cobalt (in the Democratic Republic of the Congo) and lithium (in Bolivia, Chile, and Argentina) for electric vehicle batteries;¹²⁴ wind farms, mega-dams, and forest conservation projects that displace Indigenous peoples or interfere with their subsistence livelihoods;¹²⁵ and biofuel plantations that have increased food prices and triggered land grabs all over the world.¹²⁶

One of the lessons of this part is that the violence inflicted on nature and the violence inflicted on racialized communities are inextricably intertwined, and both feed racial capitalism's profit-making imperatives. A second lesson is that the climate crisis is in many ways an intensification of the preexisting racialized injustices caused by colonial and postcolonial domination.¹²⁷ However, as the articles published in this issue point out, marginalized communities all over the world are mounting fierce resistance to these systemic injustices.¹²⁸ Jackie Dugard's article examines

¹²³ See Christos Zografos & Paul Robbins, *Green Sacrifice Zones, or Why a Green New Deal Cannot Ignore the Cost Shifts of Just Transitions*, 3 ONE EARTH 543, 543 (2020).

¹²⁴ See *id.* at 544–45; see also Daniela Soto Hernandez & Peter Newell, *Oro Blanco: Assembling Extractivism in the Lithium Triangle*, 49 J. PEASANT STUD. 945 (2022); Benjamin K. Sovacool, *The Precarious Political Economy of Cobalt: Balancing Prosperity, Poverty, and Brutality in Artisanal and Industrial Mining in the Democratic Republic of the Congo*, 6 EXTRACTIVE INDUS. & SOC'Y 915 (2019).

¹²⁵ See Shalanda H. Baker, *Project Finance and Sustainable Development in the Global South*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 338, 338–55 (Shawkat Alam et al. eds., 2015) (examining the impacts of wind farms on Indigenous peoples in Mexico); Dayna Nadine Scott & Adrian A. Smith, *The Abstract Subject of the Climate Migrant Displaced by the Rising Tides of the Green Energy Economy*, 8 J. HUM. RTS. & ENV'T 30 (2017) (examining the impacts of a proposed dam on Indigenous peoples in Canada); see also Elizabeth A. Kronk Warner, *South of South: Examining the International Climate Regime from an Indigenous Perspective*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 451, 463–67 (Shawkat Alam et al. eds., 2015) (discussing the impacts on Indigenous peoples all over the world of forest conservation projects undertaken to offset the carbon emissions of states and corporations in the Global North).

¹²⁶ See generally Carmen G. Gonzalez, *The Environmental Justice Implications of Biofuels*, 20 UCLA J. INT'L L. & FOREIGN AFFS. 229 (2016) (explaining how the cultivation of biofuel feedstocks on large plantations in the Global South has sparked food price increases and deprived local communities of access to arable land for food production); JAMES SMITH, *BIOFUELS AND THE GLOBALIZATION OF RISK: THE BIGGEST CHALLENGE IN NORTH-SOUTH RELATIONS SINCE COLONIALISM?* (2010) (analyzing the political economy of the biofuels industry and its adverse impacts on small farmers in the Global South).

¹²⁷ See Stephen Humphreys, *Climate Justice: The Claim of the Past*, 5 J. HUM. RTS. & ENV'T 134, 138 (2014).

¹²⁸ See, e.g., Usha Natarajan, *Environmental Justice in the Global South*, in THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT 39–57 (Sumudu A. Atapattu, Carmen G. Gonzalez, & Sara L. Seck eds., 2021).

the struggle of Indigenous communities against mining in South Africa.¹²⁹ Lisa Benjamin's article analyzes the proliferation of innovative climate litigation in many jurisdictions, especially those in the Global South.¹³⁰ Finally, the article by Rebecca Bratspies, Andrea Scarborough, Riana Mehreen, Danielle Dubno-Hammer, Maida Galvez, Kiran P. Nagdeo, Luz Guel, and Dawn Roberts-Semple provides valuable insights on how lawyers can work in a collaborative and nonextractive manner with frontline communities in pursuit of climate and environmental justice.¹³¹

II. RACIAL CAPITALISM AND INTERNATIONAL LAW

International law has long been complicit in the extraction of wealth from nature and from persons racialized as inferior. While colonization and slavery were imposed primarily through physical violence, they were also endorsed by international law, including the racialized framework known as the doctrine of discovery.¹³² The doctrine of discovery originated in papal bulls authorizing the Portuguese slave trade and dividing the territories that Portugal and Spain "could invade without interference from one another."¹³³ Premised on a "fundamental racial distinction" between civilized Europeans and uncivilized non-Europeans,¹³⁴ the doctrine authorized European states to claim lands they "discovered" if these lands were not inhabited by Christians.¹³⁵ The doctrine, which governed the interactions of settlers and conquerors with Indigenous peoples and enslaved Africans, was later applied by Spain, Portugal, and other European states to claim additional territory in Africa, Asia, and the Americas.¹³⁶

¹²⁹ Jackie Dugard, *Xolobeni's Struggle Against Patrilineal-Colonial Capitalist Mining in South Africa: A Counterpoint to Climate Catastrophe?*, 41 WIS. INT'L L.J. 551 (2024).

¹³⁰ Lisa Benjamin, *Racial Capitalism and Climate Change: Colonialism and Climate Law and Policy in the Commonwealth*, 41 WIS. INT'L L.J. 577 (2024).

¹³¹ Rebecca Bratspies et al., *Community-Based Research Can Be a Tool in the Fight Against Structural Racism*, 41 WIS. INT'L L.J. 613 (2024).

¹³² See generally Robert J. Miller, *The Doctrine of Discovery*, 5 INDIGENOUS PEOPLES' J.L. CULTURE & RESISTANCE 35 (2019) (discussing the origins and key elements of the doctrine of discovery).

¹³³ K-Sue Park, *Conquest and Slavery in the Property Law Course: Notes for Teachers*, GEO. L. FAC. PUBL. & OTHER WORKS 1, 9 (2020), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3316&context=facpub> [<https://perma.cc/5QGR-CWW3>].

¹³⁴ *Id.*; see also Miller, *supra* note 132, at 39.

¹³⁵ See Miller, *supra* note 132, at 36–37, 39.

¹³⁶ See generally Robert J. Miller & Olivia Stitz, *The International Law of Colonialism in East Africa: Germany, England and the Doctrine of Discovery*, 32 DUKE J. COMPAR. & INT'L L. 1 (2021) (describing the origins and subsequent development and application of the doctrine of discovery).

One consistent theme that runs through the history of international law is the concept of the “civilizing mission.”¹³⁷

The “civilizing mission” operates by characterizing non-European peoples as the “other”—the barbaric, the backward, the violent—who must be civilized, redeemed, developed, pacified. Race has played a crucially important role in constructing and defining the other. This concept of the “civilizing mission” justified the continuous intervention by the West in the affairs of Third World societies and provided the moral basis for the economic exploitation of the Third World that has been an essential part of colonialism.¹³⁸

The civilizing mission identifies a gap between Europeans and non-Europeans, constructs Europeans as “universal” and civilized and non-Europeans as “particular” and uncivilized, and then intervenes in non-European societies through a variety of techniques to transform, normalize, or “save” the aberrant non-European.¹³⁹ While the terms used to describe the racialized “other” vary in different historical phases of capitalism, the underlying logic (racialization to facilitate and justify the expropriation of land, labor, and natural wealth) remains the same. For example, in the nineteenth century, at the height of colonial expansion, European legal scholars “devised a series of formal doctrines that used explicitly racial and cultural criteria” to deny sovereignty to colonized territories and justify their ongoing pillage.¹⁴⁰ These doctrines classified humanity into three categories: “civilized,” “semi-civilized,” and “uncivilized” based on their proximity to European norms.¹⁴¹ The Berlin Conference of 1884–1885, which divided the African continent among the major colonial powers to facilitate wealth extraction, was justified as an effort to bring civilization to the natives through trade and commerce.¹⁴²

In the twentieth and twenty-first centuries, the civilizing mission proceeded first under the doctrine of trusteeship,¹⁴³ later under the concept of development,¹⁴⁴ and most recently under the guise of the war on

¹³⁷ *Id.* at 9.

¹³⁸ Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, 2 CHINESE J. INT’L L. 77, 85 (2004).

¹³⁹ See ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 4 (2004).

¹⁴⁰ Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 745 (2006).

¹⁴¹ Nele Matz, *Civilization and the Mandate System Under the League of Nations as Origin of Trusteeship*, 9 MAX PLANCK Y.B. U.N. L. 47, 66 (2005).

¹⁴² See ANGHIE, *supra* note 139, at 96–97.

¹⁴³ *Id.* at 140.

¹⁴⁴ *Id.* at 203–04.

terror.¹⁴⁵ The Mandate System of the League of Nations, which was established after World War I, placed the colonies of the major defeated powers (Germany and the Ottoman Empire) under the trusteeship of the victors (most often, Britain and France) to prepare them to become independent sovereign states.¹⁴⁶ Under the Mandate System, the League of Nations devised legal, administrative, and institutional mechanisms to transform supposedly “backward” territories into modern states while ensuring that these newly independent states remained economically subservient to the great powers and highly profitable.¹⁴⁷ After World War II, this system of tutelage persisted under the auspices of the United Nations trusteeship system until the last trust territory (Palau) gained independence in 1994.¹⁴⁸

Next, as described in Part I of this Article, Northern interventions in the decades following World War II accelerated the transfer of wealth from the South to the North through mechanisms that transformed the states of the Global South along neoliberal lines pursuant to the ideology of development.¹⁴⁹ Finally, the war on terror created new opportunities for racialized plunder. For example, the invasion of Iraq in the name of peace and democracy (the civilizing mission) and preemptive force against “rogue states”¹⁵⁰ (the violent “other” who must be pacified) enabled the United States and its allies to seize and sell the country’s state-owned enterprises, fire over half a million employees, remove trade barriers, and rewrite intellectual property laws to open the economy to foreign investors.¹⁵¹ A decade after the invasion, Iraq’s state-owned oil industry had been fully privatized and dominated by foreign firms.¹⁵²

The legal doctrines that justified the extraction of wealth from humans and nature often operated in tandem. European colonizers regarded

¹⁴⁵ Anghie, *supra* note 140, at 750–51.

¹⁴⁶ *Id.* at 746–47.

¹⁴⁷ *Id.* at 747–48; *see also id.* at 141–44 (explaining how the colonial powers continued to extract profits from the colonized territories under the Mandate System).

¹⁴⁸ *See* Mark E. Wojcik, *The UN at 75: Success Stories From the Trusteeship System*, 33 PACE INT’L L. REV. 309, 309–11 (2021).

¹⁴⁹ *See generally supra* Part I.

¹⁵⁰ Anghie, *supra* note 140, at 750.

¹⁵¹ *See* Mark Neocleous, *War on Waste: Law, Original Accumulation and the Violence of Capital*, 75 SCI. & SOC’Y 506, 524–25 (2011).

¹⁵² Antonia Juhasz, *Why the War in Iraq Was Fought for Big Oil*, CNN (April 15, 2013), <https://www.cnn.com/2013/03/19/opinion/iraq-war-oil-juhasz/index.html>

[<https://perma.cc/XU2Q-TNAG>]; *see also* NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW 176–87 (2020) (explaining which Northern industries benefited from the occupation of Iraq and discussing the extraordinary depth and breadth of the political and economic domination and transformation of Iraq).

nature as property—an object to be placed under the “sole despotic dominion” of humans.¹⁵³ Societies that deviated from this ostensibly universal European norm and did not “improve” the land for commercial profit were deemed uncivilized and worthy of dispossession.¹⁵⁴ The domination of nature came to be seen as the hallmark of civilization,¹⁵⁵ and legal scholars such as Francisco de Vitoria, Hugo Grotius, and Alberico Gentili developed human hierarchies based on the distance of a particular society from the “animalistic non-human condition of nature.”¹⁵⁶ As the colonial project expanded beyond the Americas, European states sought to radically remake the colonized territories by imposing European systems of contract, property, and land tenure.¹⁵⁷

International law normalized the domination of nature by conditioning sovereignty, among other criteria, on a society’s distance from nature.¹⁵⁸ International law granted Europeans title to Indigenous lands through the doctrine of *terra nullius* (empty or unoccupied land) if such people did not assert control over the land by farming.¹⁵⁹ This was premised on an “ideology of improvement that privileges European forms of cultivation as proof of ownership.”¹⁶⁰ In the period following World War I, the League of Nations Mandate System classified colonized territories as A, B, and C mandates depending on their perceived readiness for sovereignty and self-government.¹⁶¹ One of the criteria that determined whether a colonized territory was eligible for statehood was its transformation and control of nature.¹⁶²

¹⁵³ Lee Godden, *Preserving Natural Heritage: Nature as Other*, 22 MELBOURNE UNIV. L. REV. 719, 724–25 (1998).

¹⁵⁴ See Neocleous, *supra* note 151, at 515–18 (discussing the legal doctrines that authorized colonizers to seize land that was deemed “waste” because it was not being “improved” for commercial purposes); see also BRENNAN BHANDAR, COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP 47–50 (2018); ANGHIE, *supra* note 140, at 103.

¹⁵⁵ VASSOS ARGYROU, THE LOGIC OF ENVIRONMENTALISM: ANTHROPOLOGY, ECOLOGY AND POSTCOLONIALITY 4 (2005).

¹⁵⁶ Lindgren, *supra* note 98, at 537.

¹⁵⁷ Robert Knox, A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law 132–33 (2014) (Ph.D. dissertation, London School of Economics) https://etheses.lse.ac.uk/1030/1/Knox_A_Critical_Examination_of_the_Concept_of_Imperialism.pdf [<https://perma.cc/H2MB-TLRJ>].

¹⁵⁸ See Usha Natarajan, *Locating Nature: Making and Unmaking International Law*, 27 LEIDEN J. INT’L L. 573, 586–87 (2014).

¹⁵⁹ See Karin Mickelson, *The Maps of International Law: Perceptions of Territory Beyond the State*, in LOCATING NATURE: MAKING AND UNMAKING INTERNATIONAL LAW 159, 164–66 (Usha Natarajan & Julia Dehm eds., 2022).

¹⁶⁰ BHANDAR, *supra* note 154, at 10.

¹⁶¹ See Matz, *supra* note 141, at 72–73.

¹⁶² See Natarajan, *supra* note 158, at 587.

Today, states in the Global South have internalized the ideology of development and aggressively seek to commodify and transform nature to modernize and industrialize.¹⁶³ Moreover, the concept of sustainable development, which aims to balance economic development, social development, and environmental protection,¹⁶⁴ has merely perpetuated racial capitalism's eco-destructive logic. The World Commission on Environment and Development (the Brundtland Commission) defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."¹⁶⁵ However, the Brundtland Commission did not contest the dominant growth-oriented development paradigm.¹⁶⁶ On the contrary, it emphasized growth as the solution to poverty and advocated for "more rapid economic growth in both industrial and developing countries" while respecting ecological limits.¹⁶⁷ As Gilbert Rist observes:

The main contradiction, then, in the Report of the Brundtland Commission is that the growth policy supposed to reduce poverty and stabilize the ecosystem hardly differs at all from the policy which historically opened the gulf between rich and poor and placed the environment in danger.¹⁶⁸

Similarly, the Sustainable Development Goals (SDGs), adopted by all United Nations member states in 2015 (the 2030 Agenda for Sustainable Development),¹⁶⁹ also failed "to reconcile the contradiction between growth and sustainability at the core of sustainable development."¹⁷⁰ The SDGs seek to achieve sustainable development through poverty

¹⁶³ See *id.* at 588; Anghie, *supra* note 140, at 203–04.

¹⁶⁴ See Sumudu A. Atapattu, Carmen G. Gonzalez & Sara L. Seck, *Intersections of Environmental Justice and Sustainable Development: Framing the Issues*, in THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT 1, 4 (Sumudu A. Atapattu, Carmen G. Gonzalez & Sara L. Seck eds., 2021). See generally NICO J. SCHRIJVER, THE EVOLUTION OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW: INCEPTION, MEANING AND STATUS (2008).

¹⁶⁵ See WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT [WCED], OUR COMMON FUTURE 8 (1978).

¹⁶⁶ See Wolfgang Sachs, *Environment*, in THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER 28 (Wolfgang Sachs ed., 2d ed. 2010).

¹⁶⁷ WCED, *supra* note 165, at 89.

¹⁶⁸ RIST, *supra* note 39, at 186.

¹⁶⁹ See generally, G.A. Res. 70/1, Transforming Our World: the 2030 Agenda for Sustainable Development (Oct. 21, 2015).

¹⁷⁰ Sam Adelman, *The Sustainable Development Goals, Anthropocentrism and Neoliberalism*, in GLOBAL GOALS: LAW, THEORY & IMPLEMENTATION 15, 34 (Duncan French & Louis Kotzé eds., 2018).

eradication and economic growth.¹⁷¹ For example, SDG 8 (sustained, inclusive, and sustainable economic growth) and SDG 10 (reduce inequality within and among nations) are premised on a physical impossibility: unlimited economic growth on a finite planet.¹⁷² SDG 8 calls for higher economic growth in all countries and merely encourages states to decouple economic growth from environmental degradation.¹⁷³ Studies using historical data and modeling projections to assess the feasibility of decoupling GDP growth from environmental impact have concluded that it is “misleading to develop growth-oriented policy around the expectation that decoupling is possible.”¹⁷⁴ As the UN special rapporteur on contemporary forms of racism noted in her report on the SDGs:

The 2030 Agenda is premised on economic and financial approaches that are facing warranted backlash because of the inequalities they perpetuate and the cataclysmic environmental consequences they inflict. . . . [T]he existing global economy for natural resource extraction is, according to scientific consensus, environmentally unsustainable and the environmental protections proposed in the 2030 Agenda cannot meaningfully transform the extractivism economy.¹⁷⁵

Despite the SDGs, international law continues to facilitate the plunder of nature at the expense of the racialized and formerly colonized. It does so through a variety of mechanisms, including those that create impunity for corporate misconduct. First, international human rights law does not impose binding obligations on corporations or require states to regulate extraterritorial corporate conduct.¹⁷⁶ Second, international investment law restricts the ability of host states to regulate extractive and

¹⁷¹ G.A. Res. 70/1, *supra* note 169, ¶ 2, 3.

¹⁷² *Id.* (SDG 8 and 10 and their respective targets call for significant increases in gross domestic product growth in poorer countries and higher levels of economic productivity everywhere without recognizing the need for affluent countries to significantly curtail their growth to avoid exceeding ecological limits); see Ruth Gordon, *Unsustainable Development*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 50, 68 (Shawkat Alam et al. eds., 2015) (discussing the ecological constraints on economic growth); HAYDN WASHINGTON, *DEMYSTIFYING SUSTAINABILITY: TOWARDS REAL SOLUTIONS* 36 (2015).

¹⁷³ G.A. Res. 70/1, *supra* note 169, at 19–20.

¹⁷⁴ James D. Ward et al., *Is Decoupling GDP Growth from Environmental Impact Possible?*, 11 PLOS ONE 1, 10 (2016).

¹⁷⁵ E. Tendayi Achiume (Special Rapporteur), *Report of the Special Rapporteur on contemporary forms of racism: 2030 Agenda for Sustainable Development, the Sustainable Development Goals and the fight against racial discrimination*, ¶ 80, U.N. Doc. A/HRC/50/60 (2022).

¹⁷⁶ See Penelope Simons, *Selectivity in Law-Making: Regulating Extraterritorial Environmental Harm and Human Rights Violations by Transnational Extractive Corporations*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT 473, 477–80 (Anna Grear & Louis Kotzé eds., 2015).

polluting industries owned by foreign investors because these regulations may be challenged in arbitration proceedings as indirect expropriations or breaches of fair and equitable treatment standards if they impair the economic value of the investment.¹⁷⁷ Third, international law and domestic law shelter the corporate parent's assets from liabilities incurred by its subsidiaries through the doctrine of separate legal personality and limited liability.¹⁷⁸ Fourth, the legal duty of corporate managers to act in the best interests of the corporation may incentivize irresponsible corporate behavior because this obligation "has been widely interpreted as pursuing the maximization of profit for the benefit of shareholders."¹⁷⁹ This duty to make money for shareholders rewards managers who are "willing to externalise costs and harms, regardless of the lives destroyed, the communities damaged and the environments and species endangered."¹⁸⁰

International environmental law, including the treaties governing climate change, have been unable to halt ecological degradation or secure climate and environmental justice for persons relegated to the sacrifice zones of the capitalist global economy. While the reasons for this failure are multiple, complex, contested, and far beyond the scope of this Article, they can be summarized as follows:

Environmental law scholars have decried the discipline's fragmentation, its incrementalism, its anthropocentric utilitarianism, and its embrace of market mechanisms and technological fixes. Several have pointed to the North-South tensions that permeate every area of international environmental law, bringing environmental treaty negotiations to a standstill. Some have argued that international economic law generally prevails over environmental law due to the latter's lack of economic sanctions for non-compliance. Others have observed that international environmental law's technocratic discourse makes it inaccessible to those who are not environmental law experts, rendering it an exotic and siloed sub-specialty of international law dominated by an elite (and disproportionately white and male) priesthood that often resists justice-oriented critique. Finally, some scholars contend that international environmental law, by accident or by design, has merely tinkered on the margins of an inequitable and unsustainable economic order, ameliorating some of its harshest impacts without challenging

¹⁷⁷ See generally Kate Miles, *Investor-State Dispute Settlement: Conflict, Convergence, and Future Directions*, 7 EUR. Y.B. INT'L ECON. LAW 273 (2016).

¹⁷⁸ Simons, *supra* note 176, at 481.

¹⁷⁹ *Id.* at 488.

¹⁸⁰ White, *supra* note 9, at 108–09.

its core assumptions—including infinite economic growth on a finite planet.¹⁸¹

In addition, a groundbreaking volume edited by Usha Natarajan and Julia Dehm persuasively explains how ecological destruction is structurally embedded in the core doctrines of international law, including the doctrines of sovereignty and development discussed in this article.¹⁸²

Finally, the treaties negotiated pursuant to the United Nations Framework Convention on Climate Change (UNFCCC) have adopted market-based mechanisms that allow wealthy states and transnational corporations to continue to emit greenhouse gases by purchasing carbon credits from forest conservation projects and other emissions-reducing activities in the Global South.¹⁸³ These mechanisms perpetuate fossil fuel dependency,¹⁸⁴ have been plagued by fraud,¹⁸⁵ and often violate the rights of Indigenous peoples to engage in subsistence and income-generating

¹⁸¹ See Carmen G. Gonzalez, *Foreword* to LOCATING NATURE: MAKING AND UNMAKING INTERNATIONAL LAW, at ix–x (Usha Natarajan & Julia Dehm) (2022); see also U.N. Secretary-General, *Gaps in International Environmental Law and Environment-Related Instruments: Toward a Global Pact for the Environment*, UN Doc. A/73/419 (Nov. 30, 2018) (examining the gaps and deficiencies in international environmental law).

¹⁸² See generally USHA NATARAJAN & JULIA DEHM, LOCATING NATURE: MAKING AND UNMAKING INTERNATIONAL LAW (2022).

¹⁸³ See generally David Takacs, *Forest Carbon (REDD+), Repairing International Trust, and Reciprocal Contractual Sovereignty*, 37 VT L. REV. 653 (2013) (describing and critiquing the forest conservation program known as REDD+); Naomi Roht Arriaza, “First Do No Harm”: Human Rights and Efforts to Combat Climate Change, 38 GA. J. INT’L & COMP. L. 593 (2010) (describing human rights abuses caused by the market-based mechanisms of the climate treaties).

¹⁸⁴ See ADRIAN PARR, THE WRATH OF CAPITAL: NEOLIBERALISM AND CLIMATE CHANGE POLITICS 36 (2013).

¹⁸⁵ See generally Heidi Blake, *The Great Cash-for-Carbon Hustle*, NEW YORKER (Oct. 23, 2023), <https://www.newyorker.com/magazine/2023/10/23/the-great-cash-for-carbon-hustle> [<https://perma.cc/QS8S-R54Y>]; Patrick Greenfield, *Revealed: More than 90% of Rainforest Carbon Offsets by Biggest Certifier are Worthless, Analysis Shows*, GUARDIAN (Jan. 18, 2023), <https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe> [<https://perma.cc/PX9K-EX22>].

activities on their ancestral lands.¹⁸⁶ Critics have denounced these schemes as both ineffective and unjust.¹⁸⁷ As Julia Dehm points out:

From a climate justice standpoint, pertinent critiques have been made of the role played by the UNFCCC in promoting “false solutions” such as carbon trading and carbon offset schemes that more deeply perpetuate the inequalities at the heart of the climate crisis. Social movements have criticized these schemes as an ineffectual response that abrogates the responsibility of key polluters whilst threatening the livelihoods of those communities with limited responsibility for and high vulnerability to climate change. For these reasons some have described the UNFCCC framework as promoting a form of “carbon colonialism” or “CO2lonialism.”¹⁸⁸

Frustrated by state and corporate impunity for climate change and other socio-ecological crises and injustices, some scholars have advocated for the criminalization of ecocide as a potential tool to expose the severity of environmental degradation and hold state and corporate actors accountable.¹⁸⁹ The theory of racial capitalism provides a useful lens through which to evaluate this proposal.

¹⁸⁶ Kronk Warner, *supra* note 125, at 463–67. Human rights violations associated with forest conservation projects (including the eviction of Indigenous peoples from their ancestral territories) have been reported in Asia, Africa, and Latin America. See, e.g., HUM. RTS. WATCH, CARBON OFFSETTING’S CASUALTIES: VIOLATIONS OF CHONG INDIGENOUS PEOPLES’ RIGHTS IN CAMBODIA’S SOUTHERN CARDAMOM REDD+ PROJECT (2024), https://www.hrw.org/sites/default/files/media_2024/02/cambodia0224web_1.pdf [<https://perma.cc/F4AJ-4UX7>]; Chris Lang, *Indigenous Ogiek communities are being violently evicted for carbon credits in Kenya*, REDD-MONITOR (Nov. 10, 2023), <https://reddmonitor.substack.com/p/indigenous-ogiek-communities-are> [<https://perma.cc/9TB6-AQAX>]; Juan Pablo Sarmiento Barletti & Anne M. Larson, *Rights Abuse Allegations in the Context of REDD+ Readiness and Implementation: A Preliminary Review and Proposal for Moving Forward*, 190 CTR. FOR INT’L FORESTRY RSCH. (2017). See generally CRISTIANE FAUSTINO & FABRINA FURTADO, THE GREEN ECONOMY, FOREST PEOPLES AND TERRITORIES: RIGHTS VIOLATIONS IN THE STATE OF ACRE (Karen Lang trans., 2014), https://www.wrm.org.uy/wp-content/uploads/2014/12/preliminary_report_green_economy.pdf [<https://perma.cc/3FEY-T6HC>].

¹⁸⁷ See, e.g., Sarah Milne et al., *Learning From ‘Actually Existing’ REDD+: A Synthesis of Ethnographic Findings*, 17 CONSERVATION & SOC’Y 84, 92–93 (2019) (finding that forest conservation projects “centralize and strengthen state control over forests, especially in Asia and Africa,” yield “adverse outcomes for forests and livelihoods,” and exacerbate social conflicts).

¹⁸⁸ Julia Dehm, *Carbon Colonialism or Climate Justice: Interrogating the International Climate Regime from a TWAIL Perspective*, 33 WINDSOR Y.B. ACCESS JUST. 129, 131 (2016).

¹⁸⁹ See generally White, *supra* note 9, at 97–101 (describing the goals of green criminology and the drivers of the move to criminalize ecocide).

III. ECOCIDE THROUGH THE LENS OF RACIAL CAPITALISM

While a full-blown analysis of the advantages and disadvantages of adding ecocide to the Rome Statute as a fifth international crime is beyond the scope of this Article, this part offers some preliminary reflections and observations based upon the analysis of racial capitalism presented herein. The proposal to criminalize ecocide has two distinct dimensions. The first is discursive—to transform popular and academic discourse about climate change and other socio-ecological crises by exposing and condemning as criminal the ecologically harmful behavior of the rich and powerful.¹⁹⁰ The second is a law reform project that seeks to amend the Rome Statute in the hope that this will lead to criminal prosecution of the state and corporate leaders responsible for eco-destructive conduct.¹⁹¹ While stigmatizing as criminal the predatory behavior of the rich and powerful may serve as an effective tool to transform popular consciousness, the law reform project may have unintended consequences.

Building on the analysis of racial capitalism and law discussed in this Article, the criminalization of ecocide raises at least three distinct concerns: (1) lack of attention to structural injustice, (2) reproduction of the civilizing mission, and (3) instrumental rationality that devalues both humans and nature. Each of these concerns is discussed in greater detail below.

A. LACK OF ATTENTION TO STRUCTURAL INJUSTICE

One of the disadvantages of criminalizing ecocide is international criminal law's emphasis on individual culpability, which obscures the structural causes of the climate crisis, particularly its origins in slavery, colonialism, and neocolonialism. International criminal law "is predicated on the domestic model of the individual as autonomous moral agent, and therefore requires an identifiable person capable of fulfilling the *mens rea* requirement of criminality."¹⁹² This emphasis on individual perpetrators "creates the illusion that, by punishing a few bad actors, centuries of oppression based on race, class, and gender can be addressed."¹⁹³ In so doing, international criminal law relieves both states and the international community of the obligation to examine the structural inequities that

¹⁹⁰ *Id.* at 98.

¹⁹¹ *See id.*

¹⁹² Shanks, *supra* note 6, at 11.

¹⁹³ Cusato & Jones, *supra* note 10, at 9–10.

frequently foster violence and conflict.¹⁹⁴ For example, the criminal prosecutions related to the atrocities in the former Yugoslavia and Rwanda focused on the individual perpetrators and ignored how the neoliberal economic reforms imposed by the IMF and the World Bank played a pivotal role in creating the economic conditions that precipitated violence.¹⁹⁵

Frédéric Mégret contends that the criminal prosecution of individual perpetrators often serves as a smokescreen that legitimates “a murky world where responsibility is often structural.”¹⁹⁶ In a similar vein, Antony Anghie and B.S. Chimni caution against the deployment of new international mechanisms of accountability without examining how *existing* international institutions contributed to the problem or failed to address it.¹⁹⁷ As explained below, these observations apply with special force to the problem of ecocide.

The Independent Expert Panel established by the Stop Ecocide Foundation¹⁹⁸ defined ecocide as “unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.”¹⁹⁹ The panel’s emphasis on “severe and either widespread or long-term” ecological destruction obscures the “slow violence” of the fossil fuel-based capitalist global economy—the gradual and often invisible forms of environmental degradation inflicted disproportionately on racialized and marginalized populations.²⁰⁰ The definition singles out radically transgressive and spectacular instances of environmental degradation instead of problematizing the death by a thousand cuts through which the planet’s life support systems are being destroyed at the expense of persons racialized as inferior. This approach discourages a deeper analysis of racial capitalism’s inherently eco-destructive logic, its history of racialized

¹⁹⁴ See *id.* at 10; see also Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1126 (2015).

¹⁹⁵ See Anghie & Chimni, *supra* note 138, at 89–90; Gerry Simpson, *Linear Law: The History of Criminal Law*, in CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION 159, 163 (Christine Schwöbel ed. 2014).

¹⁹⁶ Frédéric Mégret, *Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project*, 12 FINNISH Y.B. INT’L L. 193, 239 (2001).

¹⁹⁷ See Anghie & Chimni, *supra* note 138, at 90–91.

¹⁹⁸ In 2021, an Independent Expert Panel convened by the Stop Ecocide Foundation drafted a definition of ecocide. See *Legal Definition of Ecocide*, STOP ECOCIDE INT’L, <https://www.stopecocide.earth/legal-definition> [<https://perma.cc/H7DD-3NJM>] (defining ecocide and including comments from the members of the Independent Expert Panel).

¹⁹⁹ STOP ECOCIDE FOUND., *supra* note 5, at 2, art. 8 *ter*.

²⁰⁰ See NIXON, *supra* note 99, at 4.

extraction, and the many ways that international law normalizes racial subordination and environmental degradation.

The criminalization of ecocide may thereby provide a façade of legitimacy to the less visible but nevertheless deadly methods through which racial capitalism profits from the destruction of nature at the expense of marginalized communities. It may also distract scholars and activists from the urgent need to interrogate and challenge the foundational legal concepts that treat nature as an inert object for human domination and commodification (such as property, sovereignty, and development) as well as the international laws and institutions that facilitate and justify the ongoing, systemic plunder of the land, labor, and natural wealth of communities racialized as inferior (such as corporate law, investment law, and the lending policies of the IMF and the World Bank).

As Patrick Wolfe observed about the settler colonial project, the invasion of Indigenous lands and elimination of Indigenous peoples is “a structure not an event . . . an organizing principle of settler-colonial society rather than a one-off (and superseded) occurrence.”²⁰¹ Similarly, expropriation (or primitive accumulation) is an ongoing structural feature of racial capitalism,²⁰² and environmental degradation is structurally embedded in the key doctrines of international law.²⁰³ Criminally prosecuting individual bad actors for singular environmentally devastating events runs the risk of legitimizing the inherently predatory, eco-destructive, structural logic of racial capitalism and obscuring the complicity of international law.

B. REPRODUCING THE CIVILIZING MISSION

A second pitfall of criminalizing ecocide is that recourse to international criminal law may reproduce international law’s civilizing mission, which creates and reinforces racial hierarchies that facilitate and justify the Global North’s ongoing interventions in the Global South. International criminal law has “reproduced colonial and racial legacies by reinforcing problematic assumptions about the Global South as a place of

²⁰¹ Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388 (2006).

²⁰² See Nancy Fraser, *Roepke Lecture in Economic Geography – From Exploitation to Expropriation Historic Geographies of Racialized Capitalism*, 94 ECON. GEOGRAPHY 1, 5–6 (2017); Tayyab Mahmud, *Precarious Existence and Capitalism: A Permanent State of Exception*, 44 SW. L. REV. 699, 703–05 (2015); David Harvey, *The ‘New’ Imperialism: Accumulation by Dispossession*, 40 SOCIALIST REG. 63, 73–76 (2004).

²⁰³ NATARAJAN & DEHM, *supra* note 182, at 23–25, 37–43.

disorder, backwardness, and lawlessness needing external interventions, including in the form of international criminal trials.”²⁰⁴ This racialization of the Global South renders invisible the colonial and postcolonial practices and projects that impoverished and destabilized the Global South and invites “a technocratic response based on simple criminality/legality binaries.”²⁰⁵

For example, the trial of former Liberian President Charles Taylor featured dramatic narratives of murder, rape, and plunder of resources “cast against the backdrop of the resource-rich and endemically violent ‘Africa’ of the international imagination.”²⁰⁶ This spectacle demonized the figure of the warlord and validated international criminal prosecution while concealing the complicity of the diamond and armament industries in mass atrocities and militarized resource-related conflicts.²⁰⁷ By shifting responsibility to the barbaric “other,” the trial also obscured the ways that the neoliberal economic reforms mandated by international financial institutions (such as the IMF and the World Bank) and various free trade agreements have opened up the Global South to “corporate colonization” and “made it increasingly difficult for postcolonial states to maintain economic independence and political autonomy.”²⁰⁸

Like the US criminal justice system, international criminal law perpetuates racial injustice through selective prosecution.²⁰⁹ As of the date of this writing, the International Criminal Court (ICC) has indicted almost exclusively Africans who are either Black or Arab.²¹⁰ There have been no indictments of the arms merchants, diamond traders, or leaders of resource-extractive industries based in the Global North who profit from resource wars.²¹¹ This targeting of Africans for criminal prosecution is “embedded within a larger project of Western judicial and military

²⁰⁴ Cusato & Jones, *supra* note 10, at 9; see also John Reynolds & Sujith Xavier, ‘The Dark Corners of the World’: *TWAIL and International Criminal Justice*, 14 J. INT’L CRIM. JUST. 959, 965–69 (2016) (discussing the racialized narratives used in international criminal prosecutions to describe post-colonial African states).

²⁰⁵ See Reynolds & Xavier, *supra* note 204, at 967.

²⁰⁶ Kamari Maxine Clarke, *The Rule of Law Through Economies of Appearances: The Making of the African Warlord*, 18 IND. J. GLOB. LEGAL STUD. 1, 11–12 (2011).

²⁰⁷ See *id.* at 10, 13, 16, 35.

²⁰⁸ See *id.* at 34–35.

²⁰⁹ See generally Randle C. DeFalco & Frédéric Mégret, *The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System*, 7 LONDON REV. INT’L L. 55 (2019) (applying to the International Criminal Court the lessons learned from analyzing structural racism in the United States).

²¹⁰ *Defendants*, INT’L CRIM. CT, <https://www.icc-cpi.int/defendants> [<https://perma.cc/4JDX-6VCQ>].

²¹¹ *Id.*

imperialism, which consistently obfuscates the crimes of the great powers, while highlighting crimes in the Global South.”²¹²

The structural racism of the ICC arises, at least in part, from its own institutional design.²¹³ First, the core crimes identified in the Rome Statute are rooted in direct forms of physical and sexual violence²¹⁴ and ignore “the structural violence of economic coercion, resource extraction, global wealth distribution and enforced impoverishment.”²¹⁵ Second, the ICC’s jurisdiction is limited to crimes that occurred after the Rome Statute entered into force on July 1, 2002.²¹⁶ This means that the ICC generally fails to consider “the colonial histories and structures of inequality that contributed to the violence being adjudicated.”²¹⁷ Third, the permanent members of the UN Security Council wield considerable influence over who is subject to criminal prosecution. Under Article 13(b) of the Rome Statute, the UN Security Council is authorized to refer cases to the ICC for prosecution, including cases involving perpetrators from states that are not parties to the Rome Statute.²¹⁸ The UN Security Council’s involvement often results in prosecutorial double standards that target crimes committed by Africans while protecting veto-wielding Security Council members and their allies from prosecution for crimes committed in, for example, Iraq, Afghanistan, and Pakistan.²¹⁹

The structural racism of the Rome Statute has significant implications for the prosecution of the crime of ecocide. The United States, the European Union, the United Kingdom, and other states of the Global North generated over 50 percent of the carbon dioxide emitted since 1850.²²⁰ Because carbon dioxide emissions and their climate-disruptive impacts linger for hundreds of years,²²¹ these countries bear significant responsibility for climate change–induced ecocide. However, “the ICC’s limited temporal

²¹² DeFalco & Mégret, *supra* note 209, at 56.

²¹³ Kamari Maxine Clarke, *Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality*, JUST SEC. (July 24, 2020), <https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/> [<https://perma.cc/GK37-985D>].

²¹⁴ DeFalco & Mégret, *supra* note 209, at 81.

²¹⁵ Reynolds & Xavier, *supra* note 204, at 981.

²¹⁶ Clarke, *supra* note 206, at 4.

²¹⁷ *Id.* at 5.

²¹⁸ The Rome Statute of the International Criminal Court art. 13(b), July 17, 1998, 2187 U.N.T.S. 90; see also Frederick Cowell, *Inherent Imperialism: Understanding the Legal Roots of Anti-imperialist Criticism of the International Criminal Court*, 15 J. INT’L CRIM. JUST. 667, 679–80 (2017).

²¹⁹ Cowell, *supra* note 218, at 681–82.

²²⁰ Hickel, *supra* note 21, at e400; Ritchie et al., *supra* note 82.

²²¹ Inman, *supra* note 72 at 156–58.

jurisdiction and the principle of nonretroactivity” will restrict the ICC’s ability to hold officials from these states accountable for their pre-2002 contributions to the climate crisis.²²² Furthermore, the states with the highest historic and current emissions are the United States, China, and Russia.²²³ Because these states are not parties to the Rome Statute²²⁴ and wield veto power in the UN Security Council,²²⁵ it is extremely unlikely that their government and corporate leaders will be criminally prosecuted for ecocide. Ecocide-related prosecutions will likely target individuals from less powerful Global South states, thereby reinforcing the racialized narrative that ecocide only occurs in “poor underdeveloped countries driven by the greed of rapacious state actors.”²²⁶ As Adam Branch and Liana Minkova emphasize, international criminal trials

can preempt long-standing global debates around climate justice and declare the responsibility of corporations, states, the fossil fuel industry, or Western society writ large to be outside the court’s scope. If the court’s Africa focus is maintained, it could create an image of the West as the savior not of a victimized African humanity, but of a victimized African nature, saving Africa from itself for the sake of the planet.²²⁷

Finally, Article 17 of the Rome Statute limits the ICC’s jurisdiction to states that are “unwilling or unable” to conduct an investigation and prosecution.²²⁸ Requiring a state to acknowledge that it is “unwilling or unable” to prosecute and must therefore depend on the ICC reinforces the racializing discourse of state failure.²²⁹ It “feeds into old tropes about African countries being unable to govern themselves, as well as a denial of legal pluralism.”²³⁰ The so-called “failed-state” fallacy prevents states in the Global South from resolving their own internal conflicts²³¹ and also absolves states in the Global North of culpability for “extracting resources,

²²² Adam Branch & Liana Minkova, *Ecocide, the Anthropocene, and the International Criminal Court*, 37 ETHICS & INT’L AFF’S 51, 70 (2023).

²²³ Evans, *supra* note 73.

²²⁴ *The States Parties to the Rome Statute*, INT’L CRIM. CT., <https://asp.icc-cpi.int/states-parties> [<https://perma.cc/4UC5-JM3L>].

²²⁵ *Current Members*, U.N. SEC. COUNCIL, <https://www.un.org/securitycouncil/content/current-members> [<https://perma.cc/Z4JW-AT6W>].

²²⁶ Branch & Minkova, *supra* note 222, at 71.

²²⁷ *Id.* at 72.

²²⁸ The Rome Statute of the International Criminal Court art. 13(b), July 17, 1998, 2187 U.N.T.S. 90; see Cowell, *supra* note 218 at 675.

²²⁹ Cowell, *supra* note 218 at 676; Ruth Gordon, *Saving Failed States: Sometimes a Neocolonial Notion*, 12 AM. U. INT’L L. REV. 903, 903 (1997).

²³⁰ DeFalco & Mégret, *supra* note 209, at 83.

²³¹ Clarke, *supra* note 206, at 8.

fostering colonial institutions with powerful legacies, propping up post-colonial leaders, providing them with arms, and undermining the emergence of plural and civil societies that might have diminished poverty, warfare and weak institutions.”²³² In addition, this fallacy reinforces the civilizing mission by constructing Northern legal processes as “the only legitimate means to adjudicate violence” and disregarding national and local systems of justice that might be better suited to the task.²³³

In sum, “international criminal justice does not proceed from a safe place of racial innocence” but is embedded in structural racism.²³⁴ It protects the interests of economically powerful states and masks the underlying structural causes of violence, racial inequality, and ecological destruction. This suggests that criminalizing ecocide is likely to result in the selective prosecution of leaders from the Global South and not the government officials and corporate executives from the Global North who are most culpable for climate change and other socio-ecological crises.

C. INSTRUMENTAL RATIONALITY THAT DEVALUES BOTH HUMANS AND NATURE

The Independent Expert Panel’s definition of ecocide only applies to acts that are “unlawful or wanton.”²³⁵ “Wanton” is defined as “reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated.”²³⁶ In an attempt to limit what harms rise to the level of ecocide, the Independent Expert Panel has incorporated a utilitarian cost-benefit analysis to distinguish criminal acts from legally condoned behavior.

The incorporation of a cost-benefit analysis into the definition of ecocide is entirely consistent with the latest iteration of the ideology of development—sustainable development. As explained in Part II of this Article, sustainable development purports to curb racial capitalism’s eco-destructive logic by balancing environmental protection, economic development, and social development. However, states have consistently interpreted sustainable development “to give primacy to economic

²³² Charles T. Call, *The Fallacy of the “Failed State”*, 29 THIRD WORLD Q. 1491, 1500 (2008).

²³³ Clarke, *supra* note 206, at 9–10.

²³⁴ De Falco & Mégret, *supra* note 209, at 86.

²³⁵ STOP ECOCIDE FOUND., *supra* note 5, art 8 *ter*, para. 1.

²³⁶ *Id.* art. 8 *ter*, para. 2 (a).

development over environmental protection and social development—to the detriment of species, ecosystems, and vulnerable human beings.”²³⁷

One problem with cost-benefit analysis is that it reinforces racial capitalism’s treatment of nature as a commodifiable, inert object that exists only to satisfy human needs. Like the concept of sustainable development, the Independent Expert Panel’s definition seeks to reconcile two irreconcilable goals—economic growth and environmental protection—while, in practice, putting its thumb on the scale in favor of economic growth. The definition prohibits only the most severe forms of environmental degradation while legitimating “the continued exploitation, commodification, and appropriation of the natural world.”²³⁸

Cost-benefit analysis is also problematic because it perpetuates racial injustice. Two key points illustrate the contours of the problem. First, cost-benefit analysis seeks to maximize aggregate human welfare without considering how the benefits and burdens of economic activity are distributed.²³⁹ For example, the burdens of pollution borne by communities living in racial sacrifice zones are treated as the “neutral” baseline from which to analyze a potential regulatory intervention.²⁴⁰ By adopting this inequitable baseline “without critical interrogation, cost-benefit analysis implicitly provides these conditions with moral sanction.”²⁴¹ Second, cost-benefit analysis often reinforces these preexisting distributional inequities by treating regulatory compliance costs and pollution-related death and disease as morally commensurate variables that can be monetized and inserted into the cost-benefit equation without regard for who bears the burden or reaps the benefit of environmentally damaging activity.²⁴² As James Goodwin explains:

[A] cost-benefit analysis for an air pollution regulation implicitly treats the expenses that a wealthy corporation would incur through compliance as ethically commensurate with the compromised health, diminished quality of life, and premature deaths experienced by affected communities. According to the twisted logic of cost-benefit analysis,

²³⁷ Atapattu, Gonzalez & Seck, *supra* note 164, at 5.

²³⁸ Cusato & Jones, *supra* note 10, at 19.

²³⁹ See Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in its Place: Rethinking Regulatory Review*, 65 UNIV. MIA. L. REV. 335, 338–39 (2011); James Goodwin, *Cost-Benefit Analysis is Racist*, CTR. FOR PROGRESSIVE REFORM (Oct. 9, 2020), <https://progressivereform.org/publications/cost-benefit-analysis-racist/> [<https://perma.cc/W5V3-ANJN>].

²⁴⁰ Goodwin, *supra* note 239.

²⁴¹ *Id.*

²⁴² Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PENN. L. REV. 1553, 1573–75 (2002); Goodwin, *supra* note 239.

if the cost to the company of cleaning up its own mess exceeds the artificially depressed monetary value of preventing people living in fenceline communities from getting unacceptably sick, then the regulation fails and must be watered down or abandoned. Note whose health is in the balance; it's not the health of the investors in the polluting company, but the residents in the fenceline community who breathe and drink water. If the benefits and the costs were both on the same ledger—that is if those who profited from pollution also bore its health burdens—there would be a hint of justice in this calculation. But that's not the case. Rich people do the polluting and profiting, while someone else bears the health costs. All too often, that someone else is Black or Brown.²⁴³

While a full analysis of this topic is beyond the scope of this Article, it is important to recognize that cost-benefit analysis is not a neutral regulatory tool but one that reinforces racial subordination.

Finally, the incorporation of cost-benefit analysis into the Independent Expert Panel's definition of ecocide threatens to universalize Western understandings of the relationship between humans and nature. This universalization may erase knowledge systems and world views that represent alternatives to racial capitalism, including those of Indigenous and other land-based societies. By reducing nature to “a mere aggregate of resources”²⁴⁴ to fulfill human needs and desires, cost-benefit analysis reinforces racial capitalism's extractivist logic—its “non-reciprocal, dominance-based relationship with the earth.”²⁴⁵ This concept of nature is at odds with the environmental ethics of many Indigenous and other land-based peoples, which often encompass a spiritual relationship with the environment, human kinship with the natural world, and a duty to care for the land for the benefit of future generations.²⁴⁶ How does one quantify and compare the climate benefits of carbon-absorbing plantation forestry against the costs of displacing Indigenous peoples and severing their spiritual, cultural, and subsistence ties to their ancestral territories? How does one balance the potential benefits of solar geoengineering (injecting sun-blocking reflective particles into the stratosphere to cool the planet) against the ethical objections of Indigenous peoples²⁴⁷ and against

²⁴³ Goodwin, *supra* note 239.

²⁴⁴ Eduardo Gudynas, *Extractivism: Tendencies and Consequences*, in REFRAMING LATIN AMERICAN DEVELOPMENT 61, 67 (Ronald Munck & Raúl Delgado eds., 1st ed. 2018).

²⁴⁵ KLEIN, *supra* note 101, at 148 (defining extractivism).

²⁴⁶ See Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 273–87 (1996) (describing key elements of Indigenous environmental ethics).

²⁴⁷ Haley Dunleavy, *An Indigenous Group's Objection to Geoengineering Spurs a Debate About Social Justice in Climate Science*, INSIDE CLIMATE NEWS (July 7, 2021),

unknown but potentially catastrophic consequences (including acid rain, ocean acidification, droughts in some regions, and flooding in others)?²⁴⁸

If put into practice at the ICC, any ecocide judgment will, implicitly or explicitly, rely upon and thus endorse specific methods of development and ideas about economic growth, capitalism, extractivism, and the relative value (or lack of value) of different lives, communities, ecosystems, and ways of life.²⁴⁹

Given the track record of the concept of sustainable development, it seems likely that the Independent Expert Panel's definition of ecocide will reinforce racial capitalism's growth-oriented, eco-destructive logic by treating nature as valuable only to the extent that it is useful to humans. It may also reinforce the racial hierarchies that facilitate profit making by systematically devaluing the life, health, knowledge systems, and world views of communities racialized as inferior.

IV. CONCLUSION

This Article questions the emancipatory potential of criminalizing ecocide to address climate change and other socio-ecological crises. It does so by using the framework of racial capitalism to analyze the root causes of climate change, the complicity of international law, the limitations of international criminal law, and the pitfalls of the proposed definition of ecocide.

Before suggesting alternatives to the criminalization of ecocide, it is useful to briefly review the Article's key arguments. The climate crisis is a function of racial capitalism's voracious demand for cheap raw materials, cheap waste disposal, and cheap labor extracted disproportionately from marginalized and racialized communities. Racial capitalism targets specific groups for plunder and then constructs them as racially inferior to justify and facilitate successive interventions that only intensify their deprivation. Racial capitalism's profit-making imperative requires the endless expansion of production and consumption and generates enormous amounts of waste, including greenhouse gases. Its rapacious, extractive relationship with humans and nature has destabilized the planet's ecosystems and created a vast and growing number of racial sacrifice zones,

<https://insideclimateneeds.org/news/07072021/sami-sweden-objection-geoengineering-justice-climate-science/> [<https://perma.cc/K54B-6DVC>].

²⁴⁸ See generally Sam Adelman, *Geoengineering: Rights, Risks and Ethics*, 8 J. HUM. RTS. & ENV'T 119 (2017).

²⁴⁹ See Branch & Minkova, *supra* note 222, at 67.

where the land and the people have been devastated by pollution; by climate-related disasters; and, most recently, by mines, dams, and other projects related to the green energy transition.

International law has normalized and legitimized the destruction of nature and the immiseration of humans racialized as inferior. It has accomplished this through a variety of doctrines, including Eurocentric conceptions of property and sovereignty as well as the doctrine of discovery, *terra nullius*, the Mandate System of the League of Nations, the post-World War II trusteeship system, and the discourse of development. One of the themes that runs through the history of international law is the civilizing mission—the racialization of the Global South as inferior to construct the plunder of its resources as a benevolent attempt to bring civilization, modernity, and development to the benighted corners of the world. Even sustainable development, which seeks to balance environmental protection with social and economic development, has failed to curb racial capitalism’s eco-destructive logic due to its commitment to economic growth.

While the discourse of ecocide may be useful as a means of exposing and condemning the ecological damage caused by powerful states and transnational corporations, expanding the ICC’s jurisdiction by incorporating ecocide into the Rome Statute is problematic for at least three reasons. First, international criminal law’s emphasis on individual culpability and spectacular acts of ecological destruction may obscure the “slow violence” racial capitalism inflicts on nature and on persons racialized as inferior. By treating high-profile ecocatastrophes as isolated and aberrant events, international criminal law may implicitly normalize and condone racial capitalism’s unrelenting but often less visible structural violence. Second, international criminal law has historically reproduced international law’s civilizing mission by constructing the Global South as lawless and barbaric, selectively prosecuting Africans, and ignoring the structural causes of poverty, conflict, and environmental degradation (including the culpability of Northern states and transnational corporations). This suggests that the targets of criminal prosecution for ecocide are likely to be Global South leaders and not the government and corporate officials in the Global North most responsible for the climate crisis. Third, the incorporation of cost-benefit analysis into the definition of ecocide may reinforce the treatment of nature as a resource for commodification and may devalue the lives and world views of colonized and racialized communities.

In short, the move to codify ecocide does not challenge the laws, institutions, or ideologies that reproduce racial capitalism. Instead of

punitive solutions that seek to scapegoat individuals for the structural ills of capitalism, it may be more productive to focus on reparative and restorative forms of justice. One of the lessons of this Article is that the destruction of nature and the violence inflicted on marginalized populations are deeply intertwined. A second lesson is that the climate crisis originates in and intensifies the injustices caused by slavery, colonialism, and neocolonialism. As Sarah Riley Case has observed, reparations for ecological and racial injustices are rarely discussed together by international legal scholars.²⁵⁰ Recognizing the interconnectedness of slavery, colonialism, neocolonialism, and climate change could lead to more robust calls for structural, forward-looking reparations that subvert rather than reinforce the core features of racial capitalism.²⁵¹

²⁵⁰ Riley Case, *supra* note 122, at 50.

²⁵¹ See, e.g., OLÚFÉMI O. TÁÍWÒ, RECONSIDERING REPARATIONS (2022) (providing a framework for reparations that fuses demands for racial justice, decolonization, decarbonization, and environmental and climate justice); Gonzalez, *supra* note 119, at 434–40 (calling for the right to migrate and resettle in the Global North as one form of reparation for persons displaced by the interconnected injustices of colonialism, neocolonialism, and climate change).