Eurocentrism and Anthropocentrism in International Law? Obstacles for the criminalisation of ecocide at the ICC.

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Abstract

There are inescapable problems within the West's approach to state sovereignty and, hence, international law whose inherent Eurocentric and anthropocentric elements must be addressed as we enter a new phase in the Ecocide Law (EL) debate. Deconstructing the epistemological foundations of western thought and jurisprudence, and their distinctively anthropocentric and Eurocentric approach to nature and indigenous peoples (IP), is one of the aims of this paper. I will examine how some of the former came to be, and I will explore their repercussions for IP and the impact on nature more generally. I will then go on to make the case that robust protection of indigenous peoples – particularly their rights to self-determination, collective land ownership and territories– is crucial for the effective criminalisation of ecocide and to further advance Earth jurisprudence. This paper considers some of the anthropological differences between the western and indigenous jurisprudence/cosmovision and goes on to argue that the existing international body of law pertaining to the protection of indigenous peoples is no longer sufficient to tackle today's bioclimate challenges. Each instrument devised within the auspices of the UN in recent decades/years geared towards the safeguarding of the rights of the indigenous nations could become meaningless if an international legal framework to criminalise ecocide is not established. Advancing national constitutional reforms towards protecting the rights to self-determination of the indigenous peoples, and the rights of nature, is essential for the international criminalization of ecocide, and vice versa, the latter is sine quan nem for the former to be enforced.

Keywords: eurocentrism, Indigenous Peoples, international law, rights of nature, decolonisation, ecocide, anthropocentric epistemologies, earth jurisprudence, Laudato si'.

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Introduction

In the last few decades important efforts have been made to criminalise ecocide under international law – the most known initiative today being the proposal by an "Independent Expert Panel of Jurists" convened by the Stop Ecocide Foundation to amend the *Rome Statute* of the International Criminal Court ("ICC")[2] thereby establishing ecocide as the fifth crime under its jurisdiction. Indeed, the idea of criminalising ecocide goes back to the 1970s (*cf.* Galston, O. Palme, Falk,)[3], yet the debate only recently begun to pay attention to the cosmovision of the IP, which is crucial for the development of an interdisciplinary, postcolonial, decolonial, intersectional Ecocide Law (EL) paradigm. Although the debates to establish the legal foundations to criminalise ecocide have evolved, and although a comprehensive pioneering Earth jurisprudence (*cf.* Berry 1988, 2003, 2004, Boff 1997, 2009, Cullinan 2002, Acosta 2011, Shiva 2011)[4] have paved the way for a post-anthropocentric

[2] The Core Text and Commentary to the "Independent Expert Panel of Jurists" summoned by the *Stop Ecocide Foundation* for the Legal Definition of Ecocide of 2021 is available in: "Legal Definition of Ecocide." Stop Ecocide International, 2021, accessed October 3, 2022, 2022, https://www.stopecocide.earth/legal-definition.

[3] The term Ecocide was first coined by Professor Arthur W. Galston at the Conference on War and National Responsibility in Washington. As the US biologist who identified the effects of a chemical developed into Agent Orange, he proposed an international agreement to ban Ecocide. He was the first scientist in 1970 to typify the massive damage and destruction of ecosystems as Ecocide. But the term Ecocide first became known in 1972, at the United Nations environmental conference in Stockholm when the premier of Sweden, Olof Palme, used the term to describe the environmental destruction provoked by the Vietnam War. The following year, in 1973, Law Professor Richard Falk drafted an "International Convention on the Crime of Ecocide", see: Falk, Richard A. "Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals." Bulletin of Peace Proposals 4, no. 1 (1973): 80-96. https://doi.org/10.1177/096701067300400105. https://journals.sagepub.com/doi/abs/10.1177/096701067300400105. The last development in that decade was in 1978 when the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed adding 'Ecocide' to the Genocide Convention. Two decades later, it was the Scottish barrister, Polly Higgins who further developed the concept and campaigned for the international criminalisation of Ecocide. To her we owe the current campaign to elevate environmental destruction to the same level as genocidal crimes since in 2010 she presented a proposal to the UN Law Commission to amend the Rome Statute to include Ecocide as a fifth crime against peace. See: Higgins, Polly. 2015. *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet*. London: Shepheard-Walwyn For further information on the history of the term see: https://ecocidelaw.com/history/. See also, Greene, Anastacia. "The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?". Fordham Environmental Law Review 30, no. 3 (2019): 1-48. https://ir.lawnet.fordham.edu/elr/vol30/iss3/1.

[4] See, particularly the Universal Declaration of the Rights of Mother and the work of the "The International Rights of Nature Tribunal", in, https://www.rightsofnaturetribunal.org/about-us/ This Tribunal met four times. Dr. Vandana Shiva (India) presided over the first International Rights of Nature Tribunal, which was convened in Quito, Ecuador in January 2014. The Tribunal subsequently conducted hearings in Lima, Peru (December 2014), in a Tribunal presided over by Alberto Acosta (Ecuador). The third International Tribunal was held in Paris, France in December 2015 during the COP21, presided over by Cormac Cullinan (South Africa). The latest Tribunal was held in Bonn, Germany in November 2017 during COP23, presided by Tom Goldtooth (Dine' and Dakota, USA). The work of Cormac Cullinan has become paradigmatic. See Cullinan, Cormac. Wild Law: A Manifesto for Earth Justice. 2nd ed. Totnes: Green Books in association with the Gaia Foundation, 2003. Also pivotal is the work of, Acosta, Alberto. "Los Derechos de la Naturaleza. Una Lectura sobre el Derecho a la Existencia." In la Naturaleza con Derechos: De la Filosofía a la Política, edited by Alberto Acosta and Esperanza Martinez, 317-68. Quito: Universidad Politécnica Salesiana/Ediciones Abya-Yala, 2011. See also the work of, Shiva, Vandana. "Democracia de la Tierra y los Derechos de la Naturaleza." in, *op.cit* La Naturaleza Con Derechos: De la Filosofía a la Política, Acosta and Martinez (eds), 139-71. See also the work of Escobar, Arturo. "Ecología Política de la Globalidad y la Diferencia." in, *La Naturaleza Colonizada. Ecología Política y*

approach to jurisprudence; this article asks whether Eurocentric prejudices and stereotypes are at risk of being, inadvertently, reproduced. Despite the climate breakdown having a devastating impact on indigenous peoples – the group least responsible for it – there are in the ecocide debate few references to the existing body of law and rights pertaining to IP. Notwithstanding flaws and limitations within this body of jurisprudence – particularly concerning issues of self-determination and indigenous territories – a thorough understanding and consideration of it, is paramount to the further development of EL.

In this paper we are reminded that, when the European colonizers arrived in the American Continent, they brought with them an idea of 'civilisation' that entailed a vision of domination through extermination, slavery, and the appropriation of the natural resources of the territories they encountered. Extraordinarily, aspects of this vision which involved denying the very existence of normative indigenous systems, prevail. One reason is the very western paradigm of sovereignty -a paradoxical legacy of both, the imperialist world order with its subsequent European Law of Nations *(cf.* Falkowsky)[5] and the League of Nations after it (*cf.* Bauman)[6]. As late as the 20th Century traces of this view persisted, with often only subtle narrative variations. It was not until the mid and late 20th Century and more recently in the 21st Century when things began gradually to change, as several UN mechanism, conventions and declarations were developed – though not entirely resolving jurisprudence flows concerning the rights of indigenous peoples (IP) or the rights of nature (RN). During the same period, stretching to the present, as profound changes in international law took place, countries in the Americas introduced constitutional reforms towards the recognition of indigenous customary law, cultural rights, and, in some cases the rights to self-determination, whilst also introducing provisions to recognise the RN. Paradoxically, however, this coincided with neoliberal globalisation and the rise of transnational corporations – an even bigger threat to indigenous rights and the environment. These entrenched prejudices/factors deserve to be acknowledged and, importantly, re-examined at this juncture to ensure we are doing justice to our efforts to protect all ecosystems and humans from ecocide.

Minería en América Latina, edited by Hector Alimonda, 61-92. Buenos Aires: Consejo Latinoamericano de Ciencias Sociales, 2011. The Pioneering work of Thomas Berry and Leonardo Boff are crucial in the construction of the Earth jurisprudence paradigm. Their oeuvre is vast but see particularly: Thomas Berry. "The Dream of the Earth". Berkeley: Counterpoint Press, 2015 (orig. San Francisco: Sierra Club Books, 1988); and Thomas Berry, "A New Jurisprudence." Foreword to Cormac Cullinan, "Wild Law". 2nd Edition. Claremont: Siberlink 2004. By the prolific Brazilian theologian Leonardo Boff, see specially his classic "Cry of the Earth, Cry of the Poor". Maryknoll, NY: Orbis Books, 1997.

[5] Falkowski, J. E. "Indian Race Indian Law. A five-hundred-year history". New York: Praeger, 1992

[6] Bauman, Zygmunt, and Citlali Rovirosa-Madrazo. "Living on Borrowed Time: Conversations with Citlali Rovirosa-Madrazo". Cambridge: Polity, 2010.

Logocentrism: the colonisation of just about everything. Conquering the Americas.

When the European colonisers arrived at the American Continent, the region focus of this paper, they brought with them a particular unquestioned legal vision. Ostensibly invoking what would later become the notion of *jus ad bellum* and based on such concepts as the so-called "right to conquest" and, crucially, the "Doctrine of Discovery" rooted in several papal bulls, particularly the *Inter Caetera* (Rovirosa-Madrazo 1995, 2016, 2023 *supra*); they constructed an epistemological and legal edifice which facilitated and 'legitimised' their invasion of the Americas, and which, in many ways, remains influential in today's legal narratives and jurisprudence (Rovirosa-Madrazo 1995, Clavero 2019, Falkowski 1992).[7] The European colonisers' idea of "civilisation" entailed a vision of world-domination through extermination, slavery, and the appropriation of the natural resources of the territories they encountered. When confronted by a civilisation unknown to them, they argued that the "barbaric" native populations lacked laws and hence needed to be "civilised". I will argue that it is in the historical connection between *logos* and *lex* (*cf.* Derrida 1971, 1978)[8] that we can understand why the Europeans denied (or conveniently dismissed) the existence of indigenous law (*cf.* Rovirosa-Madrazo 1995)[9].

In the European reasoning the natives did not speak words but only emitted noises; it followed that they did not have lex or laws and needed to receive them (from the coloniser) (Rovirosa-Madrazo 1995 pp 34-47, 239-242).[10] Spaniards believed that natives did not speak but produced noises like "brute animals" (Pagden 1986: 183)[11] a consequence of which was – so went the argument – that the original inhabitants must have been unable to produce laws (Rovirosa-Madrazo *ibid*).

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[7] See on these issues, Clavero, Bartolomé. "Entre Genocidio Colonial Y Constitucionalidad Global." Conversación Sobre La Historia, 2019, accessed October 3, 2022, 2022, https://conversacionsobrehistoria.info/2019/12/05/entre-genocidio-colonial-y-constitucionalidad-global/, Rovirosa-Madrazo, Citlali. "Indigenous Rights, Ethnocentrism and the Crisis of the Nation-State: Paradigmatic Consideration for Human Rights: Zapatista Rebellion in Mexico and Ethnic Conflict in Nicaragua". PhD Thesis, University of Essex, 1995; Falkowski, J. E. *op.cit*; and, Rovirosa-Madrazo y F Cardenal (2016) "Francisco: entre la Ciencia y la Teología Moral". Managua: Hispamar, pp209-279

[8] Derrida, Jacques. "De la Gramatología." México: Siglo XXI, 1971, and, Derrida, J. "Writing and Difference". Translated by Alan Bass. Chicago: University of Chicago Press, 1978

[9] Rovirosa-Madrazo, Citlali. "Indigenous Rights, Ethnocentrism and the Crisis of the Nation-State: Paradigmatic Consideration for Human Rights…", 1995, *op.cit*

[10] Rovirosa-Madrazo, Citlali. 1995 *op.cit.*

[11] Pagden, Anthony. "The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology". Cambridge University Press: Cambridge, 1986.

I argue that this type of reasoning represented a seminal moment in the evolution of anthropocentrism and colonial domination. Whilst the Europeans had already begun to change their relationship with nature (to one of exploitation), the native populations of the Americas had preserved (and still do) their ability to communicate with and revere nature in a language unintelligible to the coloniser.

If in the past the Spaniards' failure to understand the languages/linguistic systems of the indigenous nations and their failure to communicate with them helped to reinforce the colonisation process; the very failure to appreciate the natives' own communication with nature, particularly (but not exclusively) with animals, also contributed to reinforce the coloniser's prejudices which justified the colonising process, whilst exhibiting the first signs of anthropocentrism.

The Spanish *conquistadores* not only failed to appreciate and understand the linguistic differences and the languages and vernaculars spoken by the native populations they encountered; but they also failed to appreciate that the latter were in fact often communicating with animals, sometimes mimicking, or reproducing the sounds they emitted. This fundamental mistake in the understanding of the *other*, this error in the perception of the natives' own communication with nature, might have influenced the development of western anthropocentrism, and the development of colonial epistemologies. Five centuries later, some are beginning to understand that the ancestral traditions of the indigenous and tribal populations of the world, and their linguistic and legal systems developed a more sophisticated, constructive, and intelligent relationship with nature (Escobar 2003, 2011, Cullinan 2003, Acosta 2011, Shiva 2011)[12] than the mechanistic, anthropocentric, rapacious, and predatory relationship the West produced.

[12] See the paradigmatic work of pioneering Cormac Cullinan: "Wild Law. A Manifesto for Earth Justice" Cullinan, Cormac. Wild Law: A Manifesto for Earth Justice. 2nd ed. Totnes: Green Books in association with the Gaia Foundation, 2003. See also, Acosta, Alberto. "Los Derechos de la Naturaleza. Una lectura sobre el Derecho a la Existencia." in, "La Naturaleza con Derechos: de la Filosofía a la Política", edited by Alberto Acosta and Esperanza Martínez, 317-68. Quito: Universidad Politécnica Salesiana/Ediciones Abya-Yala, 2011; and. In the same volume, see, Shiva, Vandana. "Democracia de la Tierra y los Derechos de la Naturaleza.", (in, "La Naturaleza con Derechos: de la Filosofía a la Política", edited by, Alberto Acosta and Esperanza Martínez, 139-71. Quito: Universidad Politécnica Salesiana/Ediciones Abya-Yala, 2011). The work of Escobar is also relevant, see Escobar, Arturo. "Ecología Política de la Globalidad y la Diferencia.", in, "La Naturaleza Colonizada. Ecología Política y Minería en América Latina, edited by Hector Alimonda, 61-92. Buenos Aires: Consejo Latinoamericano de Ciencias Sociales, 2011; See, by the same author, "Mundos y Conocimientos de Otro Modo. El Programa de Investigación de Modernidad/Colonialidad Latinoamericano.", in, Tabula Rasa, no. 1 (2003): 51-86. https://doi.org/10.25058/20112742.188. https://www.redalyc.org/articulo.oa?id=39600104

Decolonising Jurisprudence: from International Law and 'Free Trade' Agreements to Ecocide Law

This colonial world vision with deep logocentric roots (*cf.* Derrida 1971, 1978, Rovirosa-Madrazo 1991, 1995)[13] was not only the product of an ideological perception of the world instilled with Eurocentric and racist prejudices (Kusch 2007, Falkowski 1992, De Sousa Santos 2011, Escobar 2003, Magallón Anaya 1991, Clavero 2008, Bernasconi 1992, Todorov 1984, O'Gorman 1992).[14] It was, of course, the result of the ideological framework the European colonisers needed in order to justify the domination and colonisation of the American territories, and their natural resources during different stages of early capitalism and, later, in the post WWII emerging 'intranational world order' (Osterhammel and Jansen 2017).[15]

The complex process simplified above involved three main epistemological factors underpinning their paradigm of civilisation which can, again, be summarised as (i) Eurocentrism, (ii) anthropocentrism, and (iii) patriarchy. For space reason we only touch here the first two[16], but all three constituted foundations for the development of the capitalist doctrine, which to this day prevails in the form of Neoliberalism –seen by many as the leading cause of ecocide. Socialist doctrines or systems which have been as harmful to the environment as capitalism, share similar epistemological roots with the latter – Marxism, with all its

[13] Derrida, Jacques. "De La Gramatología." México: Siglo XXI, 1971, and. Derrida, J. "Writing and Difference". Translated by Alan Bass. Chicago: University of Chicago Press, 1978. Rovirosa-Madrazo, Citlali. "Analfabetismens Censur". In Magtens Tavse Tjener : Om Censur Og Ytringsfrihed : Et Debatskrift Med Essays, Der Spænder Fra Vaclav Havel Til Salman Rushdie, edited by Nils Barfoed. København: Spektrum, 1991; and Rovirosa-Madrazo, C. 1995 *op.cit*

[14] On these issues see the following, Kusch, Rodolfo. "América Profunda". Buenos Aires: Librería Hachette, 1962; Fitzpatrick, Peter. "The Desperate Vacuum : Imperialism and Law in the Experience of Enlightenment." *Droit et Société*, no. 13 (1989): 347-58. https://www.persee.fr/doc/dreso_0769-3362_1989_num_13_1_1042; Falkowski, James E. "Indian Law/Race Law: A Five-Hundred-Year History". New York: Praeger, 1992. Clavero, Bartolomé. "Genocide or Ethnocide, 1933-2007. How to unmake, and remake Law with words". in, per la storia del pensiero giuridico moderno 82. Universita di Firenze. Volume Ottantaduesimo. Milano: Giuffre Editorede. Sousa Santos, Boaventura. "Epistemologías del Sur." In, Utopía y Praxis Latinoamericana 16, no. 54 (2011): 17-39. https://produccioncientificaluz.org/index.php/utopia/article/view/3429/3428. Magallón Anaya, Mario. "Dialéctica de la Filosofía Latinoamericana: Una Filosofía en la Historia. México: UNAM, 1991. "Mundos y Conocimientos de Otro Modo. El Programa de Investigación De Modernidad/Colonialidad Latinoamericano." In, Tabula Rasa, no. 1 (2003): 51-86. https://doi.org/10.25058/20112742.188. https://www.redalyc.org/articulo.oa?id=39600104. O'Gorman, Edmundo. "Fantasmas en la Narrativa Historiográfica." Nexos 15, no. 175 (1992): 49-52. Todorov, Tzvetan. "The Conquest of America: The Question of the Other". New York: HarperCollins, 1984. Bernasconi, Robert. "Who is my Neighbour? Who is the Other? Questioning 'the Generosity of Western Thought'." Ethics and Responsibility in the Phenomenological Tradition: *The Ninth Annual Symposium of the Simon Silverman Phenomenology Center*, Pittsburgh, Simon Silverman Phenomenology Center, Duquesne University, 1992.

[15] Jansen, Jan C., and Jürgen Osterhammel. "Decolonization: A Short History". Translated by Jeremiah Riemer. Princeton, NJ: Princeton University Press, 2017

[16] For analytical purposes in this article, we focus on Eurocentrism and anthropocentrism, but this is not to disregard the relevance of patriarchal thinking.

paradoxes, being a case in point (Rovirosa-Madrazo 1995, Short, 2010, Zibechi 2022).[17] Of these factors, anthropocentrism and eurocentrism have perhaps been the most influential[18] and decisive with respect to the IP, afro-descendent communities, and tribes of the Americas.

The ideologies in question permeated every layer of western political, legal, and economic thought; they remain present everywhere in different forms: from national constitutional narratives and international law to the wording of Free Trade Agreements (Clavero 2019, Peres Rocha, Rovirosa-Madrazo, 2022)[19] and development doctrine/policies (*cf.* Esteva, 1992, 2022, Escobar, 1995, 2000, Latour 2019) in the era of Neoliberalism, which has commodified nature to extremes not seen before (*cf.* Short 2014, Crook *et al* 2018).[20] Some of these complex ideological processes help understand how and why colonialism robbed the indigenous nations of their past whilst globalisation steals their present (de Sousa Santos 2009, Latour 2019)[21] and why a profound radical change of paradigms is imperative.

[17] On the paradoxes of Marxism, particularly Engels' view on what we now call *genocide*, seer Short 2010 *op. cit.* Concerning Marxism in Latin America and the Marxist concept of what I called the 'Ontological Privilege of the Proletariat' v. indigenous peoples, see Rovirosa-Madrazo 1995 *op.cit.* pp 72-76, 132-149. A brief reflection on the contrast between the Marxist theory of materialism and the indigenous cosmovision in the Americas, can be read in, Raúl Zibechi. "Espiritualidad y autonomía" https://www.jornada.com.mx/2022/10/21/opinion/019a1pol, Accessed 21 October

[18] A comprehensive compilation on the subject can be read in, Acosta, Alberto, and Esperanza Martínez, eds. "La Naturaleza con Derechos: de la Filosofía a la Política". Quito: Universidad Politécnica Salesiana/Ediciones Abya-Yala, 2011

[19] On the potential link between Globalisation, Free Trade Agreements, the WTO, and the changes, in 1996, to the Rome Statute draft removing the crime of Ecocide; see Rovirosa-Madrazo, Citlali. "La Cop26 y la Criminalización del Ecocidio en el Derecho Penal Internacional." *Confidencial*, November 2, 2022, Accessed October 4, 2022. https://www.confidencial.digital/opinion/la-cop26-y-la-criminalizacion-del-ecocidio-en-el-derecho-penal-internacional/. See also the work of Manuel Perez Rocha, at the Institute for Policy Studies www.ips-dc.org The document "Ciudadanos Mexicanos ante los Acuerdos de Libre Comercio" (produced and edited by various authors, including Pérez Rocha and Rovirosa-Madrazo, 1998, regarding the impact of free trade on the indigenous peoples, is also relevant.
See also on this subject, Barreda Marín, Andrés, *ed*., "Juicio al Estado Mexicano por la Violencia Estructural Causada por el Libre Comercio". Ciudad de México: Editorial Itaca, 2016

[20] On the commodification of nature in general from a Marxist perspective, see Crook, Martin, Damien Short, and Nigel South. "Ecocide, Genocide, Capitalism and Colonialism: Consequences for Indigenous Peoples and Glocal Ecosystems Environments." Theoretical Criminology 22, no. 3 (2018): 298-317. https://doi.org/10.1177/1362480618787176. https://journals.sagepub.com/doi/abs/10.1177/1362480618787176.. Regarding the commodification of natural resources and their extreme exploitation in the age of neoliberalism, see, though in a more general context, the opinion articles by George Monbiot, in the British Newspaper *The Guardian*

[21] See Lataur, Bruno "Dónde aterrizar. Cómo orientarse en política". Traducción de Pablo Cuartas. Barcelona: Taurus/Penguin Random House Grupo Editorial, 2019.; and, de Sousa Santos, Boaventura. "Una Epistemología Del Sur. La Reinvención del Conocimiento y la Emancipación Social". México: Consejo Latinoamericano de Ciencias Sociales/Siglo XXI Editores, 2009

Neo-colonialism: State Sovereignty v. Mother Earth and Indigenous Peoples.

During the most important international law debates of the early to mid-20th Century concerning the IP, they were denied the legal status of nations. Instead, they were defined as 'minorities' existing within the hegemonic national borders. Any status and rights granted to them were reduced to the status of 'minorities' rights (Stavenhaguen 1997; 44-64).[22] Indeed, during the debates over the Convention on the Prevention and Punishment of the Crime of Genocide (1948) regarding non-self-governing territories, cultural genocide proved to be one of the more contentious elements (Short 2010: 834, Clavero 2019)[23] leaving the protection of 'minorities' to conventions on human rights and minority rights. This was problematic from the outset because of the close link between culture, territoriality, and indigenous land ownership. Subsequently most Latin American constitutions, save a few exceptions, failed to recognise the ancestral, historical existence of indigenous peoples/tribes as groups *preceding* the existence of the modern states that claimed supremacy and sovereignty over them (Clavero 1997, Gómez (*ed*) 1997). This, added to cultural genocide (*cf.* Lemkin)[24], in the long term came to undermine any claims to self-governing, self-determination and indigenous autonomy over indigenous territories, hence reducing indigenous peoples' ability, decades later, to resist environmental destruction and ecocide – be it caused by corporations, or by governments.

It took a long time for the UN to develop the concept of indigenous rights, and a mechanism for the protection of the indigenous peoples/tribes of the world. This was partly due to the emerging "international world order" after the European wars of the 20th Century and the subsequent international law system. Indeed, for some historians the UN was the result of a re-structured and new division of world powers – a process today known as neo-colonialism.

[22] The process of transition from minorities rights to indigenous peoples' rights in international law is complex and had huge consequences, but for space reasons we cannot here expand on this issue. To read on the subject see: Stavenhagen, Rodolfo "El Marco Internacional del Derecho Indígena.", in, Derecho Indígena, edited by Magdalena Gómez, 43-64. México: INI-AMNU, 1997. See also the work of Clavero *op.cit* infra/supra

[23] Short, Damien. "Cultural Genocide and Indigenous Peoples: A Sociological Approach." The International Journal of Human Rights 14, no. 6 (2010/11/01 2010): 833-48. https://doi.org/10.1080/13642987.2010.512126

[24] Regarding the link between Lemkins's seminal concept of Genocide, cultural genocide, and, ecocide, see the critical work of, Crook, Martin, Damien Short, and Nigel South. "Ecocide, Genocide, Capitalism and Colonialism: Consequences for Indigenous Peoples and Glocal Ecosystems Environments." Theoretical Criminology 22, no. 3 (2018): 298-317 https://doi.org/10.1177/1362480618787176, and https://journals.sagepub.com/doi/abs/10.1177/1362480618787176. On the same issue, see the equally critical work of Clavero, Bartolomé. "Genocide or Ethnocide, 1933-2007. How to unmake, and remake Law with words", in, *per la storia del pensiero giuridico moderno* 82. Universita di Firenze. Volume Ottantaduesimo. Milano: Giuffre Editore

On the other hand, this process, in the second half of the 20th Century and following the various wars of independence of the 19th Century and early/mid-20th Century, was dominated by the modern state paradigm (*cf.* Cassirer 1961).[25]

Indeed, the very concept of nation-state is the reason why it took so long for the UN to develop a legal framework that focused on the protection of the rights of indigenous nations and, indeed the rights of nature, which was eventually advanced in the aftermath of the UN 1972 Stockholm Summit and later the UN Rio 1992 *Earth Summit* which set the basis for the Biodiversity Convention which, in turn, recognised, in its preamble, the importance of the IP in the conservation of the then defined "Biologic Resources". [26]

Ultimately, in many ways, the former states were born out of the idea that nature – planet Earth- was an entity which could be fragmented, divided, and distributed amongst powers (mostly led by white European men).

This fragmentation of the Earth implied the belief in an unchallenged sovereign supreme power over it, and the privilege right to appropriation of the natural resources contained therein. Although Mother Earth distinguishes no frontiers, national borders have been forced upon it as a result, in many instances, of patriarchal, Eurocentric colonial powers, often through war (*cf.* Rovirosa-Madrazo 2022, Shiva 2011)[27]: indigenous peoples have always known this.

Beyond its merits and potentials in the pursue of peace and justice, the fact that the recently created *crime of aggression* at the ICC is focused on the violation/invasion of the countries existing within established national borders, is an indication of the deep anthropocentrism cemented at very profound levels of international law, in that we often seem unable to recognize

[25] On this subject see, Cassirer, Ernst. "The Myth of the State". New Haven: Yale University Press, 1961.
[26] It was also the *Earth Summit* that approved the Agenda21 with Chapter 26 focusing on the recognition and strengthening of the role of Indigenous communities for sustainable development. See the UN's Foro Permanente para las Cuestiones Indígenas de Naciones Unidas (E/C.19/2010/4). 2010. Estudio sobre la necesidad de reconocer y respetar los derechos de la Madre Tierra. Nueva York: Naciones Unidas - Consejo Económico y Social, p 3, and https://www.un.org/en/conferences/environment/rio1992
For the Biodiversity Convention, see: http://www.cbd.int/convention
[27] This is an argument I suggested in an opinion article regarding the current Russian war of aggression in Ukraine. See Rovirosa Madrazo, Citlali 2022. "Ucrania: la extraña y mortífera 'geopolítica' del patriarcado.", accessed September 30, 2022. https://www.confidencial.digital/opinion/ucrania-la-extrana-y-mortifera-geopolitica-del-patriarcado/. (Rovirosa-Madrazo 2022). See on this also Shiva, Vandana. "Democracia de la Tierra y los Derechos de la Naturaleza.", in, "La Naturaleza con Derechos: de la Filosofía a la Política", edited by Alberto Acosta and Esperanza Martínez, 139-71. Quito: Universidad Politécnica Salesiana/Ediciones Abya-Yala, 2011.

that wars of aggressions not only devastate human communities living withing those borders, but also destroy all *ecosystems* contained therein (Rovirosa-Madrazo 2022).

And although concerns for damage to the environment are already covered as war crimes in the Rome Statute (Article 8(2)(b)(iv) of the ICC, the issue often seems delegated to the margins (*cf.* Ambos 2021, Keller 2021).[28] For all its contributions to our civilisation and for all the extraordinary progress made in international law relating to the rights of IP (especially, but not exclusively, the 169 ILO Convention and the 2007 UN *Declaration on the Rights of Indigenous Peoples*) the fact remains, indigenous territories, like all Mother Earth, continue to be constrained and subsumed within the national sovereignty framework drown within the borders established from colonial times, through to the League of Nations – all which is made worse by the fact that the said instruments are rarely enforced, and the fact that EL jurisprudence would be forced to operate, for obvious reasons, within the modern state paradigm.

Ignoring from the outset the indissoluble link between indigenous culture, territoriality, and tribal/indigenous land ownership was no accident: it was what capitalism and modern states had to do to prevail.

This was why constitutional narratives in most Latin American constitutional reforms – save a few exceptions – failed, as remarked above, to recognise the ancestral historical existence of indigenous peoples/tribes as *preceding* the existence of the nation-state (Clavero 1997).[29] Claiming supremacy and sovereignty over the former was the way nation-states had to secure ownership and exploitation of the land, natural resources, and territories.

The greatest irony is that, whilst the sovereignty of the modern state remains, understandably, undisputed by most international law provisions and national constitutions regulating indigenous rights; the transnational corporations appear to have taken over and filled the gap. Where there was a jurisprudence gap in positive law regarding the collective ownership of land

[28] Some authors and jurists make the case that, the crime of ecocide is implicit and central in the all other ICC crimes and that there no need for its explicit criminalization, see for example, Ambos, Kai, "Protecting the Environment through International Criminal Law?" European Journal of International Law *ed*. EJIL:Talk! , September 28, 2022, 2021, https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/. For a more unconvinced author, see Heller, Kevin Jon. "Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)", http://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/, 2021

[29] Clavero, Bartolomé. "Muticulturalismo y Monoconstitucionalismo de Lengua Castellana en América.", in, "Derecho Indígena", edited by Magdalena Gómez, 65-113. México: INI-AMNU, 1997

and natural resources by the IP, corporations have taken over. The consequences for ecocide are lethal.

Eurocentric and Anthropocentric Ideologies

The historical, epistemological, ideological, and juridical preconceptions that led us to this point are complex and cannot be analysed here, but it is important to emphasise that, in addition to the paradigms of sovereignty, many old prejudices became, as already suggested, entrenched in the League of Nations centuries after the colonisation of the Americas and following the wars of independence of the 19th Century.[30] The question of sovereignty remains a constant challenge for the indigenous rights today, which is not to say that indigenous communities are claiming separation from their countries: in fact, the opposite is true in most cases.

The relevance of this is that the same analytical, ideological, and juridical mistakes of the past appear to be repeated concerning the rights of nature today, because in the western cosmovision, humans were not conceived as part of nature, whilst nature itself was conceived as belonging to nations and dominions whose borders (established by imperial powers) remain as "sacrosanct" (Bauman and Rovirosa-Madrazo 2010, Rovirosa-Madrazo 2010, 2023)[31]. This is why many Latin American states have sustained ambivalent, inconsistent, contradictory terms when defining the rights to self-determination.

But this is also why, indigenous organisations, councils, and assemblies in the Americas (and other regions) are building their own legal narratives, particularly since the emergence, in the 1990s, of what some have called 'new Latin-American constitutionalism' (*cf.* Dalmau 2011, 2018)[32] or the emergence and constitutional revindication (specially Andean jurisprudence) of *Pachamama* and natures' rights in countries like Ecuador and Bolivia (*cf.* Zaffaroni 2011, Acosta 2011, 2022, Cullinan 2008, de Sousa Santos Boaventura, 2006, Rovirosa-Madrazo

[30] The analysis of Rodolfo Stavenhaguen and Bartolomé Clavero are crucial here, see *op.cit* (supra/infra)
[31] Bauman, Zygmunt, and C. Rovirosa-Madrazo (2010) *op.cit*. The epistemological legacy of the Cartesian Eurocentric binary reasoning, and the way in which it influenced western epistemology (and hence anthropocentrism), is a theme I discussed in Rovirosa-Madrazo 2010 *op.cit*. I further developed it, in, C. Rovirosa-Madrazo: "A new epistemology for the post-Anthropocene. Crimes against Nature. Considerations on the roles of universities to avert Ecocide" (*forthcoming*). University of York. IGDC. (2023
[32] Concerning the debate about new *constitutionalism* in Latin America, see Martínez Dalmau, Ruben "¿Han funcionado las constituciones del nuevo constitucionalismo latinoamericano?", in *Cultura Latinoamericana*. 28 (2), pp. 138-164, DOI https://dx.doi.org/10.14718/CulturaLatinoam.2018.28.2.7, and by the same author, Martínez Dalmau, Ruben. "El nuevo costitucionalismo latinoamericao: fundamentos para una construcción doctrinal" Revista General de Derecho Público Comparado No9, (2011) in, https://www.academia.edu/6339900/El_nuevo_constitucionalismo_latinoamericano_fundamentos_para_una_construcci%C3%B3n_doctrinal

2010, 2020, 2021)[33], and, the subsequent indigenous movements demanding and creating *constituyentes* assemblies pushing for more radical constitutional reforms focused on indigenous and nature's rights or the creation of international instances such as the *International Rights of Nature Tribunal*. Another relevant and recent case evolved in Chile under the newly inaugurated government of President Boric, and which involved a complex debate concerning indigenous rights, the rights of nature and, indeed, the criminalization of ecocide[34].

These gradual changes have also been reflected in international law, particularly the UN system which in recent times developed a wider jurisprudence where both, nature and IP have gained centrality. Thus, the indigenous people's cosmovision of RN eventually influenced international environmental law (IEL), and, whilst things are still evolving, they are moving in the right direction, proving that indigenous peoples' rights, human rights, and nature's rights are indivisible.

[33] Zaffaroni, Eugenio Raúl. "La Pachamama y el Humano." in, "La Naturaleza con Derechos: de la Filosofía a la Política", edited by Alberto Acosta and Esperanza Martínez, 25-137. Quito: Universidad Politécnica Salesiana/Ediciones Abya-Yala, 2011. For a more general analysis on the American Continent, see: de Sousa Santos, Boaventura. "Renovar la Teoría Crítica y Reinventar la Emancipación Social". Buenos Aires: Consejo Latinoamericano de Ciencias Sociales, 2006. See also, Rovirosa-Madrazo *op.cit* 2010, and, Rovirosa-Madrazo Citlali, "Sínodo Amazónico, COP25 y Pachamama: el legado para el 2020", in Revista Confidencial, https://www.confidencial.com.ni/opinion/sinodo-amazonico-cop25-y-pachamama-el-legado-para-el-2020/, enero 2020; and, Rovirosa-Madrazo Citlali, "La CELAC no va a salvar al continente americano de ecocidio", in Revista Confidencial, https://www.confidencial.com.ni/opinion/la-celac-no-va-a-salvar-al-continente-americano-de-ecocidio/, septiembre 2021

[34] The most fact recent example exposing this prejudice is the case of Chile where, as late as 2022, the people in that country voted overwhelmingly against constitutional reforms to include indigenous rights and the rights of nature in President Boric's government project. The proposed reform defined the Chilean State as '*pluri-national'* (as opposed to *multicultural*). It is important to note that the reasons for the rejection of the draft that included a wide range of rights are complex. Many agree that, to a great extent the rejection was the result of disinformation. Thus, for Chilean analyst Pamela Figueroa: "many opponents to the constitutional text associated pluri-nationality with the 'fragmentation of the country' and with the creation of 'privileges' for the native indigenous peoples", quoted in, "Triunfo del 'rechazo'. La (aparente) paradoja de Chile: 3 razones para entender el no a la nueva Constitución cuando casi el 80% estaba a favor de cambiarla", https://www.bbc.com/mundo/noticias-america-latina-62790749
Thus, the fear of creating a 'regimen of exception' or special rights for certain groups appears to have influenced the decision to reject the constitution. See also, Acosta, Alberto. "Chile reconoce los derechos de la naturaleza", in Revista Confidencial https://www.confidencial.com.ni/opinion/chile-reconoce-los-derechos-de-la-naturaleza/, 2022, and, Martínez Dalmau, Rubén. "Chile: Apuntes De Urgencia Sobre El Referéndum Constitucional." Latinoamérica21, September 5, 2022. (September 5, 2022). Accessed October 3, 2022. https://latinoamerica21.com/es/chile-apuntes-de-urgencia-sobre-el-referendum-constitucional/.

Criminalising ecocide: condition of possibility to mitigate the bioclimate collapse and to protect the rights of indigenous peoples.

It is now well known that 80% of the world's biodiversity is found in indigenous territories where it has always been protected by its original inhabitants. Today, IP who make up to 6% of the world population, are expected to be custodians of the world's biodiversity and to be responsible for the preservation of wildlife. Additionally, over 90% of forested lands held by indigenous peoples in the Amazonia Basin encompass those carbon sinks so crucial for regulating the planet temperature. When the global expansion of protected areas was recently agreed at the 2022 Cop15 Biodiversity Summit with a target to preserve 30% of land and sea by 2030; emphasises was made on the protection of indigenous rights and territories. However, there is something fundamentally wrong about a civilisation that delegates the stewardship of biodiversity to the smallest and most vulnerable population of the planet. Furthermore, the mentioned initiative and the so-called 'carbon credits' market, will not be sufficient for the protection of the IP or, indeed, to mitigate the worse effects of climate change. This is why criminalising ecocide is crucial.

Reflecting on the paradoxes, limitations, and complex relationship between international criminal law (ICL), international environment law (IEL) and international human rights law (IHRL) regarding environmental crimes, some jurists have considered the value of Ecocide Law (EL) and the merits of combining all four approaches (*cf.* Robinson 2022). I will suggest that all mentioned jurisprudence, as well as all international provisions concerning the rights of indigenous peoples are essential for the consolidation of a legal system geared at protecting, simultaneously, nature and IP; whilst at the same time providing a legal framework towards climate change mitigation. In this sense, the existing body of Earth jurisprudence (*cf.* Berry 1988, 2004 Cullinan 2002, Acosta 2011, Boff 1997) as well as some Latin-American constitutions have already paved the way (*cf.* Acosta 2011, Gómez 1997, Iturralde 1997 Rovirosa-Madrazo 2010)[35].

[35] Citlali Rovirosa-Madrazo (2010b) "Derechos Indígenas, Derechos de la Naturaleza, Biodiversidad y Seguridad Alimentaria en América Latina ante el Cambio Climático." Paper presented at the Annual Meeting of the Americas Section of the United Nations' Office of the High Commissioner for Human Rights, Panama City, Panama, United Nations' Office of the High Commissioner for Human Rights, 2010. This was not a public event. Regarding this debate see also Rodolfo, and Diego A. Iturralde, *eds*. "Entre La Ley y la Costumbre. El Derecho Consuetudinario Indígena en América Latina". México: Instituto Indigenista Interamericano & Instituto Interamericano de Derechos Humanos, 1990; and, Acosta 2011, *op.ci,* and, Gómez 1997 *op.cit.*

Although the link between biodiversity protection and indigenous peoples was generally recognised since the 1992 Earth Summit and later in the Biodiversity Convention[36], there is now irrefutable scientific consensus (summarised in the latest IPCC statement/reports[37], and the quoted World Resources Institute ("WRI") report that nature cannot be protected without the protection of the former,[38] and the other way around: indigenous and tribal peoples cannot be fully protected without the explicit and comprehensive legal protection of the ecosystems they inhabit. Hence the historical challenge for Ecocide Law.

According to the IWGIA it is estimated that around 30% of the Earth is inhabited and managed by indigenous peoples[39]. Yet, according to WRI, while national laws in many countries now recognise collective land ownership and customary land tenure arrangements, only 10% of the world's land is legally recognized as belonging to indigenous peoples and communities.[40] This disparity reflects the ongoing conflict between positive law and customary law (Rovirosa-Madrazo 1995). Although every legal system stem from custom and tradition – customary law in general being a crucial source of law (*cf.* Kelsen)[41] – indigenous customary law has always been placed in the periphery and discriminated against (Fitzpatrick 1989: 348)[42]. Collective ownership of land established in the former, remains a contending, thorny issue**.** It is not surprising then that in countries like México there is going conflict between the government and the indigenous peoples, particularly the Mayas of the EZLN, regarding the collective rights

[36] As early as the UN Rio1992 Earth Summit which set the basis for the Biodiversity Convention which in turn recognised, in its preamble, the importance of the indigenous peoples in the conservation of the then defined "Biologic Resources". It was also the Earth Summit that approved the *Agenda 21* with Chapter 26 focusing on the recognition and strengthening of the role of Indigenous communities for sustainable development. See the UN's *Foro Permanente para las Cuestiones Indígenas* de Naciones Unidas (E/C.19/2010/4). 2010. Estudio sobre la necesidad de reconocer y respetar los derechos de la Madre Tierra. Nueva York: Naciones Unidas - Consejo Económico y Social, p 3. For the Biodiversity Convention, see: http://www.cbd.int/convention

[37] The latest IPPC report is the result of scientific consensus in admitting the role of indigenous peoples in the protection of the environment and the impact on them of its destruction. See also the UN's *Foro Permanente para las Cuestiones Indígenas de Naciones Unidas* (E/C.19/2010/4). 2010. *Estudio sobre la necesidad de reconocer y respetar los derechos de la Madre Tierra*. Nueva York: Naciones Unidas - Consejo Económico y Social, p 3. For the Biodiversity Convention, see: http://www.cbd.int/convention

[38] See, https://www.wri.org/insights/ipcc-calls-securing-community-land-rights-fight-climate-change, last accessed September 2022

[39] https://iwgia.org/doclink/iwgia-book-the-indigenous-world-2021-eng/eyJ0eXAiOiJKV1QiLCJhbGciOiJIUzI1NiJ9.eyJzdWIiOiJpd2dpYS1ib29rLXRoZS1pbmRpZ2Vub3VzLXdvcmxkLTIwMjEtZW5nIiwiaWF0IjoxNjI4ODM5NjM2LCJleHAiOjE2Mjg5MjYwMzZ9.z1CuM7PcT5CPkV0evx8ve88y6v0vmwDu_51JQ_lwAkM

[40] https://www.wri.org/insights/ipcc-calls-securing-community-land-rights-fight-climate-change, last accessed September 2022

[41] Kelsen, H. "General Theory of Law and the State". Harvard: Harvard University Press. 1945

[42] Fitzpatrick, P "The desperate vacuum: imperialism and law in the experience of Enlightenment", in Droit et societe No 13: 347-358, 1989

to land ownership and self-determination (Rovirosa-Madrazo 2002, 2012, Gómez 1997, 2021, 2022)[43].

If indigenous peoples are not granted full sovereignty over their territories under international law and under the constitutional jurisprudence of those nation-states that they inhabit; the potential for biting Ecocide Law diminishes, whilst achieving climate justice becomes even more remote. If these communities are not recognised as sovereign entities; if they are not granted collective rights, then the natural resources, biodiversity and ecosystems contained within their territories, become more vulnerable to the crime of ecocide. This is why the announcement (2016) of the Office of the Prosecutors at the ICC in the Hague that it would for the first time concern itself with land-grabbing or illegal dispossession of land and environmental damage was significant (Crook *et al*, 2018: 310).

In short, advancing constitutional reforms and enforcing the rights to self-determination in the territories is a condition of possibility for the international criminalization of ecocide, and vice versa, the latter is *sine quan nem for* the latter national laws to be enforced.

[43] Rovirosa-Madrazo, Citlali. "Chiapas between War and Peace. Towards a Sustainable Humanitarian Strategy." Paper presented at the conference I organised: "Peace building, constitutional reforms and humanitarian assistance in Chiapas", University of York - Post-War Reconstruction and Development Unit (PRDU), July 9, 2002. Regarding this ongoing conflict between the government and the Zapatistas, see, Gómez, Magdalena. "Los Acuerdos de San Andrés, más que una Efeméride." La Jornada. (February 16, 2021). Accessed October 13, 2022, in https://www.jornada.com.mx/2021/02/16/opinion/017a2pol, and , Gómez, Magdalena, 1997 *op.cit*

The 169 OIT Convention and the crime of ecocide

Each instrument devised within the auspices of the UN in recent decades/years geared towards the protection of the rights of the indigenous nations could become meaningless if an international legal framework to criminalise ecocide is not established, especially when extractivism by reckless transnational corporations become more aggressive – be it through mining, fracking, water, or lithium extraction etc. The compelling question is then, how can the commitments made by the international community to mitigate the bioclimate crisis be delivered, if the existing body of human rights law (particularly concerning the RN, environmental rights, and indigenous rights) is not supported within a new international criminal law framework around ecocide: could the criminalisation of ecocide under the ICC play a pivotal role in enforcing the former?

The enforcement of the 169 OIT Convention is an example of what we mean when we say Ecocide Law (EL) is a *condition of possibility* for delivering some commitments to tackle the bioclimate emergency. Without implementing it, more climate calamities are likely. EL could play a crucial role in pushing its enactment in those countries that have ratified it, and yet, systematically infringe it. In turn, the compliance with the 169 Convention could help push forward the Rome Statute's reforms necessary towards criminalising ecocide.

Indeed, it is difficult to imagine how, in the current political climax the 169 would be truthfully observed if there is no international jurisdiction for the crime of ecocide as proposed by the mentioned "Independent Expert Panel of Jurists" -the case of the obliteration of the Amazonia in Brazil being a paradigmatic example. The problem is of course that the 169 (concerning prior/informed/consent regarding extractive activities and megaprojects in their territories); is played down, when not infringed, by governments as Francisco Cali Tzay, UN special rapporteur for indigenous peoples reminds us. If the existing international body of law regarding indigenous rights is not strengthened by initiatives such as the criminalization of ecocide; breaches of international law designed to protect indigenous peoples and their territories are more likely.

Similarly, the rights of nature (RN) consecrated in national Constitutions in such countries as Ecuador or Bolivia, are also more likely to become accepted as a universal paradigm if EL is established, further pushing the frontiers of international criminal law and international environmental law. Recognising the RN is then a decisive step towards consolidating Earth Jurisprudence as environmental lawyers have eloquently shown (*cf.* Cullinan, Greene). It is

indeed a decisive step towards the criminalisation of ecocide itself whilst the latter is, in a symbiotic manner, *sine qua non* to consecrate the former in international law and national constitutions. It is an irrefutable fact that the indigenous peoples are and have always been the custodians of biodiversity; their protection is crucial to tackle climate change. If IP are not protected, bioclimate collapse is inevitably accelerated – the destruction of the Brazilian Amazonia and their ancestral peoples being a case in point.

Deconstructing International Law

Furthermore, it may not be an exaggeration to say that, only an international mechanism to criminalise ecocide could address simultaneously both, the bioclimate crisis, and *genocide* in the Amazon basin (as well as other parts of the world). This is why Kate Mackintosh, a vice-President of the named panel of jurists leading the Ecocide Law campaign may be right when she asserts that we are at a critical moment in the development of international law.[44] Criminalizing ecocide could indeed revolutionise international law. This is also why we must listen to environmental lawyer and Judge, Cormac Cullinan, of the *International Rights of Nature Tribunal*, when he asserts that "national and international legal systems were not just allowing the erosion of the Amazon to happen—they were facilitating it".[45] Hence the relevance today of the *Universal Declaration of the Rights of Mother Earth* adopted (Cochabamba, Bolivia 2010) – critical to understand the changes needed in the international law paradigm (Rovirosa-Madrazo 2010, Cullinan 2003).

Arguably, the advance of Earth and ecocide jurisprudence (*cf.* Boff) must be cemented first and foremost in the recognition of the epistemological factors mentioned earlier that have pervaded western legal and modern state narratives. Indeed, from the point of view of discourse analysis and philosophy of law, the legal edifice needed to criminalise ecocide must be built simultaneously around indigenous cosmovision, and, critical thinking, including anthropological and sociological (*cf.* López y Rivas, de Sousa Santos B. 2006/2009, González

[44] Quoted in, John Harlow, John. "Rethinking the frontiers of international criminal law, Kate Mackintosh is finding new ways to bring war criminals to justice" in, https://newsroom.ucla.edu/magazine/kate-mackintosh-international-criminal-law, 2022

[45] Quoted in, Surma, Katie. "A Thousand Miles in the Amazon, to Change the Way the World Works." Inside Climate News, Updated October 9, 2022, 2022, accessed October 18, 2022, https://insideclimatenews.org/news/09102022/a-thousand-miles-in-the-amazon-to-change-the-way-the-world-works/.

Casanova)[46], ethical, scientific and theological thinking (Berry 2003)[47] – particularly Theology of Liberation and eco-theology (*cf.* L. Boff, 1997, 2009, 2010, 2020, 2021, Rovirosa-Madrazo 2016).[48] Ecocide jurisprudence should thus simultaneously feed on decolonial epistemology, critical thinking, critical jurisprudence (*cf.* Cullinan 2002, 2014, Mignolo 2009, Quijano 1997, Escobar 2011, Rovirosa-Madrazo 1995, 2010, 2023)[49], and juridic pluralism (*cf.* Clavero, Gómez, Stavenhaguen, Martínez Dalmau),[50] and it must be intersectional, interdisciplinary and transdisciplinary.[51] In short, decolonising, and deconstructing law (*cf.* Douzinas 1987, Rovirosa-Madrazo, 1991)[52] including international law (*cf.* Pahuja 2011, Clavero)[53], is a

[46] See particularly, González Casanova, Pablo. "Explotación, Colonialismo y Lucha por la Democracia en América Latina". México D.F.: Inter Pares, 2017; and de Sousa Santos, Boaventura. "Renovar la Teoría Crítica y Reinventar la Emancipación Social". Buenos Aires: Consejo Latinoamericano de Ciencias Sociales, 2006. This Newspaper opinion article by prominent Mexican anthropologist offers an insight on the current estate of the debate, López y Rivas, Gilberto. "Antropologías En Conflicto." *La Jornada*. (June 24, 2022) https://www.jornada.com.mx/2022/06/24/opinion/018a2pol. Accessed October 3, 2022.

[47] See the work of Berry, Thomas. "The New Story." In Teilhard in the 21st Century: The Emerging Spirit of Earth, edited by Arthur Fabel and Donald P. St. John, 77-88. Maryknoll, N.Y.: Orbis Books, 2003

[48] As I argued back in 2016, in Rovirosa-Madrazo and Fernando Cardenal, "Francisco: entre la Ciencia y la Teología Moral". Managua: Hispamer; Pope Francis's ecological Encyclical *Laudato si'* -clearly influenced by critical theology and Theology of Liberation- represents a turning point. Regarding this, see also, Boff, Leonardo. "Evangelio Del Cristo Cósmico: Hacia Una Nueva Conciencia Planetaria". Madrid: Editorial Trotta, 2009

[49] The pioneering work of Cullinan is essential, see Cormac Cullinan, "Wild Law: A Manifesto for Earth Justice". 2nd ed. Totnes: Green Books in association with the Gaia Foundation, 2003. An interview with him can be read in: "The Philosopher of Wild Law" in https://thegreeninterview.com/interview/cullinan-cormac/ Regarding *epistemological decolonisation* see, Rovirosa-Madrazo, C. 1995, 2010 *op.cit*, and Rovirosa-Madrazo C. 2023 (*forthcoming* see fn. 30), Mignolo, Walter "Epistemic Disobedience, Independent Thought and Decolonial Freedom". Theory, Culture & Society, 26 (7-8), 159-181, 2009; Escobar, Arturo: "Epistemologias de la naturaleza y colonialidad de la naturaleza. Variedades de realismo y constructivismo", in, Montenegro (*ed*.) "Cultura y Naturaleza. Aproximaciones a propósito del bicentenario de la independencia en Colombia". Bogotá: Alcaldía Mayor, 2011; Quijano, Aníbal: "Colonialidad del poder, cultura y conocimiento en América Latina", en *Anuario Mariateguiano* vol, IX, no. 9, Lima, 1997

[50] Here the work of Douzinas becomes relevant again: Douzinas, Costas and Warrington, R. "On the Deconstrucction of Jurisprudence: Fin(n)is philosophiae". Journal of Law and Society 14 No 1: 33-46, 1987. See also Douzinas *et all* - "Postmodern Jurisprudence. The Law of Text in the Texts of Law". London: Routledge, 1991

[51] See, de Sousa Santos, Boaventura. "Epistemologías del Sur." Utopía y Praxis Latinoamericana 16, no. 54 (2011): 17-39. https://produccioncientificaluz.org/index.php/utopia/article/view/3429/3428, and de Sousa Santos, Boaventura, "Una Epistemología del Sur. La Reinvención del Conocimiento y la Emancipación Social". México: Consejo Latinoamericano de Ciencias Sociales/Siglo XXI Editores, 2009.

[52] A crucial consideration when deconstructing *legal eurocentrism* and *cultural decolonization* is the fact that, colonial and neocolonial laws have always been developed for and imposed upon nations with large *illiterate* populations and enormous rates of illiteracy. Thus, the duet *literacy-logocentrism* became a pillar column to the epistemological foundations of law, as I argued back in 1991, see: Rovirosa-Madrazo, Citlali. "Analfabetismens Censur". In Magtens Tavse Tjener : Om Censur Og Ytringsfrihed : Et Debatskrift Med Essays, Der Spænder Fra Vaclav Havel Til Salman Rushdie, edited by Nils Barfoed. København: Spektrum, 1991. As Clavero explains (2019 *op.ci.*) the colonial foundations of constitutionalism are complex but need to be understood if real decolonisation is to happen, particularly in the Americas.

[53] Pahuja, Sundhya. "Decolonising International Law: Development, Economic Growth, and the Politics of Universality. Cambridge Studies in International and Comparative Law". Cambridge: Cambridge University Press, 2011

decisive step to achieving the criminalisation of ecocide, both, internationally and withing national constitutions.

The above-mentioned Ecocide Law proposal of 2021 to amend the Rome Statute may be the most advanced initiative since the 1970s, but implicit recognition in the debate of the collective rights of IP is fundamental as most grave cases of ecocide seem to take place on indigenous and tribal land. The recognition of the corpus of international law regarding IP is then, crucial.

Decisive in the ecocide conversation in this new phase is an appraisal of the current status of the Universal Declaration on the Rights of Indigenous Peoples, and the above mentioned 169 Convention - particularly since entering into force of the Escazú Agreement[54] considered the first environmental treaty of Latin America and the Caribbean, crucial to protect the human rights of environmentalists and ensure that decisions concerning the exploitation of resources or development of megaprojects on indigenous territories, must not proceed without the informed consent of IP. Like the 169 Convention, Escazu is crucial in the public debate regarding the amendments to the Rome Statute because it forces us to recognise the indissoluble link between genocide and ecocide and the implications today for the survival of the indigenous peoples.

From Emiliano Zapata to Pope Francis' Encyclical *Laudato si'*

One of the biggest difficulties Ecocide Law faces, is that it must operate within paradoxical, complex international law paradigms/systems: navigating from the UN 'minority rights' early instruments, to the 169 Convention, and the UN *Declaration on the Rights of Indigenous Peoples*, or – to name two more recent developments- the Kunming-Montreal COP15 Agreement, and the UN's *Convention on Biological Diversity* (CBD)[55] -all of which were vital. However, insufficient progress has been made to accommodate and truly protect the rights of indigenous peoples (Chambers, Marés, Stavenhaguen, 1997)[56].

[54] ECLAC/CEPAL-UN. "Escazú Agreement Enters into Force in Latin America and the Caribbean on International Mother Earth Day." (April 22, 2021). Accessed October 13, 2022. https://www.cepal.org/en/pressreleases/escazu-agreement-enters-force-latin-america-and-caribbean-international-mother-earth

[55] For a recent reflection and critique to the outcome and paradoxes of the COP15 Agreement, see Ribeiro, Silvia "Billonarios contra la biodiversidad", in https://www.jornada.com.mx/2022/12/17/opinion/015a1eco, December 2023

[56] Regarding the paradoxes of the 169 Convention, see, Chambers, Ian. "El Convenio 169 de la Oit: Avances Y Perspectivas." in, "Derecho Indígena, edited by Magdalena Gómez, 123-37. México: INI-AMNU, 1997. Marés Carlos, F. "Los indios y sus derechos invisibles", en *ibid.,* pp- 143-180; and, Stavenhagen, Rodolfo. "El Marco

In this long process/transition, the challenge was to secure the civil and political rights granted to their members as *individuals* (International Covenant on Civil and Political Rights), whilst also securing the social, cultural, and economic rights granted to their members groups or *communities* (International Covenant on Economic, Social and Cultural Rights) (*cf.* Stavenhaguen 1997)[57]. But the one thing that did not change was the assumption that, ultimately, modern states retain sovereignty over the indigenous territories -land becoming an object of commercial and trade law after it had become subsumed within the modern nation-state.

Mexican revolutionary Emiliano Zapata, and other indigenous leaders across the Americas understood these paradoxes well: to them the fight for land was not, and is not, a mere fight for natural resources, it is a fight for a spiritual, almost 'mythical' space (*cf.* Stavenhaguen): it is the *collective* defence of Mother Earth and their territories. This issue remains a persistent source of conflict in Latin American countries and can be exemplified with the Mexican case, where peace talks between the modern Zapatistas of the Mayan EZLN, and the Mexican Government, ended up in failure as the latter broke the promises to respect cultural, autonomy and indigenous self-determination (Rovirosa-Madrazo 2002, Gómez, 1997, 2021)[58].

Thus, for Rodolfo Stavenhaguen, the first demand made by the indigenous peoples is the right for land but "not just any land, but a land that has […] belonged to them from time immemorial […] not just land as an economic or productive resources, but *land as territory*"[59].

It is an irony that, the Catholic Church which conceived the so-called 'Doctrine of Discovery' and enacted the *papal bulls* that granted sovereignty over the American territories to the Spanish colonisers which lead to genocide, five centuries later, reinstates a Christian *Theology of Creation* (*cf.* Boff 1997) that teaches that the Earth – considered in Christianity as God's

Internacional Del Derecho Indígena." In. *op.cit*. "Derecho Indígena, edited by Magdalena Gómez, pp 43-64. México: INI-AMNU, 1997.

[57] Stavenhaguen *op.cit*, 1997

[58] Regarding the persistent conflict between the Maya Zapatistas of the *Ejército Zapatista de Liberación Nacional* (EZLN) and the Mexican government, see Rovirosa-Madrazo, Citlali. "Chiapas between War and Peace. Towards a Sustainable Humanitarian Strategy." Paper presented at the conference I organised at York University: "Peace building, constitutional reforms and humanitarian assistance in Chiapas, University of York - Post-War Reconstruction and Development Unit (PRDU), July 9, 2002; and Rovirosa-Madrazo 1995 *op. cit.* See also, Gómez, Magdalena. "Los Acuerdos de San Andrés, Más que una Efeméride." *op.cit.* 2021.

[59] Stavenhaguen Rodolfo. "Comunidades étnicas en estados modernos", América Latina 49 No 1: 11-34, 1989 See also by the same author and former special *UN rapporteur for indigenous peoples*: Rodolfo Stavenhagen, Charters and Claire *eds*. "El Desafío de la Declaración. Historia y Futuro de la Declaración de la ONU sobre Pueblos Indígenas". Copenhague: IWGIA, 2010; and, Stavenhagen, Rodolfo, and Diego A. Iturralde, *eds*. "Entre La Ley y la Costumbre. El Derecho Consuetudinario Indígena en América Latina". México: Instituto Indigenista Interamericano & Instituto Interamericano de Derechos Humanos, 1990.

sacred creation, belongs to *all* living creatures; and that humans are but its custodians, with no privileged claim of sovereignty over it. Hence the historical relevance of Pope Francis' Encyclicals *Laudato si'*[60] (*cf.* Rovirosa-Madrazo and F. Cardenal (SJ) 2016, Boff 1997, Boff and Hathaway 2021)[61]; hence the relevance of his writing on the rights of the indigenous peoples of the Amazonia[62] (Rovirosa-Madrazo 2016, 2020, 2023; Boff and Hathaway 2021)[63].

By way of Conclusion.

It is true that the 2021 amendments to the Rome Statute proposed by the named panel of jurists recognise that the atmosphere is one of the areas where ecocide takes place. However, it must be recognised that the bioclimate crisis represents yet another form of colonisation.

The fact that climate change is affecting the poorest countries and regions of the world and those least responsible for it, forces us to expand the way we understand ecocide and hence, perhaps, the potential prosecution procedures for its criminalisation: it may not be an exaggeration to say that it is nation-states – colluded with corporations – that are colonising the atmosphere.

[60] The official Encyclical by Pope Francis, and other crucial related encyclicals, including *Querida Amazonia* and Fratelli Tutti can be read in full at the Vatican website: see the "Encyclical letter Laudato si' of the Holy Father Francis on Care for our Common Home", in, https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html

[61] The pioneering work of Leonardo Boff which goes back decades, is crucial; particularly his "Cry of the Earth, Cry of the Poor", *op.cit*. See also, Boff, Leonardo and M. Hathaway "Ecology and Theology of Nature", 14 January 2021, https://concilium-vatican2.org/en/original/boff-hathaway. Rovirosa-Madrazo, Citlali and Fernando Cardenal (SJ), *op.cit* 2016, and, Rovirosa-Madrazo, Citlali. "The Epistemological Implications and Political Repercussions of the Ecological Encyclical Laudato Sí" *op.cit*. 2016; approach these issues at length.

[62] Rovirosa-Madrazo, Citlali. "The Epistemological Implications and Political Repercussions of the Ecological Encyclical Laudato Sí." Paper read at the St Bede's Pastoral Centre, York, July 20, 2016. See also, Rovirosa-Madrazo and Fernando Cardenal (SJ) *op. cit*, 2016. The mentioned official Exhortation document by Pope Francis can be read in full at the Vatican website: see the "Post-Synodal Apostolic Exhortation Querida Amazonia of the Holy Father Francis to the People of God and to all Persons of Good Will"; in, https://www.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20200202_querida-amazonia.html

[63] Rovirosa-Madrazo, Citlali: "Ecocidio o la nueva "Doctrina del Descubrimiento", Revista Confidencial, June, 1, 2023. https://confidencial.digital/opinion/ecocidio-o-la-nueva-doctrina-del-descubrimiento/ Rovirosa-Madrazo, Citlali. "Sínodo Amazónico, Cop25 y Pachamama", Revista Confidencial, January 2, 2020. https://www.confidencial.com.ni/opinion/sinodo-amazonico-cop25-y-pachamama-el-legado-para-el-2020/Accessed October 13, 2022. See also, Rovirosa-Madrazo, Citlali and Fernando Cardenal (SJ) *op.cit.* The pionering work of Leonardo Boff which goes back decade, is crucial; for some of his latest analysis, see Boff, Leonardo, "5º Tribunal Internacional De Derechos De La Naturaleza. Veredicto Oficial Sobe a Amazonia", Leonardo Boff, September 30th, 2022, 2021, https://leonardoboff.org/2021/11/14/5o-tribunal-internacional-de-derechos-de-la-naturaleza-veredicto-oficial-sobe-a-amazonia/. See also, Boff Leonardo, and M. Hathaway "Ecology and Theology of Nature", 14 January 2021, https://concilium-vatican2.org/en/original/boff-hathaway/

The increasing emissions to the atmosphere by rich countries, along with the increased deforestation and extractivism on indigenous land, have taken the Anthropocene (*cf.* Krutzen 1995) to a new phase (Rovirosa-Madrazo 2023)[64]. International law and ICL must catch up. EL debates should look beyond the (national) frontiers historically drawn by the powerful and focus on the atmosphere, where a new colonisation of planet Earth seems to be taking place. Further deconstructing the epistemological foundations of western jurisprudence and international law and their distinctively anthropocentric, Eurocentric approach, is crucial to advance the criminalisation of ecocide. This involves acknowledging that the fulfilment of the rights of nature and the rights of IP, particularly self-determination, is crucial to protect natural resources within their territories henceforth advancing Ecocide Law for the sake of all humanity.

Claiming sovereignty over Earth or parts of it was fundamental to the western legal vision. To achieve civil global support towards the criminalisation of ecocide, we may need to challenge the illusions of national borders -if naively invoking John Lennon… As Crook *et al* (2018: 311)[65] wrote, "law may serve humans, but history shows it does not serve the planet, nor does it serve all humans equally". And I would add, one reason for this is that law has separated and detached humans from nature, whilst also fragmenting Mother Earth into countries that alienate, when not exterminate, both her original human inhabitants, and all other species in the biosphere.

[64] C. Rovirosa-Madrazo: "A new Epistemology for the post-Anthropocene. Crimes against Nature. Considerations on the roles of universities to avert Ecocide" (*forthcoming*). University of York. IGDC. (2023)
[65] Crook, Martin, Damien Short, and Nigel South. "Ecocide, Genocide, Capitalism and Colonialism: Consequences for Indigenous Peoples and Glocal Ecosystems Environments." in, Theoretical Criminology 22, No. 3 (2018): 298-317. https://doi.org/10.1177/1362480618787176. https://journals.sagepub.com/doi/abs/10.1177/1362480618787176.