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From Ecocide to Eco-Sensitivity: 'Greening' Reparations at the International Criminal Court

This paper considers the possibilities and challenges facing international criminal law as a means of meaningfully responding to environmental destruction. Noting the interconnections between environmental destruction and the causes, conduct and impacts of mass violence, scholars have explored multiple ways in which international criminal law might be better equipped to respond to such harms. These have ranged from using existing provisions to introducing a new crime against the environment. This paper examines the evolution of these approaches and considers the capacity of international criminal law to respond to environmental destruction. In light of the challenges associated with introducing a new crime, it focuses on the possibilities associated with 'greening' the Rome Statute. Building on this approach, the paper considers whether the reparation framework adopted by the ICC offers an opportunity to meaningfully respond to environmental destruction and related human rights violations. It argues that there are three main ways in which this might be done: (i) by introducing the concept of 'eco-sensitivity' to reparations designed to respond to other anthropocentric harms; (ii) by awarding reparations that explicitly recognise the harm caused by environmental destruction when possible; and (iii) by exploring the possibilities of an environmental approach towards 'transformative reparations'.

Keywords: international crime; the International Criminal Court; reparations; ecocide; environmental destruction

1. Introduction

Periods of mass violence have devastating and far reaching consequences for civilian lives and livelihoods. This reality has prompted the development of diverse avenues through which victims can seek justice and redress for grave human rights violations. International criminal law has become one such avenue, via the evolution of individual accountability, and the introduction of victim participation and reparation mechanisms. The creation of the permanent International Criminal Court (ICC) signalled a commitment amongst its proponents to end impunity and deliver 'justice for victims' around the world.¹ In reality, the Court recognises and responds to a relatively narrow category of victimisations, even when jurisdiction and resource constraints allow it to carry out investigations and prosecutions. The focus on the core crimes of genocide, crimes against humanity, war crimes and the crime of aggression excludes millions who suffer as a result of poverty, hunger, disease, natural disaster, financial crises and inequality.² Even within the context of the core crimes, the prioritisation of certain forms of violence over others obscures the multifaceted harms caused by those crimes.³ In this paper, I consider attempts to address one such obfuscation, namely, the ways in which the anthropocentric nature of the core crimes⁴ renders invisible the destructive harm that mass

violence can have on the natural environment and the people who rely on that environment.⁵ Undoubtedly, much of the destruction of our natural world is carried out during times of peace, often in the context of activities deemed completely legal. However, mass violence also brings threats to the environment, indeed over 80% of all major armed conflicts between 1950 and 2000 took place in locations which sustain roughly half the world's plant species, as well as many rare animal species. Furthermore, the interconnections between environmental destruction and mass violence are increasingly being exacerbated by climate change.⁶ Climate change causes environmental changes that may ignite violence, while conflict also harms the resources communities need to withstand the consequences of climate change.⁷ International criminal law's failure to respond to environmental destruction grows all the more notable and problematic in such contexts.

While debates over ways to respond to environmental destruction and related human rights violations can be traced to the 1970s,⁸ international criminal law has struggled to provide accountability and redress for such harms. This has led campaigners to advocate for the expansion of international criminal law to better encompass environmental destruction. Some have argued in favour of introducing new crimes, such as 'ecocide'⁹ or 'grave' or 'severe' crimes against the environment.¹⁰ The 'moral imperative' to introduce specific criminal accountability for environmental destruction is compelling.¹¹ If international criminal law aims to deliver justice for crimes that 'shock the conscience of humanity', then the ever-increasing awareness of global environmental destruction suggests that environmental crime should be classed as such a crime.¹² However, there are significant barriers to introducing a crime against the environment, ranging from issues around culpability and causation to the political resistance to expanding individual accountability beyond the four core crimes.¹³ Partially in response to these barriers, others have explored the ways in which we might 'green' the current framework, using the existing core crimes to incorporate greater awareness of environmental destruction and related human rights violations.¹⁴ In this context, the ICC Office of the Prosecutor's (OTP) 2016 Policy Paper on Case Selection and Prioritisation,¹⁵ which placed stress on environmental destruction and illegal exploitation of natural resources in selecting future cases, was met with considerable excitement.¹⁶ Although limited by the parameters of the existing core crimes, the Policy Paper signals an increased awareness of the high environmental costs of genocides, crimes against humanity, war crimes and the crime of aggression.

This paper analyses the possibilities and challenges of introducing a new crime and using the existing international criminal law framework to respond to conflict- and atrocity-related environmental destruction. While it acknowledges the need for more significant changes to the framework in the longer term, it argues that the 'greening' of the existing framework offers pragmatic potential for accountability and redress in the short to medium term. In that spirit, the paper then explores how the increased environmental awareness signalled by the OTP's Policy Paper might be taken forward and adapted into the ICC's reparations mandate. It puts forward three suggestions for ways in which we might 'green' reparations. These include (i) adopting an 'eco-sensitive' approach to the design and implementation of reparations for human rights violations; (ii) awarding reparations that explicitly recognise the harm caused by

environmental destruction when possible; and (iii) expanding understandings of ‘transformative’ reparations to encompass underlying environmental discrimination and inequality. The paper acknowledges the already significant pressures that are placed on the ICC’s reparations mandate,¹⁷ and recognises that criminal institutions such as the ICC cannot in and of themselves prevent and respond to the environmental devastation that so often accompanies conflict and mass atrocity.¹⁸ However, it argues that the scale of the problem should invite innovative and flexible legal responses whenever possible – including within existing structures - rather than induce paralysis.

The paper proceeds as follows. Section two places the paper’s arguments in context by exploring the interconnections between mass violence, environmental destruction and grave human rights violations. Section three explores in greater detail the campaigns to achieve greater accountability through international criminal law, and the significance of the OTP’s Policy Paper in this regard. Section four sets out how the ICC’s reparations mandate might be adapted to better respond to environmental destruction. Section five concludes.

2. Mass Violence and Environmental Destruction

Mass violence and the environment intersect in three main ways: environmental destruction can be a *cause* of mass violence, the *conduct* of mass violence can cause environmental destruction, and the continued impacts of that destruction can be a *barrier* to long-lasting peace. This section discusses each in turn.

The Environment as a Cause of Mass Violence

While environmental conditions will inevitably interact with other social, economic and political factors,¹⁹ environmental degradation and destruction is increasingly acknowledged as causing violence to erupt in a number of intersecting ways.²⁰ Environmental neglect can impact negatively on human rights and communities’ welfare, exerting pressure on societies, entrenching societal divisions, and increasing the potential for conflict.²¹ Poverty resulting from unequal, unfair or unsustainable use of natural resources can act as a powerful recruitment tool for rebel groups,²² and can motivate the commencement or continuation of conflict.²³ Such cases can be found for example in the Solomon Islands, where disputes over timber rights, logging and mining revenues, and associated environmental degradation are thought to have been an important factor in the origins of conflict.²⁴ In Liberia, the unsustainable exploitation of natural resources and the related human rights violations perpetrated against the indigenous peoples fuelled the 1980 coup d’état.²⁵ Indeed, the United Nations Environment Programme (UNEP) has estimated that at least forty percent of internal conflicts over the last sixty years have related to the exploitation of natural resources.²⁶

Mass Violence as a Cause of Environmental Destruction

Mass violence can cause environmental destruction in four main ways. First, the environment may be directly attacked as a means of depriving targeted populations of food, water and shelter.²⁷ For example, the US’s use of Agent Orange as a means of destroying the Viet Cong’s forest cover in Northern Vietnam, Cambodia and Laos, caused devastating environmental harm

and a refugee crisis.²⁸ Environmental destruction is also a frequent feature of conflicts involving indigenous populations, which may feature deliberate attacks on the environments on which those populations rely.²⁹ Second, environmental devastation often accompanies other tactics of mass violence and grave human rights violations. For example, Saddam Hussein's burning of 600 Kuwaiti oil wells which resulted in atmospheric pollution spreading as far as the Himalayas, causing a severe threat to the surrounding fragile desert ecosystem.³⁰ Armed forces can also leave trails of environmental destruction behind them through their use of heavy vehicles and the construction of temporary camps.³¹ Forced displacement or movements of refugee populations can also take a toll on the natural world, as those groups seek out shelter, food and other supplies.³² Third, environmental destruction can result from parties to a conflict or perpetrators turning to wildlife poaching or other natural resource exploitation in order to fund their campaign.³³ For example, poaching in the DRC has had disastrous impacts on many endangered animals,³⁴ while the overexploitation of forests in Liberia has threatened the long-term viability of the forest.³⁵ Fourth, and more broadly, conflict can result in 'armed and lawless societies that can severely impact the environment.'³⁶ For example, the influx of small arms into a country can see a shift in hunting practices that can be devastating for local wildlife and the communities who rely on that ecosystem.³⁷

Environmental Destruction as a Barrier to Long-Lasting Peace

Just as environmental pressures can lead to mass violence, the environmental impact of violence can make the restoration of peace more difficult.³⁸ The destruction of the environment can remove natural resources which may have provided a potential platform for cooperation, and practically impact the pool of resources available for social reconstruction.³⁹ It can also limit the possibility of enjoying natural features that cross sectarian divides, such as nature recreation areas. Such limitations make a return to conflict more likely. For example, the UNEP's post-conflict environmental assessment in Darfur noted both the ongoing impacts of conflict-related environmental destruction and the underlying and unresolved tensions around access to natural resources which made continued conflict more likely. As a result, it indicated that 'long term peace [would] not be possible unless...underlying and closely linked environmental and livelihood issues were resolved.'⁴⁰ Transitions from violence to peace can also have high environmental costs, as neo-liberal market forces interact with weakened institutions and post-conflict socio-economic challenges.⁴¹ A study into seven post-conflict states demonstrated that natural resource extraction, deforestation and land use conflicts intensified in the aftermath of conflict, and that the return of displaced populations may cause further environmental damage.⁴² As observed by Millburn, 'while armed conflict is very damaging to biodiversity, the post-conflict period can be even more so.'⁴³ In the longer term, environmental degradation can lead to the release of carbon and the associated exacerbation of climate change, a phenomenon that is likely to pose larger international security threats through changes to the world's physical and geopolitical landscape.⁴⁴

This section demonstrated the multifaceted connections that exist between mass violence, the destruction of the environment. From even the limited examples included here, it can be seen that conflict can have significant detrimental impacts on the environment that can be long-term

and have serious consequences for human rights, health and wellbeing, as well as the environment itself.⁴⁵ The following section explores international legal responses to these impacts, focusing in particular on attempts to pursue greater individual criminal liability for environmental destruction.

3. Responding to Environmental Destruction

Growing international awareness of the connections between mass violence, human rights violations and environmental destruction has resulted in the expansion of legal frameworks governing environmental protection.⁴⁶ Examples include the adoption of the Environmental Modification Convention,⁴⁷ the Declaration and Protocol on Asphyxiating Gases and Bacteriological Methods of Warfare, and Additional Protocol I to the Geneva Conventions,⁴⁸ the drafting of guidelines for the protection of the environment during armed conflict by the International Committee of the Red Cross,⁴⁹ and the work of the International Law Commission on the Protection of the Environment in Relation to Armed Conflicts.⁵⁰ On the 8th July 2019 the International Law Commission adopted draft legal principles to enhance protection for the environment before, during and after armed conflicts, a development praised as ‘the biggest step forward in legal protection for the environment in conflicts since the 1970s.’⁵¹

In this context, it is notable that the concept of international environmental crime has failed to gain much traction in the rapidly expanding area of international criminal law.⁵² Neither of the ad hoc tribunals addressed environmental crime, and the Rome Statute of the ICC includes only one explicit reference to environmental protection: Article 8(2)(b)(iv). This draws on the language of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) and Additional Protocol I, and specifies that, within the scope of an international armed conflict, the following actions could constitute a war crime:

Intentionally launching an attack in the knowledge that such attack will cause ... widespread, long-term and severe damage to the environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

This Article contains numerous jurisdictional barriers, and an almost prohibitively high bar for the OTP to reach in order to prove guilt. In relation to finding jurisdiction, the damage to the environment must be linked to an international conflict and committed ‘as part of a plan or policy or as part of a large-scale commission of such crimes’, potentially excluding singular acts of environmental destruction.⁵³ The elements of damage, disproportionality and intent present further hurdles. ‘Widespread’, ‘long-term’ and ‘severe’ damage are each difficult to prove alone,⁵⁴ and are also viewed cumulatively and balanced against military advantage.⁵⁵ The ICC Elements of Crimes state that the ‘military advantage anticipated’ is assessed from the perspective of the perpetrator on the basis of the information available to him/ her at the time of launching the attack,⁵⁶ making it difficult to prove disproportionality.⁵⁷ In the context of intent; the OTP would be required to prove that the accused both intended to launch an attack

and *knew* that the conduct would cause environmental harm. In light of these stringent requirements, it is unsurprising that there have been no prosecutions using Article 8(2)(b)(iv) to date.

International criminal law's failure to adequately recognise and respond to environmental destruction overlooks a range of serious human rights violations experienced both individually and collectively,⁵⁸ denies victims access to justice and redress for those violations, and misses an opportunity to express international condemnation of attacks on the natural world.⁵⁹ In recognition of this lacuna, activists, lawyers, policy actors and academics have explored different avenues through which to extend individual criminal accountability to include environmental destruction. As noted above, suggested approaches tend to fall into one of two camps. The first is that there is a need for a new international crime against the environment, sometimes framed as ecocide or 'grave' or 'severe' crimes against the environment. The second is that it is possible to 'green' international criminal law by using existing core international crimes to prosecute environmental destruction. The following subsections outline the emergence and development of these two approaches.

A New International Crime

Discussions around the need to introduce an international crime of ecocide can be traced to the 1970s.⁶⁰ Often linked to the outrage felt over the US's use of Agent Orange in Vietnam, Cambodia and Laos,⁶¹ these discussions focused largely on wartime situations in which intent to cause environmental harm was present.⁶² As part of the review of the Genocide Convention in 1973, a draft International Convention on the Crime of Ecocide was prepared for UN consideration by war crimes expert Professor Richard A. Falk. This outlined a military offence that could be committed in times of war or peace, and could include acts such as using

- (a) weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
- (b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
- (c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of the soil or to enhance the prospect of diseases dangerous to human beings, animals, or crops;
- (d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;
- (e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
- (f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.⁶³

Although never adopted, the concept of ecocide resurfaced in UN discussions over the effectiveness of the Genocide Convention throughout the 1970s and 1980s, with the Sub-Commission on Prevention of Discrimination and Protection of Minorities recommending that the inclusion of ecocide be investigated further.⁶⁴ However, the review never progressed beyond this point, for reasons that remain unclear, but which may be linked the influence of

powerful governments and their focus on protecting their nuclear arms.⁶⁵ Similarly, while early versions of the Rome Statute's precursor, the 'Codes of Crimes Against the Peace and Security of Mankind', contained a specific Article covering environmental crimes, this was substantially watered down and eventually removed entirely.⁶⁶

More recently, the campaign to prosecute ecocide has been taken up by academics Higgins, Short and South, who argue in favour of criminalising ecological destruction regardless of when it occurs as a strict liability offence.⁶⁷ Higgins describes ecocide as:

the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.⁶⁸

Adopting the same or similar definitions, other academics, legal practitioners and activists have also called for the criminalisation of ecocide or 'grave' or 'severe' crimes against the environment as the fifth crime against peace under the Rome Statute.⁶⁹ Often, these arguments are in favour of a crime that captures environmental damage in times of peace as well as in war, in recognition of the fact that the devastation sown by some human activities under the cover of 'peace' is often far greater than that caused in 'war'.⁷⁰

The urgent environmental challenges facing our planet, the failure of environmental regulation to prevent widespread destruction, and the normative expressive value of prohibiting the loss of ecosystems all make the call for a crime against the environment compelling.⁷¹ However, there are significant practical barriers to introducing a new crime. For one, political resistance to the introduction of a crime that might curb economic expansion is likely,⁷² as is resistance to a crime that restricts the ability of states to exploit the natural environment during conflict. Such resistance has been evidenced for example by the US's rejection⁷³ of the International Committee for the Red Cross's finding that

The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long- term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.⁷⁴

Additional practical challenges would arise from the complexity and ambiguity of environmental crimes and the difficulties that this would pose when proving causation. The level of intention required would also require careful consideration, as environmental crimes may not necessarily result from specific intent, but rather from 'ignorance, complacency, and negligence to human and natural life.'⁷⁵ This has led advocates to argue in favour of strict liability⁷⁶ or 'reasonably foreseeable intent',⁷⁷ both of which would mark a departure from the approach taken in respect of the other core crimes.⁷⁸ Personal jurisdiction would require expansion to incorporate corporations or legal persons, raising challenges in obtaining agreement from the Assembly of State Parties, as well as issues around complementarity if domestic jurisdictions did not also allow for corporate responsibility.⁷⁹ Similarly, expanding victimisation beyond humans might lead the ICC into debates around legal personhood and

whether the concept might similarly require expansion beyond human beings.⁸⁰ More broadly, expanding the ICC's mandate would place additional resource strains on an already stretched tribunal, as it attempted to adapt to the realities of investigating and prosecuting a new type of crime, and potentially responding to a new category of non-human victims.⁸¹

'Greening' the Rome Statute

Despite the limitations of the core crimes, there are some who have argued that the existing international criminal legal framework as contained in the Rome Statute can to some extent incorporate environmental destruction. For example, Freeland has argued that:

Where the circumstances so warrant, the prosecution of environmental crimes within the terms of the existing jurisdiction of the Court is possible and appropriate under the provisions of the Rome Statute. There is no legal reason why this should not be the case.⁸²

In addition to exploring the possibilities offered by the explicit reference to the environment in Article 8(2)(b)(iv),⁸³ scholars have analysed the other core crimes over which the ICC has jurisdiction to demonstrate how they might be used to prosecute environmental crime despite their lack of specific reference to the environment.⁸⁴ In the context of genocide, 'acts causing serious bodily or mental harm' or 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction' could arguably include environmental destruction, falling within the type of acts that constitute genocide.⁸⁵ This approach would acknowledge the 'genocide-ecocide nexus' as highlighted by Crook and Short, who noted that while this nexus may be far from a recent development for indigenous peoples around the world, it is likely to become a far more frequent occurrence in light of climate change.⁸⁶ As they argue, 'assaults on the essential foundations of life of national groups (and ecosystems are perhaps the most important of all such foundations) is what [genocide] was designed to highlight and prohibit.'⁸⁷ There is some precedent in this regard; in 2008 the ICC OTP established a connection between genocide and the deliberate destruction of the environment by systematically destroying properties, vegetation and water sources and repeatedly destroying, polluting or poisoning communal wells or other communal water sources by the militia and Janjaweed in Darfur.⁸⁸ However, the stringent *mens rea* requirement, namely the 'intent to destroy, in whole or in part' a protected group, places limitations on the use of genocide to prosecute environmental harm.

In the context of crimes against humanity, environmental destruction could arguably fall within three categories of act. First, the prohibition of 'extermination, or intentional infliction of conditions of life...calculated to bring about the destruction of part of the population'. Second, the deportation or forcible transfer of a population, persecution through the intentional and severe deprivation of fundamental rights contrary to international law. And third, it could be considered an example of 'other inhumane acts', provided the destruction occurred 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.'⁸⁹ Mistura has argued that this crime lends itself more easily to environmental

prosecutions, as the *mens rea* requirements are less rigorous than those applied to genocide.⁹⁰ Again there is some limited precedent; in the situation in Darfur the OTP found that the same behaviour highlighted above in the context of genocide, which also incorporated the forcible displacement of populations, could constitute a basis for crimes against humanity charges.⁹¹

In relation to the crime of inter-state aggression, environmental degradation through military attacks could qualify as the ‘use of armed force by a state against the sovereignty, territorial integrity or political independence of another State’, although criminal liability would be limited to those in positions to effectively control or direct the political or military action of a state.⁹² Precedent for investigating aggression-related environmental harm can be found in an initial enquiry into NATO’s 1999 bombing campaign against Serbian security and military positions by the International Tribunal for the former Yugoslavia, although no criminal case emerged from the investigation.⁹³

Using the existing core crimes framework poses inevitable restrictions on the ability of the ICC to recognise and respond to environmental destruction; these provisions were not designed with the environment in mind. However, in light of the barriers that face any attempts to introduce a new crime, there is value in considering how best to work with the tools available. In apparent support of this way of thinking, there has been some progress in the ‘greening’ of the prosecutorial policy at the ICC. In 2013, the OTP released its Policy Paper on Preliminary Examinations,⁹⁴ which included ‘environmental damage’ as an explicit factor to be considered by the Office in the conduct of its preliminary examination of a situation that might warrant an investigation. Similarly, the OTP’s 2016 Policy Paper on Case Selection and Prioritisation incorporated specific mention of the environment in its rules and principles guiding the exercise of prosecutorial discretion. In determining which cases to select and prioritise, the OTP is required to focus on the ‘gravity’ of the crimes, which in turn comprises the *scale, nature, manner of commission* and the *impact* of the crimes. In the context of the manner of commissioning, the OTP noted that it

will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.

In the context of impact, the OTP noted that

The impact of the crime may be assessed in light of, inter alia... the environmental damage inflicted on affected communities.

These combined Policy Papers suggest that individuals are more likely to be investigated and selected as cases for prosecution when environmental destruction has occurred in the context of the core crimes than when it has not. However, the Office’s powers are obviously constrained: it will only be able to pursue situations and cases in which core crimes appear to have been committed. As observed by Anton, ‘causing long-term and severe damage to the natural environment is criminal because it is a means (as a weapon or target) by which atrocities

on human beings are perpetrated.’⁹⁵ While Cusato argues that the 2016 Policy Paper frames nature as a direct or indirect beneficiary of protection, this seems to stretch the OTP’s meaning into new terrain.⁹⁶ Given the ICC’s definition of victims as natural or legal persons, it seems more likely that environmental destruction will be viewed through the prism of human rights violations. This has resulting implications for how reparations for environmental harm might be conceived, as discussed below.

Despite these limitations, the papers signal an increased awareness of the ways that conflict, atrocity and the environment are interconnected. While some commentators have been sceptical about the practical implications of the Policy Papers,⁹⁷ ICC Senior Appeal Counsel Helen Brady has stated that the reference to the environment is ‘highly important and it’s not just symbolic – it means something.’⁹⁸ While others have explored what these documents might mean for future case selections and prosecutions,⁹⁹ for the remainder of this paper, I will instead consider how the ICC might build upon and expand this emerging environmental sensitivity in respect of another aspect of its work: its reparations mandate. Repairing environmental damage is not usually considered an important issue in the aftermath of mass violence, when the short-term needs of human victims take precedence. However, as discussed above, environmental degradation and the loss of natural resources can harm livelihoods, place barriers in the way of recovery, and sow the seeds of future human rights violations.¹⁰⁰ Rather than seeing environmental and human welfare as mutually exclusive, it is therefore worth exploring how reparations which seek to respond to human rights violations might also encompass environmental considerations.

4. ‘Greening’ Reparative Justice for Environmental Destruction

It is first worth briefly outlining the nature of the ICC’s reparations mandate. Under Article 75 of the Rome Statute, the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. It may also order that the award for reparations be made through the Court’s Trust Fund for Victims (TFV). The TFV is an independent, non-judicial institution that operates within the Rome Statute system and which can use funds made available by voluntary contributions to complement any money or property collected from the convicted person.¹⁰¹ In practice, the TFV has solely relied on voluntary contributions, due to the indigence of the accused. This is likely to continue.¹⁰² In addition to facilitating the delivery of reparations, the TFV may also provide assistance in the form of physical and psychological rehabilitation and material support to victims who have suffered harm as a result of a crime within the Court’s jurisdiction, providing those crimes are linked to a situation under investigation. Assistance programmes have been delivered in the DRC and Uganda, and have included measures such as medical referrals, individual and group counselling, and socio-economic activities.¹⁰³

The ICC’s jurisprudence has established the conditions necessary for a victim to claim reparations. These include that the victim be a natural person or legal entity that has suffered harm, whether directly or indirectly. The harm must be personal and can be material, physical

and psychological. Reparations can be awarded if the harm suffered was a result of the commission of any crime within the jurisdiction of the Court, with the causal link between the crime and harm being determined in light of the specificities of a case.¹⁰⁴ Reparations can be individual or collective in nature, or both, depending on the scope and extent of any damage, loss or injury.¹⁰⁵ In addition, the Court may order awards to intergovernmental, international or national organisations, although it has yet to do so. Prior to making an order, the Court may invite representations from the convicted person, victims, other interested persons and States, as well as relevant experts.¹⁰⁶

The requirement that harm be ‘personal’ to a natural or legal person is reflective of the anthropocentric nature of the core crimes and prohibits the Court from responding to environmental destruction outside the context of a related human rights violation. However, I would argue that there are three interlinked ways that reparations and assistance can contribute to repairing environmental destruction, while retaining a focus on responding to human victimisation. These are: (i) adopting an ‘eco-sensitive’ approach to the design and implementation of reparations for anthropocentric harms; (ii) awarding reparations that explicitly recognise harm caused by environmental destruction when possible; and (iii) expanding understandings of ‘transformative’ reparations to encompass underlying environmental discrimination and inequality. These are explored in turn in the following subsections. It should be noted that the recommendations here are necessarily fairly general, as every experience of conflict or atrocity is different, and there are therefore no specific reparative measures that will always be appropriate.

Eco-Sensitive Reparation Design and Implementation

Reparations can take myriad forms and recognise a diverse range of harms. Their flexibility allows them to be sensitive to the nature and context of the crimes that have been committed.¹⁰⁷ However, if misconceived or insensitively delivered, reparations may exacerbate tensions or undermine the cooperation and reconciliation needed to prevent future violence and harm.¹⁰⁸ In cases where the environment has been directly targeted, or where there are tensions around access to resources, a lack of sensitivity to such considerations could have long-term repercussions to the possibilities of long-term peace. Therefore, at a minimum, the TFV could adopt an ‘eco-sensitive approach’ to the design and implementation of reparations. Adapted from the practice of conflict-sensitivity (which is already implemented by the TFV),¹⁰⁹ an eco-sensitive approach would be defined as (i) attempting to understand how reparations may interact with environmental damage through the use of environmental impact assessments; (ii) monitoring, evaluating and mitigating against any unintended environmental effects, and (iii) positively influencing environmental sustainability wherever possible.¹¹⁰ Adopting an eco-sensitive approach would signal a further ‘mainstreaming’ of environmental consciousness in the work of the Court and related bodies. It would acknowledge the interconnections between humans and their environment, and the need to ensure projects do not have unintentionally harmful results in the future due to their environmental impacts.

There is some evidence that the TFV is already moving in an eco-sensitive direction. While acknowledging that the ICC does not have a ‘going green policy’, the Fund claims that it has tried to progressively integrate an environmental dimension into its interventions.¹¹¹ For example, in its 2014-2017 Strategic Plan the Fund identifies as one of its Programming Guiding Principles:

Work with implementing partners to assess, mitigate and evaluate the likely environmental impact of a proposed project or programme, taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse.¹¹²

However, the Fund has acknowledged that its ability to integrate environmental concerns into its activities has been limited by the lack of a monitoring mechanism and limited resources available to dedicate specifically to environmental issues. The 2014-2017 Strategic Plan claimed that the next TFV plan would pay particular attention to putting in place a structured monitoring system that matches its stated priorities and goals for environmental impact. As the Fund has not made subsequent Strategic Plans public, it is not possible to ascertain whether it has done so. However, while an eco-sensitive approach would at a minimum incorporate the monitoring and evaluation highlighted in the Strategic Plan, it would also ideally look beyond ‘mitigation’ to consider ways in which assistance and reparation projects could positively influence environmental sustainability.¹¹³

Introducing this level of eco-sensitivity would not rely on or be linked to the OTP’s selection of situations and cases which feature environmental destruction. Rather, it could be implemented throughout the TFV mandate and incorporated into the delivery of measures that respond to human rights violations resulting from the core crimes. For example, collective symbolic reparations¹¹⁴ to acknowledge suffering might encompass the establishment of projects that help restore and conserve natural spaces. Drawing from environmental peacebuilding and security studies,¹¹⁵ this might involve, for example, creating peace parks for use by impacted communities. Examples of peace parks can be found in diverse contexts, and although often used to resolve transboundary conflicts between states, can also be used to contribute to the rehabilitation of an area after conflict.¹¹⁶ In Myanmar, a community-based NGO known as KESAN has been involved in the creation of the Salween Peace Park Initiative, described as a ‘space that promotes peace, cooperation, cultural preservation, and environmental and natural resources conservation.’¹¹⁷ The Peace Park’s Charter establishes that the war has eroded the bio-cultural practices of local communities, and acknowledges that peacebuilding must have both ‘ecological and cultural dimensions.’¹¹⁸ Other forms of reparations, such as vocational training and income-generating activities¹¹⁹ could also be designed in ways that minimise negative environmental impacts and where possible proactively seek to repair environments while restoring the livelihoods of victims. This potential is already acknowledged by the TFV, which has highlighted ‘environmentally-friendly livelihood activities’ as a form of material support that can be offered through its assistance mandate.¹²⁰ The dependence of much of the population within regions of armed conflict on natural resources, means that initiatives improving the quality and accessibility of

such resources could potentially assist a large number of people beyond the direct beneficiaries.¹²¹

To be effective, eco-sensitivity would require application at each stage of reparation design and delivery and would be mainstreamed into the TFV's institutional mindset.¹²² This would require initial environmental impact assessments of the effects likely to arise from a reparation project, featuring consultation and public participation as integral aspects to ensuring the reparation proceeded in an eco-sensitive manner.¹²³ Ongoing monitoring and evaluation would also be required as projects progressed, and the TFV would need to have the willingness to adjust as necessary. Indeed, an eco-sensitive approach might involve fundamental changes in the way the TFV thinks about the delivery of its reparation mandate, for example through the development of eco-sensitive policies and project delivery standards.¹²⁴ This could be supported and entrenched by the ICC Chambers incorporating eco-sensitivity into any subsequent reparation principles produced in future cases.¹²⁵

As with integrating a conflict-sensitivity model, introducing greater eco-sensitivity would have resource implications, and require a shift in mindset amongst those responsible for designing and implementing reparations.¹²⁶ However, the resource implications of this shift would lessen with time and should be weighed against the risks of environmentally unsustainable or damaging projects, as well as the potential benefits of measures which capture the connections between human and environmental recovery.

Reparations that Explicitly Recognise Environmental Destruction

In cases where the OTP successfully brings prosecutions which encompass 'the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land' or which inflict environmental damage on affected communities,¹²⁷ the Court's Chambers could award reparations which explicitly respond to the harm caused by that destruction and damage. As noted by Special Rapporteur for environmental protection Marja Lehto:

No reparations entailing environmental remediation have so far been ordered, but the decision on the principles and procedures would seem to allow for such measures as well.¹²⁸

It is possible to 'transpose some of the current provisions on reparations to accommodate justice for non-human life.'¹²⁹ As further observed by Marja Lehto, 'the effects of environmental damage are often felt both individually and collectively',¹³⁰ thus requiring reparations which are individual or collective in nature, or both. To facilitate such awards, the Court could consult with appropriate experts to assist in determining the scope and extent of environmental damage, loss and injury and to suggest various options concerning the appropriate types and modalities of reparations.¹³¹ The ICC could learn from the practice of other courts in this regard. For example, the New South Wales Land and Environment Court has called expert witnesses to assess the harm to rivers and streams, soil, trees and habitat of endangered species.¹³² These have included 'terrestrial ecologists, biologists, experts in aerial photography, environmental scientists, fauna ecologists, agricultural consultants, a natural

history and environmental consultant, a veterinarian, ornithologists, wetland ecologists, frog biologists, plant ecologists, plant ecology and restoration experts and arborists.¹³³ Where possible in light of what may be an ongoing security issue, the Court may also consider different methods and techniques to establish harm, such as site visits, photographs and aerial photographs, and satellite images.¹³⁴

Repairing the harm caused by environmental destruction undeniably poses specific challenges: complete restitution is likely to be impossible in many cases.¹³⁵ The temporal dimension of harm will also limit what can realistically be done; the full range of impacts of environmental destruction may only emerge of time. However, potential avenues of restitution could include: (i) orders for restoration of any harm to the environment caused by the commission of the offence, if feasible, and if not, payment of the costs and expenses incurred in restoring the environment; (ii) costs for carrying out a specified project for the restoration or enhancement of the environment for the victims' benefit; or/and (iii) payment of a specified amount to an environmental trust or a specified environmental organization for the purpose of a specified restoration project.¹³⁶ Such measures are likely to be resource-intensive and require specialist expertise and equipment, suggesting that other forms of reparation might be preferable.¹³⁷ Therefore, the Court may consider awarding compensation and ordering fines or orders for the forfeitures of property which factor in harm to the environment.¹³⁸ In the context of international law, the commentary to the articles on State responsibility,¹³⁹ the International Law Institute,¹⁴⁰ the UN Compensation Commission¹⁴¹ and the International Court of Justice¹⁴² have each made clear that environmental destruction is compensable.

Valuating environmental destruction for the purpose of compensation may pose challenges;¹⁴³ a lack of information, scientific certainty, and/or sufficient resources may inhibit the fact-finding and analysis necessary to calculate the nature of the harm.¹⁴⁴ However, methods of assessment and valuation have developed in recent international law and international human rights law practice. For example, when addressing the environmental damage resulting from Iraq's invasion and occupation of Kuwait, the Environmental Panel of the UN Compensation Commission acknowledged the relative lack of methods for evaluating damage, and instead relied on more general principles, 'particularly the principle that reparation must, as far as possible, wipe out all the consequences of the illegal act.'¹⁴⁵ Given the challenges associated with exact restitution, the Commission used an equivalency-based model which valued the costs of replacing lost natural resources with resources that could supply equivalent ecological services.¹⁴⁶ At the International Court of Justice¹⁴⁷ judges adopted a valuation approach which took into account 'the perspective of the ecosystem as a whole, by adopting an overall assessment of the impairment or loss of environmental goods and services prior to recovery'.¹⁴⁸ This considered the nature of the harmful acts,¹⁴⁹ harm,¹⁵⁰ and affected area,¹⁵¹ as well as the area's capacity for natural regeneration.¹⁵² In the context of international human rights law, the Inter-American Court of Human Rights has previously ordered compensation for material damage (including environmental damage) and the immaterial damage caused to a people's spiritual connection with their territory.¹⁵³ These examples show that the compensability of environmental destruction is well recognised, and that valuation approaches exist to enable compensation to be awarded.¹⁵⁴

The Court may also wish to look to other more collective forms of reparation. Firstly, because compensation alone might not be enough to deliver a sense of justice to victims, unless it is accompanied by other symbolic measures of acknowledgment.¹⁵⁵ This may be particularly the case where the harmed communities have a strong connection to land that extends beyond material or financial into spiritual, cultural or familial relationships. Secondly, as noted by Lee: '[t]he distribution of cash reparations alone will do little to bring about sustainable development, but will simply alleviate poverty temporarily.'¹⁵⁶ Indeed, in line with the eco-sensitive approach advocated above, reparations should be delivered with an eye on long term environmental sustainability.¹⁵⁷ The costs of delivering compensation to large numbers of victims may also make collective and community-oriented reparations for environmental destruction more feasible. Explicitly awarding eco-sensitive collective measures, such as the those discussed in the above subsection, would acknowledge the symbiotic relationship between restoring the environment and repairing harm experienced by individuals living in that environment, with potentially wide-ranging impacts.¹⁵⁸

Environmental Destruction and Transformative Reparations

More radically, we might consider applying an eco-sensitive lens to the 'transformative reparations' discourse. Transformative justice has been defined as 'transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion.'¹⁵⁹ Advocates of transformative reparations recognise that for marginalised groups, the end of violence may precipitate a continuation of or return to positions of subjugation, and that reparations should therefore contribute to 'overcoming structures of inequality and discrimination.'¹⁶⁰ They have been predominantly advocated for in the context of widespread or systematic sexual violence, 'where the occurrence of the crime reflects more ingrained structural discrimination and marginalisation of certain groups that precipitate such violence.'¹⁶¹ Feminist transitional scholars have critiqued dominant forms of reparation, such as restitution, compensation and rehabilitation, for risking a return of women harmed during conflict to the positions of gendered inequality that may have preceded and contributed to conflict, and endured post-conflict.¹⁶² Instead, a transformative reparations agenda aims to look forward, unsettling the status quo and learning from the past in order to positively impact the allocation of resources and values of a society. A significant contribution of transformative justice literature is to argue in favour of representative forms of justice (by increasing the numbers of women in positions of power), redistributive justice (which seeks to enhance economic equality), and recognition (through the designation of social and cultural standing or status).¹⁶³

It is arguable that similar principles are applicable when thinking about reparations for conflict- and atrocity-related environmental destruction. As explored in section two, environmental damage during conflict should be situated in a broader context which often involves environmental harm pre- and post- conflict, as well as structural inequalities which shape who is able to access and use natural resources.¹⁶⁴ For many targeted communities or marginalised

groups, a return to the status quo would be a return to limited access to resources and lack of input into how the natural world is used and protected.¹⁶⁵ The end of conflict may also involve a return or emergence of unsustainable resource exploitation, environmental degradation, and/or lack of protection for the environment.¹⁶⁶ A failure to address these underlying environmental issues and inequalities can make a lasting peace less likely, plant the seeds for future human rights violations, and overlook the challenges facing those who were originally marginalised.¹⁶⁷ Indeed, the environmental justice movement has worked since the 1960s to expose these inequalities,¹⁶⁸ highlighting how disadvantaged groups suffer disproportionately from environmental degradation and unequal distribution of natural resources.¹⁶⁹ Mirroring the calls from proponents of transformative justice, environmental justice is commonly described as requiring distributive justice, procedural justice and recognition.¹⁷⁰

The ICC has been identified as an important organ for pursuing transformative reparations.¹⁷¹ This has been evident in its judgments. As stated in the amended Lubanga reparation decision, the principles of dignity, non-discrimination and non-stigmatisation mean that reparations should address underlying injustices and avoid replicating discriminatory practices or structures that predated the commission of the crimes.¹⁷² The TFV has similarly spoken of the importance of ensuring awards that ‘do not exacerbate the root causes of the conflict.’¹⁷³ However, the possibilities for a court-ordered reparation to unilaterally fundamentally change underlying structural inequalities are undoubtedly limited, as acknowledged in scholarly critiques of gender transformative justice.¹⁷⁴ As noted by Durbach and Chappell, achieving equal representation in decision making, a significant redistribution of economic resources and the removal of socially and culturally embedded bias requires extensive state-sponsored, collective measures.¹⁷⁵ In the context of environmental transformative justice, while one can see the value of increasing the political representation and recognition of, for example, indigenous communities impacted by unequitable natural resource exploitation, this is likely beyond the power of a judicial institution, without accompanying state buy-in. Similarly, large-scale redistribution of natural resources and habitat management may require integration into peace agreements and post-conflict policies. The ICC cannot force a state to act, and is therefore limited in what it can achieve. There are also significant resource limitations on what the Court can achieve in terms of repairing the environment. Drumbl has highlighted the challenges this poses to implementing environmental change:

Unless this criminal law apparatus is hooked into broader restorative remediation efforts, compensation efforts, and scientific expertise...the actual hard work of improving the damage to the environment will not take place.¹⁷⁶

However, such limitations do not mean that the ICC cannot seek to integrate environmental transformative justice to the extent available. For example, representative/procedural justice elements can be incorporated by ensuring that those with an understanding of the specific environmental context in which violence occurred are heard prior to reparation orders being made and during the design and implementation of reparative projects.¹⁷⁷ Steps can be taken to identify the intersections of ethnicity/race/clan, class, sexuality, nationality, dis/ability and employment status which influence access to natural resources, to ensure that discriminatory

practices of exclusions are not reproduced via the provision of reparations.¹⁷⁸ Adopting an eco-sensitive approach to design and implementation as advocated above could also contribute to mainstreaming environmental concerns into the TFV's operations.¹⁷⁹

While likely incapable of natural resource redistribution without state cooperation and involvement, a focus on reparative measures which have the potential to bring about long-term positive impacts on the environment could have lasting benefits for targeted communities that may have historically lacked access to natural resources. It could be that some of the measures discussed above could facilitate this type of environmental transformative agenda. For example, KESAN has described the Salween Peace Park as aiming to contribute to conflict transformation by expanding the conversation around 'governance' to address issues of 'militarization, conflict, displacement, resource capture, and destructive development'.¹⁸⁰ Emerging environmental peacebuilding theory argues that cooperation over environmental resources and biodiversity management can help prevent the outbreak of conflict and enable peacebuilding to promote a transition towards peaceful and sustainable development.¹⁸¹ Facilitating the treatment, management and development of natural habitats could simultaneously develop biodiversity and human welfare both to meet the needs of the present generation and to improve the standard of living, sanitation and social, environmental and political stability for future generations.¹⁸² It might be that a more holistic, eco-sensitive approach to reparations might 'deflect, subsume and eventually even transcend entrenched social conflicts'.¹⁸³

5. Conclusion

With so much already expected of the ICC, it might be fair to query whether there is 'any place within the already congested transitional justice agenda...to consider the addition of environmental justice?'¹⁸⁴ One might also question whether a system designed to focus on grave human rights violations such as international criminal law is equipped to protect the environment on its own terms.¹⁸⁵ Certainly, there are both practical and conceptual challenges associated with encompassing environmental destruction into the ICC's remit. The introduction of a new crime against the environment seems far away, if not impossible, and the existing core crimes include little recognition of environmental destruction. The TFV faces resource restrictions and implementation challenges that inevitably impact upon its ability to deliver meaningful reparations to victimised communities. This paper has acknowledged and engaged with these challenges. Yet, it has also sought to demonstrate both that there are ways and means of adopting greater environmental awareness into the ICC's legal and reparative framework, and that it is imperative that we continue to explore ways to do so. While the proposals made here have been relatively modest, their introduction might nonetheless play some role in addressing the harm caused by environmental destruction. Furthermore, beyond constituting a form of acknowledgement for those who suffered, they may also contribute to a more general consciousness raising. As a high-profile international institution, the ICC has the potential ability to draw attention to the need to take seriously the impact of violence on the environment and prevent and repair these types of harm.

The interconnections between conflict, atrocity and environment mean that the neglect of environmental destruction has potentially long-term and severe implications for individuals and communities recovering from mass violence and human rights violations. Indeed, the wellbeing of humans cannot be achieved in isolation from the wellbeing of nature.¹⁸⁶ An eco-sensitive approach to international criminal law and reparations is therefore necessary if the impacts of mass violence are to be meaningfully and sustainably addressed. Furthermore, it is important to note that these interconnections impact on all of us. Environmental degradation risks not only to the emergence or resurgence of conflict, but larger international security threats through its contribution to global warming and associated changes to the physical and geopolitical world. Integrating environmental considerations into our responses to conflict is therefore not only important to the wellbeing of victimised impacted communities, but a development and security imperative.¹⁸⁷

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³ Rachel Killean, 'Constructing Victimhood at the Khmer Rouge Tribunal: Visibility, Selectivity and Participation', *International Review of Victimology* 24, no. 3 (2018): 273-296.

⁴ Carsten Stahn, Jens Iverson and Jennifer Easterday, 'Protection of the Environment and Jus Post Bellum: Some Preliminary Reflections' *Environmental Protection and Transitions from Conflict to Peace* (Oxford: Oxford University Press, 2017), 16.

⁵ Audra Mitchell, 'Only Human? A Worldly Approach to Security', *Security Dialogue* 45, no. 1 (2014): 5-21.

⁶ Thor Hanson and others, 'Warfare in Biodiversity Hotspots', *Conservation Biology* 23, no. 3 (2009): 578–587.

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⁸ Anastacia Greene, 'The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?', *Fordham Environmental Law Review* 30, no. (2019): 7-19.

⁹ See e.g. Polly Higgins, Damien Short and Nigel South, 'Protecting the Planet: A Proposal for a Law of Ecocide', *Crime Law and Social Change* 59 (2013): 251-266; Tim Lindgren, 'Ecocide, Genocide and the Disregard of Alternative Life-Systems', *The International Journal of Human Rights* 22, no. 4 (2018): 525-549.

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¹¹ Greene, 'Quixotic Quest or Moral Imperative?'

¹² Mégret, 'International Crime Against the Environment': 60-61.

¹³ Alessandra Mistura, 'Is there Space for Environmental Crimes under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritisation on the Current Legal Framework', *Colombian Journal of Environmental Law* 43 (2018): 181.

¹⁴ Matthew Gillett, 'Eco-Struggles: Using International Criminal Law to protect the Environment During and After Non-International Armed Conflict' in *Environmental Protection and Transitions from Conflict to Peace*, ed. Carsten Stahn, Jens Iverson and Jennifer Easterday (Oxford: Oxford University Press, 2017), 220-256; Steven Freeland, 'Human Rights, the Environment and Conflict: Addressing Crimes Against the Environment', *International Journal on Human Rights* 2, no. 2 (2005): 113-141.

¹⁵ ICC, Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, 15 September 2016, www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf. (accessed January 17, 2020).

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