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IMAGINING FUTURE REPARATIONS FOR ENVIRONMENTAL DESTRUCTION¹

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Noting the interconnections between environmental destruction and periods of conflict and mass violence, scholars have explored multiple ways in which international criminal law might be better equipped to respond to such harms. These have included introducing a new crime against the environment, creating specific international environmental courts, and adapting existing frameworks. While recognising the need for more substantive measures in the long term, this chapter considers how existing international criminal frameworks might be used to respond to environmental destruction in the short to medium term. Focusing on options for repair in particular, it considers the ways in which the International Criminal Court's reparation framework and the Trust Fund for Victim's assistance mandate might be used to facilitate reparative measures which respond to environmental destruction. It argues that there are three interlinked ways in which this might be done: first, by introducing the concept of 'eco-sensitive' reparations and assistance; second, by awarding reparations that explicitly respond to environmental destruction when related to the ICC's core crimes; and third, by exploring the possibilities of environmentally 'transformative' reparations.

Introduction

From the use of Agent Orange in South East Asia, to the burning of Kuwaiti oil wells, to illegal poaching across the African Great Lakes region, examples of conflict and atrocity-related environmental destruction² can be found across the world.³ As awareness of the interconnections between mass violence and environmental destruction has grown, legal

¹ An earlier version of this piece appears as: Rachel Killean, 'From Ecocide to Eco-sensitivity: 'Greening' Reparations at the International Criminal Court' *The International Journal of Human Rights* (2020).

² I.e damage to protected species and natural habitats, water damage and land damage. See *Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage* [2004] OJ L 143, Article 2.

³ Ines Peterson, 'The Natural Environment in Times of Armed Conflict: A Concern for International War Crimes Law?' (2009) 22 *Leiden Journal of International Law* 331; M. Schmitt, 'Green War: An Assessment of the Environmental Law of International Armed Conflict' (1997) 22 *Yale Journal of International Law* 19; UNSC, *Interim report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, 22 May 2002, (S/2002/565), para. 52.

frameworks have expanded to grant greater environmental protections in times of conflict.⁴ Examples include the adoption of the Environmental Modification Convention,⁵ the Declaration and Protocol on Asphyxiating Gases and Bacteriological Methods of Warfare, and Additional Protocol I to the Geneva Conventions;⁶ the drafting of guidelines for the protection of the environment during armed conflict by the International Committee of the Red Cross;⁷ and the 2019 legal principles developed by the International Law Commission on the Protection of the Environment in Relation to Armed Conflicts.⁸

In this context, the continuing failure of international criminal law to address environmental destruction is notable.⁹ The Rome Statute of the International Criminal Court includes only one explicit reference to environmental protection, identifying ‘widespread, long-term and severe damage to the environment’ as a possible war crime.¹⁰ However, the stringent jurisdictional requirements associated with this provision mean it has yet to be used in practice.¹¹ Indeed, the anthropocentric nature of the core crimes¹² (genocide, crimes against humanity, war crimes and aggression) frequently renders invisible the destructive harm that mass violence can have on the natural environment.¹³ In recognition of this lacuna, activists, lawyers, policy actors and academics have long explored different ways to create individual criminal accountability for environmental destruction.¹⁴ Some have campaigned for the establishment of a specific international environmental court,¹⁵ while others have explored how the ICC might be used to respond to this type of harm. Amongst those in the latter camp, two approaches have developed.

⁴ See e.g. Carsten Stahn, Jens Iverson and Jennifer S. Easterday, *Environmental Protection and Transitions from Conflict to Peace* (OUP 2017).

⁵ *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, 18 May 1977, 16 I.L.M. 90.

⁶ ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 UNTS 3, 8 June 1977.

⁷ ICRC, *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, endorsed by UN GA Res. 49/ 50 (1994).

⁸ Michael Bothe, ‘The ILC’s Special Rapporteur’s Preliminary Report on the Protection of the ‘Environment in Relation to Armed Conflict: An Important Step in the Right Direction’ in Pia Acconci and others (eds) *International Law and the Protection of Humanity. Essays in Honor of Flavia Latanzi*, (Brill 2017); Doug Weir, Director at the Conflict and Environment Observatory, cited in ‘Why Legal Principles on War and Environment Matter’ (UNEP, 20 August 2019) <www.unenvironment.org/news-and-stories/story/why-legal-principles-war-and-environment-matter> accessed 13 April 2020

⁹ Notable, but reflective of a broader perception within green criminology that formal institutions of criminal justice fail to take environmental crime seriously. See Rob White, ‘Reparative Justice, Environmental Crime and Penalties for the Powerful’ (2017) 67 *Crime, Law and Social Change* 117.

¹⁰ UNGA, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, art 8(2)(b)(iv).

¹¹ For an in-depth exploration of this article and its limitations see Jessica C. Lawrence and Kevin Jon Heller, ‘The First Ecocentric Environmental War crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute (2007) 20 *Georgetown International Environmental Law Review* 61.

¹² Carsten Stahn, Jens Iverson and Jennifer Easterday, *Environmental Protection and Transitions from Conflict to Peace* (OUP 2017) 16.

¹³ Audra Mitchell, ‘Only Human? A Worldly Approach to Security’ (2014) 45(1) *Security Dialogue* 5.

¹⁴ Anastacia Greene, ‘The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?’ (2019) 30 *Fordham Environmental Law Review* 7.

¹⁵ See e.g. Stephen Hockman, ‘The Case for an International Court for the Environment’ 3 (2010) *Journal of Court Innovation*; Alessandra Lehman, ‘The Case for the Creation of an International Environmental Court: Non-State Actors and International Environmental Dispute Resolution’ (2015) 26 *Colo. Nat. Resources, Energy & Envtl. L. Rev.* 2.

On the one hand are those who argue in favour of a new international crime against the environment, such as the crime of ‘ecocide’¹⁶ or ‘grave’ or ‘severe’ crimes against the environment.¹⁷ While 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 specific crime against the environment compelling,¹⁸ there are significant barriers to introducing a new crime. These include political resistance,¹⁹ practical challenges surrounding proving intent,²⁰ the obstacles to recognising the role of corporations in environmental destruction,²¹ and the additional resource strains associated with introducing a new type of crime.²²

Partially as a result of these barriers, others have interrogated the ways in which we might adapt the existing ICC legal framework to incorporate greater awareness of environmental destruction.²³ In addition to exploring the possibilities offered by the explicit reference to the environment in the context of war crimes, scholars have noted the potential for environmental destruction to constitute a genocidal act,²⁴ a crime against humanity²⁵ or an act of aggression.²⁶ Such explorations are not exclusively academic; the last decade has indicated that the ICC’s Office of the Prosecutor (OTP) has also considered the possibility of pursuing prosecutions which encompass environmental harms. Most notably, OTP Policy Papers released in 2013 and 2016 listed ‘environmental damage’, ‘the destruction of the environment’, ‘illegal

¹⁶ Polly Higgins, Damien Short and Nigel South, ‘Protecting the Planet: A Proposal for a Law of Ecocide’ (2013) 59 *Crime Law and Social Change* 251; Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (Shepherd-Walwyn 2010); Damien Short, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide* (Zed Books 2016).

¹⁷ See e.g. Sailesh Mehta and Prisca Merz, ‘Ecocide – A New Crime Against Peace?’ (2015) 17(1) *Environmental Law Review* 3; Deniz Tekayak, ‘Protecting Earth Rights and the Rights of Indigenous Peoples: Towards an International Crime of Ecocide’ (2016) 14(2) *Fourth World Journal* 5.

¹⁸ Higgins, Short and South, (n.16).

¹⁹ See e.g. John Bellinger and William Haynes, ‘A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law’ (2007) 89(866) *International Review of the Red Cross*.

²⁰ Tim Lindgren, ‘Ecocide, Genocide and the Disregard of Alternative Life-Systems’ (2018) 22(4) *The International Journal of Human Rights* 525.

²¹ David Scheffer, ‘Corporate Liability under the Rome Statute’ *Harvard International Law Journal* 57 (2016) 38.

²² Rosemary Mwanza, ‘Enhancing Accountability for Environmental Damage under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity’ (2018) 19 *Melbourne Journal of International Law* 610.

²³ Matthew Gillett, ‘Eco-Struggles: Using International Criminal Law to protect the Environment During and After Non-International Armed Conflict’ in Carsten Stahn, Jens Iverson and Jennifer Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace*, (OUP 2017); Steven Freeland, ‘Human Rights, the Environment and Conflict: Addressing Crimes Against the Environment’ (2005) 2(2) *International Journal on Human Rights* 113.

²⁴ Steven Freeland, ‘Human Rights, the Environment and Conflict: Addressing Crimes Against the Environment’ *International Journal on Human Rights* 2:2 (2005) 113-141

²⁵ Donald K. Anton, ‘Adding a Green Focus: The Office of the Prosecutor of the International Criminal Court Highlights the ‘Environment’ in Case Selection and Prioritisation’, *Griffith Law School Research Paper No. 17-03*, 2016; 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’ 43 (2018) *Colombian Journal of Environmental Law* 181.

²⁶ Gillett, n. 23.

exploitation of natural resources’ and ‘the illegal dispossession of land’ as explicit factors to be considered when selecting sites for investigation and cases for prosecution.²⁷

The OTP’s powers are naturally constrained by the ICC’s legal framework: it can only pursue situations and cases in which core crimes appear to have been committed.²⁸ As a result, some commentators have been sceptical about how the Policy Papers’ indication of an increased environmental awareness will manifest in practice.²⁹ Yet, the 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.’³⁰ While its possible implications for future case selections and prosecutions have been explored elsewhere,³¹ in this chapter, I take a closer look at how other organs of the ICC might build upon and expand this emerging environmental sensitivity. In particular, I focus on the possibilities of incorporating greater environmental awareness into measures of repair, both through the awarding of specific reparations, and through the Trust Fund for Victims’ (TFV) assistance mandate.

To briefly introduce these measures of repair: reparations may be awarded by the ICC’s Trial Chambers following the conviction of an accused.³² Reparations can be individual, collective or both, depending on the scope and extent of any damage, loss or injury, and may include restitution, compensation and rehabilitation.³³ These orders can be made against the convicted person, or through the TFV,³⁴ an independent, non-judicial institution which can use funds made available by voluntary contributions to complement any money or property collected from the convicted person.³⁵ In addition to implementing reparation awards, the TFV may also provide more general assistance to victims who have suffered harm as a result of a crime which is within the Court’s jurisdiction and linked to a situation under investigation.³⁶ This can be

²⁷ Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’ (ICC, 15 September 2016) <www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 14 April 2020.

²⁸ Anton (n.25) 1.

²⁹ William Schabas, ‘Feeding Time at the Office of the Prosecutor’ (*International Criminal Justice Today*, 23 November 2016) <www.international-criminal-justice-today.org/arguendo/icc-prosecutors-perpetuation-of-the-fiction-of-objectivity/> accessed 13 April 2020.

³⁰ Phoebe Braithwaite, ‘Environmental Crimes Could Warrant International Criminal Court Prosecutions’ (*Inter Press Service*, 1 October 2016) <www.ipsnews.net/2016/10/environmental-crimes-could-warrant-international-criminal-court-prosecutions/> accessed 13 April 2020.

³¹ Eliana Teresa Cusato, ‘Beyond Symbolism: Problems and Prospects with Prosecuting Environmental Destruction before the ICC’ (2017) *Journal of International Criminal Justice* 15; Nadia Bernaz, ‘An Analysis of the ICC Office of the Prosecutor’s Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights’ (2017) 15 *Journal of International Criminal Justice* 527.

³² Rome Statute, art 75(1).

³³ ICC Rules of Procedure and Evidence, ICC-ASP/1/3 (adopted 9 September 2002), rr 97 - 98.

³⁴ Rome Statute, art 75(2).

³⁵ See *Regulations of the Trust Fund for Victims*, ICC-ASP/4/Res.3, 3 December 2005.

³⁶ International Criminal Court Res. ICC ASP/4/Res.3, annex, *Regulations of the Trust Fund for Victims*, 21 (Dec. 3, 2005).

done prior to any judgment being issued,³⁷ and can include physical and/or psychological rehabilitation and material support.³⁸

While reparations and victim assistance are increasingly acknowledged as central aspects of post-conflict and post-atrocity recovery,³⁹ the understandable prioritisation of severe human rights violations can lead to an overlooking of environmental destruction. However, this arguably overlooks the interconnected relationships that exist between humans and their environments.⁴⁰ 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.⁴¹ Rather than seeing environmental and human welfare as mutually exclusive, it is therefore worth exploring how reparations and measures of assistance which seek to respond to human rights violations might also encompass environmental considerations.

The chapter is written in the knowledge that significant pressures on the ICC and TFV's reparative mandates already exist,⁴² and that international criminal institutions cannot in and of themselves prevent and respond to the environmental devastation that so often accompanies conflict and atrocity.⁴³ However, I argue that the scale of the problem should invite innovative and flexible legal responses whenever possible – including within existing structures - rather than induce paralysis. In that spirit, I argue that there are three interlinked ways that reparations and measures of assistance can contribute to repairing environmental destruction. First, through the incorporation of an 'eco-sensitive' approach to reparations and assistance. Second, through the awarding of reparations explicitly responding to environmental destruction that can be appropriately linked to convictions for the core crimes, and third, by exploring the possibilities of environmentally 'transformative' reparations. It should be noted that the recommendations contained within this chapter 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' Implementation of Reparation and Assistance Measures

Reparations can take myriad forms and recognise a diverse range of physical, moral, emotional and social harms, experienced both individually and collectively. Their flexibility allows them

³⁷ Anne Dutton and Fionnuala Ní Aoláin, 'Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate' (2019) 19(2) *Chicago Journal of International Law* 490, 506.

³⁸ Trust Fund for Victims, 'Assistance Programmes' <www.trustfundforvictims.org/en/what-we-do/assistance-programmes> accessed 13 April 2020.

³⁹ Peter J. Dixon, 'Reparations, Assistance and the Experiences of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2016) 10(1) *International Journal of Transitional Justice* 88.

⁴⁰ And, indeed, the value of repairing nature for its own sake.

⁴¹ Richard Milburn 'The Roots to Peace in the DRC: Conservation as a Platform for Green Development' (2014) 90(4) *International Affairs* 883.

⁴² See e.g. Luke Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward' (2017) 21(9) *The International Journal of Human Rights* 1204.

⁴³ Lindgren (n.20).

to be sensitive to the nature and context of the crimes that have been committed.⁴⁴ However, if misconceived or insensitively delivered, reparative measures, or indeed measures of victim assistance, may exacerbate tensions or undermine the cooperation and reconciliation needed to prevent future violence and harm.⁴⁵ 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 repercussions for the possibilities of long-term peace. Therefore, at a minimum, this chapter argues in favour of an ‘eco-sensitive’ approach to reparations and victim assistance measures. Adapted from the practice of conflict-sensitivity⁴⁶ (which is already implemented by the TFV),⁴⁷ I define an eco-sensitive approach as one which (i) attempts to understand how reparations may interact with environmental damage through the use of environmental impact assessments; (ii) monitors, evaluates and mitigates against any unintended environmental effects, and (iii) positively influences environmental sustainability wherever possible. Such an approach would prioritise biological diversity and ecological integrity and incorporate an awareness of the possible long-term and inter-generational impacts of reparative projects. Adopting an eco-sensitive approach would signal a further ‘mainstreaming’ of environmental consciousness in the work of the Court and TFV. 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.⁴⁸ 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.⁴⁹

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

⁴⁴ Ruti Teitel, *Transitional Justice* (OUP 2000) 127.

⁴⁵ Merryl Lawry-White, ‘Victims of Environmental Harm During Conflict: The Potential for Justice’ in Carsten Stahn, Jens Iverson and Jennifer S. Easterday (eds) *Environmental Protection and Transitions from Conflict to Peace* (OUP 2017) 368.

⁴⁶ Adapted from ‘Conflict-sensitive approaches to development, humanitarian assistance and peace building: Resource Pack’ <www.conflictsensitivity.org/key_reading/conflict-sensitive-approaches-to-development-humanitarian-assistance-and-peacebuilding-resource-pack/> accessed 13 April 2020.

⁴⁷ TFV, ‘Strategic Plan 2014-2017’ (*Trust Fund for Victims*, August 2014) <www.trustfundforvictims.org/sites/default/files/imce/1408%20TFV%20Strategic%20Plan%202014-2017%20Final%20ENG.pdf> accessed 13 April 2020.

⁴⁸ *Ibid*, 24.

⁴⁹ *Idem*.

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.⁵⁰ Indeed, as noted by Dutton and Ní Aoláin, the TFV’s focus on harm requires that its ‘services focus on addressing the root causes of the suffering experienced by beneficiaries.’⁵¹ In cases where experiences of harm are intertwined with environmental destruction or associated resource challenges, an eco-sensitive approach that centered environmental sustainability might better enable effective engagement with those root causes.

The broad scope of the TFV’s assistance mandate might prove valuable in this regard, as it is designed to enable the delivery of reparative measures to a ‘more extensive range of victims who are affected by the broader situations before the Court, regardless of whether the harm they suffered stems from particular crimes charged in a specific case.’⁵² However, even in the context of judicially awarded reparations, introducing this level of eco-sensitivity would not rely on or be linked to the OTP’s selection of situations and cases which explicitly 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, if implementing collective symbolic reparations⁵³ to acknowledge suffering, the Fund might encompass the establishment of projects that help restore and conserve natural spaces. Drawing from environmental peacebuilding and security studies,⁵⁴ 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.⁵⁵ 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

⁵⁰ Peter Woodrow and Diana Chigas, *A Distinction with a Difference: Conflict Sensitivity and Peacebuilding* (CDA Collaborative Learning Projects 2009), <www.cdacollaborative.org/publication/a-distinction-with-a-difference-conflict-sensitivity-and-peacebuilding/> accessed 13 April 2020.

⁵¹ Dutton and Ní Aoláin (n.37) 522.

⁵² Trust Fund for Victims, ‘Two Mandates’ <<https://www.trustfundforvictims.org/en/about/two-mandates-tfv/assistance>> accessed 27 August 2020.

⁵³ Modalities previously awarded in the Lubanga and Katanga cases in the DRC situation, and the Al Madhi case in the Mali situation. See ‘Draft Implementation Plan for collective reparations to victims, Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06)’, ICC-01/04-01/06-3177-AnxA; ‘Draft implementation plan relevant to Trial Chamber II’s order for reparations of 24 March 2017 (ICC-01/04-01/07-3728)’, ICC-01/04-01/07-3751-Red; ‘Corrected version of Draft Implementation Plan for Reparations, Annex I, 20 April 2018’, ICC-01/12-01/15-265-Conf, 30 April 2018 ICC-01/12-01/15-265-Conf-Corr+Corr-Anx.

⁵⁴ Lesley Evans Ogden, ‘Environmental Peacebuilding’ (2018) 68(3) *Bioscience* 157.

⁵⁵ Examples can be found in the US and Canada, Peru and Ecuador, Costa Rica and Nicaragua, Albania, Greece and Macedonia, and South Africa and Botswana. See Saleem Hassan Ali, *Peace Parks: Conservation and Conflict Resolution* (MIT 2007).

resources conservation.’⁵⁶ 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.’⁵⁷

Reparations or assistance programmes which seek to respond to material harm, such as vocational training and income-generating activities⁵⁸ 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 and pursued by the TFV, which has highlighted ‘environmentally-friendly livelihood activities’ as a form of material support that can be offered through its assistance mandate.⁵⁹ For example, in Northern Uganda, the TFV has supported training in bee-keeping, improved agricultural techniques and tree-planting.⁶⁰ 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.⁶¹ Indeed, the TFV describes longer-term sustainability and impact of material assistance as a particularly rewarding and promising aspect of its mandate, noting the potential for community-grown, community-owned and community-managed interventions in post-conflict settings.⁶² Given the long-term nature of the assistance programme and involvement of local as well as international project implementing partners,⁶³ introducing an eco-sensitive approach to these measures could arguably entrench practices that are sustainable for both the communities and the environment which they inhabit. Indeed, given the centrality of collaboration to the TFV’s mandates, this might have knock-on impacts in the way that implementing partners engage with their own work.

To be effective, eco-sensitivity would require application at each stage of reparation and assistance design and delivery and would be mainstreamed into the TFV’s institutional mindset.⁶⁴ This would require initial environmental impact assessments of the effects likely to arise from a proposed reparation or assistance project. This would feature both consultation with local experts (when possible) and public participation as integral aspects to ensuring the

⁵⁶ Salween Peace Park Initiative, <<https://kesan.asia/salween-peace-park-initiative/>> accessed 13 April 2020.

⁵⁷ Shona Loong, ‘Notes from the Salween Peace Park’ (*New Mandela*, 27 May 2019)

www.newmandala.org/notes-from-the-salween-peace-park/ accessed 13 April 2020.

⁵⁸ Modalities previously awarded in the Lubanga and Katanga cases in the DRC situation. See TFV, 3 March 2015 Draft Implementation Plan; TFV, 24 March 2017 Draft Implementation Plan.

⁵⁹ TFV, *Report to the Assembly of State Parties on the Projects and Activities of the Board of Directors of the Trust Fund for Victims for the Period 1 July 2017 to 30 June 2018 Seventeenth Session*, ICC-ASP/17/14, 5-12 December 2018.

⁶⁰ Trust Fund for Victims <<https://www.trustfundforvictims.org/en/about/two-mandates-tfv/assistance/material-support/>> accessed 27 August 2020.

⁶¹ Richard Milburn, ‘Mainstreaming the Environment into Postwar Recovery: The Case for ‘Ecological Development’ (2012) 88(5) *International Affairs* (2012)1088-1089.

⁶² Trust Fund for Victims <<https://www.trustfundforvictims.org/en/about/two-mandates-tfv/assistance/material-support/>> accessed 27 August 2020.

⁶³ Dutton and Ní Aoláin, (n.37) 505.

⁶⁴ Maria Lange, ‘Conflict-Sensitive Humanitarian Assistance: Building Capacity for Mainstreaming’ in Pat Gibbons and Brigitte Piquard (eds) *Working in Conflict – Working on Conflict: Humanitarian Dilemmas and Challenges* (University of Duesto 2006): 155-170.

project proceeded in an eco-sensitive manner.⁶⁵ Ongoing monitoring and evaluation would also be required as projects progressed, and the TFV and its implementing partners 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 and assistance mandates, for example through the development of eco-sensitive policies and project delivery standards.⁶⁶ 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.⁶⁷ 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.

While this section has focused on the TFV and its implementing partners, it is worth noting that an eco-sensitive approach to reparations delivery could also be supported and further entrenched in practice by the ICC Chambers, through the incorporation of eco-sensitivity into any subsequent reparation principles, awards or implementation plans produced in future cases.⁶⁸ The Court has to date never adopted institution-wide principles on the delivery of reparations. While this has been critiqued for producing a lack of clarity and inconsistency,⁶⁹ it also enables the flexible development of practice through the progressive practices of different Chambers.⁷⁰ It also leaves open the possibility of amended or new principles in future as the ICC adapts to new ways of thinking, including the possible future adoption of eco-sensitive approaches. Similarly, as new cases approach the reparations stage, opportunities may arise for Chambers to make awards that specifically address environmental destruction, as explored in the following section.

Awarding Reparations that Address Environmental Destruction

The ICC's jurisprudence has established the conditions necessary for a victim to claim reparations. A victim must be a natural person or legal entity that has suffered harm, whether directly or indirectly. The harm can be material, physical and psychological, but must be personal and must be the result of a crime within the jurisdiction of the Court.⁷¹ The

⁶⁵ Stephen Jay and others, 'Environmental Impact Assessment' (2007) 27(4) *Environmental Impact Assessment Review* 287.

⁶⁶ Huma Haider, 'Conflict Sensitivity: Topic Guide' (*Governance, GSDRC Applied Knowledge Services*) <www.gsdrc.org/docs/open/gsdrc_cs_topic_guide.pdf> accessed 13 April 2020.

⁶⁷ Resource Pack (n.46).

⁶⁸ See Rome Statute, art 75(1): 'The Court shall establish principles relating to reparations...'; *Prosecutor v Thomas Lubanga Dyilo*, Decision Establishing the Principles and Procedures to be Applied to Reparations, ICC-01/04-01/06-2904, 7 August 2012.

⁶⁹ Alina Balta, Manon Bax and Riane Letschert, 'Trial and (Potential) Error: Conflicting Visions Within the ICC System' 29(3) (2019) *International Criminal Justice Review* 221.

⁷⁰ Carla Ferstman, 'Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness' in Carla Festman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill, 2020) 446-478.

⁷¹ *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129-AnxA, 3 March 2015.

requirement that harm requiring reparation must 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, in cases where the OTP successfully brings prosecutions in line with its Policy Papers, 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,⁷² the Court’s Chambers could award reparations which explicitly respond to the ‘damage, loss and injury’⁷³ caused by that destruction. 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.⁷⁴

It is possible to ‘transpose some of the current provisions on reparations to accommodate justice for non-human life.’⁷⁵ As further observed by Marja Lehto, ‘the effects of environmental damage are often felt both individually and collectively’,⁷⁶ thus requiring reparations which are individual or collective in nature, or both. Indeed, environmental destruction in the context of conflict or atrocity can in some cases be situated within a deliberate attempt to destroy communities and groups, leading to associated harms that are communal, shared and with potentially intergenerational impacts. While it may not be possible to meet all demands, the experiences, harms, priorities and needs of victims should be understood and incorporated into reparation awards to the greatest extent possible.⁷⁷ Prior to making an order, the Court may invite representations from victims, which may help in this regard.⁷⁸

In addition to consultation with victims, the Court may wish to 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.⁷⁹ Repairing the harm caused by environmental destruction undeniably poses specific challenges: complete restitution may be unlikely in many cases.⁸⁰ 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

⁷² ICC OTP (n.27).

⁷³ Rome Statute, art 75.

⁷⁴ Second report of the Special Rapporteur, Ms. Marja Lehto (71st session of the ILC (2019)), A/CN.4/728, 27 March 2019, 32.

⁷⁵ Mwanza (n.22) 606.

⁷⁶ Special Rapporteur (n.74) 32.

⁷⁷ John Braithwaite, *Restorative Justice and Responsive Regulation* (2002), 46.

⁷⁸ Rome Statute, Article 75(3), RPE, Rule 97(3).

⁷⁹ ICC, Rules of Procedure and Evidence, r 97.

⁸⁰ Gabčíkovo-Nagymaros Project (Hungary/Slovakia), *Judgment*, ICJ Reports, 25 September 1997, pp. 77–78, para. 140: ‘The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.’

amount to an environmental trust or a specified environmental organization for the purpose of a specified restoration project.⁸¹ Examples can be found in the practice of the Inter-American Court of Human Rights (IACtHR), where reparations have previously included environmental restitution, clean-up and reforestation programmes.⁸² In domestic systems, the practice of specialist environmental courts may also be instructive. For example, the New South Wales Land and Environment Court in Australia is empowered to award offenders to carry out specified projects for the restoration of the environment, as well as pay compensation.⁸³ In relation to the practicalities of pursuing restoration, other domestic and regional frameworks may also provide guidance. For example, the US Comprehensive Environmental Response, Compensation, and Liability Act,⁸⁴ and the European Union Environmental Liability Directive,⁸⁵ both of which contain frameworks for the restoration of injured natural resources.⁸⁶

While templates for awarding restitution measures as reparations exist, the reality may be that full restitution is resource-intensive and requires specialist expertise and equipment.⁸⁷ Depending on the nature of the harm, it may also require state involvement, which the ICC and TFV cannot guarantee. These limitations suggest that other or additional forms of reparation might be required. For example, the Court may consider awarding compensation and ordering fines or orders for the forfeitures of property which factor in harm to the environment.⁸⁸ In the context of international law, the commentary to the articles on State responsibility,⁸⁹ the International Law Institute,⁹⁰ the UN Compensation Commission,⁹¹ the International Court of Justice,⁹² and the International Center for Settlement of Investment Disputes⁹³ have each made clear that environmental destruction is compensable. Certainly, evaluating environmental

⁸¹ Eileen Skinnider, *Victims of Environmental Crime – Mapping the Issues* (The International Centre for Criminal Law Reform and Criminal Justice Policy 2011) 55.

⁸² *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment*, Inter. Am. Ct. H.R. (ser. C) No. 245, 294 (June 27, 2012).

⁸³ See e.g. Chief Executive, Office of Environment and Heritage v Coffs Harbour Hardwood Sales Pty Ltd. [2012] NSWLEC 52; Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino) Lani [2012] NSWLEC 115, as discussed in White (n.9).

⁸⁴ 42 U.S.C. §9601 et seq. (1980)

⁸⁵ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage

⁸⁶ See Kévine Kindji and Michael Faure, ‘Assessing reparation of environmental damage by the ICJ: A lost opportunity?’ 57 (2019) *QIL* 5.

⁸⁷ Lawry-White (n.45) 380.

⁸⁸ Mwanza (n.22) 606.

⁸⁹ International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) 2(2) *Yearbook of the International Law Commission* 101, para. 15 of the commentary to Article 36.

⁹⁰ The Institute of International Law, ‘Responsibility and Liability under International Law for Environmental Damage’ *Session of Strasbourg* (1997), art 23.

⁹¹ UN Compensation Commission, Governing Council, *Report and Recommendations made by the Panel of Commissioners concerning the fifth instalment of ‘F4’ claims* (S/AC.26/2005/10), 4 April 2005, para. 58.

⁹² *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica*, ICJ, 2 February 2018, General List No. 150. Although note some dissent on the exclusive use of compensation in Judge Cançado Trindade’s Separate Opinion, paras 36 – 37.

⁹³ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (Feb. 7, 2017).

destruction for the purpose of compensation may also pose challenges;⁹⁴ valuations are likely to require expert testimony, site visits and appropriate evidence collection,⁹⁵ and 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.⁹⁶ Nevertheless, where the practicalities of the situation allow for it, methods of assessment and valuation are possible.⁹⁷

Guidance on this process can be found 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.'⁹⁸ 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.⁹⁹ At the International Court of Justice¹⁰⁰ judges were called upon to determine compensation for material damage in the case of *Costa Rica v. Nicaragua*. The Court adopted an 'overall 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'.¹⁰¹ This considered the nature of the harmful acts,¹⁰² harm,¹⁰³ and affected area,¹⁰⁴ as well as the area's capacity for natural regeneration.¹⁰⁵ Arguably the most experienced in considering reparations for environmental harms in the context of human rights abuses is the IACtHR, where indigenous communities have sought compensation for the loss of culturally significant land and natural resources.¹⁰⁶ In this context, the Court has previously ordered compensation for material damage caused by 'despoiled subsistence

⁹⁴ Tarcisio Hardman Reis, *Compensation for Environmental Damage under International Law: The Role of the International Judge* (Kluwer Law International 2011), 157.

⁹⁵ Burlington Resources (n.93) 423.

⁹⁶ Cymie Payne, 'Environmental Integrity in Post-Conflict Regimes' in Carsten Stahn, Jens Iverson and Jennifer Easterday (eds) *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014) 515.

⁹⁷ Kindji and Michael Faure (n.86).

⁹⁸ UN Compensation Commission (n.91) para. 80.

⁹⁹ Cymie Payne, 'Developments in the Law of Environmental Reparations: A Case Study of the UN Compensation Commission' in Carsten Stahn, Jens Iverson, and Jennifer Easterday (eds) *Environmental Protection and Transitions from Conflict to Peace* (OUP 2017) 358.

¹⁰⁰ Diane Desierto, 'Environmental Damages, Environmental Reparations, and the Right to a Healthy Environment: The ICJ Compensation Judgment in *Costa Rica v. Nicaragua* and the IACtHR Advisory Opinion on Marine Protection for the Greater Caribbean' (*EJIL: Talk!*, 14 February 2018)

www.ejiltalk.org/environmental-damages-environmental-reparations-and-the-right-to-a-healthy-environment-the-icj-compensation-judgment-in-costa-rica-v-nicaragua-and-the-iacthr-advisory-opinion-on-marine-protection/ accessed 13 April 2020.

¹⁰¹ *Nicaragua* (n.92) para 78.

¹⁰² *Ibid*, para 79.

¹⁰³ *Idem*.

¹⁰⁴ *Ibid*, para. 80.

¹⁰⁵ *Ibid*, para. 81.

¹⁰⁶ For a comprehensive overview and critique of the IACtHR's compensation practices, see Thomas M. Antkowiak, 'A Dark Side of Virtue: the Inter-American Court and Reparations for Indigenous Peoples' 25(1) (2014) *Duke Journal of Comparative and International Law* 1-80.

resources' and 'destruction' of forests,¹⁰⁷ as well as the immaterial damage caused to a people's spiritual connection with their territory.¹⁰⁸ While these various examples are distinct from the ICC in terms of their legal frameworks, they demonstrate that the compensability of environmental destruction is well recognised in international law, and that valuation approaches exist to enable compensation to be awarded.¹⁰⁹

The Court may also wish to look to other forms of reparation for environmental destruction, for three reasons. First, compensation alone might not be enough to deliver a sense of justice to victims without accompanying measures of satisfaction.¹¹⁰ Indeed, a sole focus on compensation has been deemed insufficient in other legal contexts; the ICJ's focus on compensation in *Costa Rica v. Nicaragua* faced critiques from judges and academic commentators alike.¹¹¹ Second, in line with the eco-sensitive approach advocated above, reparations should be delivered with an eye on long term environmental sustainability.¹¹² 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.'¹¹³ And third, the nature of environmental destruction may be such that the harm has been experienced collectively, requiring an appropriately collective response. In addition to those highlighted in the context of eco-sensitivity, examples of additional forms of reparation can be found in the practice of the IACtHR. For example, it has previously awarded the creation of community development funds designed to enable eco-tourism developments, access to clean water and food security.¹¹⁴ Additional symbolic measures, such as apologies, acceptances of responsibility and acknowledgments of suffering could also be structured in a way which incorporated recognition of environmental harms.¹¹⁵ Awarding a combination of individual reparations in the form of compensation and wider ranging collective measures would be in

¹⁰⁷ *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations*, Judgment, Series C, No. 245 (Inter-American Court of Human Rights, 27 June 2012).

¹⁰⁸ *Case of the Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, Costs, Series C, No. 172 (Inter-American Court of Human Rights, 28 November 2007).

¹⁰⁹ As observed by the Special Rapporteur Marja Lehto, investment arbitration tribunals have also decided a considerable number of environmental cases, see Kate Parlett and Sara Ewad, 'Protection of the Environment in Investment Arbitration – a Double Edged Sword' *Kluwer Arbitration Blog*, 22 August 2017, cited in Special Rapporteur (n.74) 63, fn 510.

¹¹⁰ Pablo De Greiff, *The Handbook of Reparations* (OUP 2006) 13.

¹¹¹ For an overview of the debate see Monaliza Da Silva, 'Compensation Awards in International Environmental Law: Two Recent Developments' 50(4) (2018) *New York University Journal of International Law and Politics* 1417-1430.

¹¹² Pabuda Sachithanandan, 'Reparations for Victims and Sustainable Development' in Sebastien Jodoin and Marie-Claire Cordonier Segger (eds) *Sustainable Development, International Criminal Justice and Treaty Implementation* (CUP 2013).

¹¹³ Tsuey-Ping Lee, A Welfare Approach to Mitigating Environmental Injustice: Exploring Needs of Pollution Victims, cited in Matthew Hall, *Victims of Environmental Harm: Rights, Recognition and Redress under National and International Law* (Routledge 2013) 98.

¹¹⁴ Sarayaku case (n. 107); Saramaka case (n.108).

¹¹⁵ On the potential of symbolic reparations at the ICC see Frédéric Mégret, 'The International Criminal Court Statute and the Failure to Mention Symbolic Reparation' 16 (2009) *International Review of Victimology* 127.

keeping with the ICC's developing practice,¹¹⁶ and would increase the possibilities of adequately responding to the harm.¹¹⁷

Awarding reparations for environmental destruction would acknowledge the symbiotic relationship between restoring the environment and repairing harm experienced by individuals living in that environment, with potentially wide-ranging impacts.¹¹⁸ However, if done without sensitivity for local context, dynamics and inequalities, such reparations would also contain risks of failing to improve the lives of victims or even resulting in further harm and inequality.¹¹⁹ In the final section, I therefore move to a more ambitious proposal, considering how the potential for long-term positive impacts might be enhanced by the application of an eco-sensitive lens to the 'transformative' reparations discourse.

The Possibilities of Environmentally 'Transformative' Reparations

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.'¹²⁰ Emerging in part as a critique of transitional justice's focus on a relatively narrow range of civil and political issues, transformative justice.¹²¹ In parallel to the development of transformative justice theories, advocates of transformative reparations have emerged. They note 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.'¹²² In the context of indigenous peoples and other marginalised groups, advocates and experts have underscored that land restitution and related reparations, while valued and even crucial, are insufficient without the simultaneous addressing of underlying discrimination and oppression.¹²³

Within the international criminal law literature, transformative reparations have been advocated for most notably 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.'¹²⁴ Feminist transitional

¹¹⁶ See *The Prosecutor v. Germain Katanga*, 24 March 2017, ICC, Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, 17 August 2017, ICC, Trial Chamber, Reparations Order, ICC01/12-01/15.

¹¹⁷ This has not been without challenges, see Balta, Bax and Letschert (n. 69).

¹¹⁸ Lawry-White (n.66) 376.

¹¹⁹ Barbara Rose Johnston and Holly M. Barker, *Consequential Damages of Nuclear War: the Rongelap Report* (2008), 225-247.

¹²⁰ Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Peace' (2014) 8 *The International Journal of Transitional Justice* 339.

¹²¹ Matthew Evans and David Wilkins, 'Transformative Justice, Reparations and Transatlantic Slavery' 28(2) (2019) *Social and Legal Studies* 137.

¹²² UN Office of the High Commissioner for Human Rights and UN Women, *UN Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence* (2014).

¹²³ Antkowiak (n.106) 56.

¹²⁴ Moffett (n.42) 1211.

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.¹²⁵ 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).¹²⁶

It is arguable that similar principles are applicable when thinking about reparations for conflict- and atrocity-related environmental destruction. While measures of restitution and compensation may play an important role, an exclusive focus on such relatively narrow measures fails to situate conflict- and atrocity-related environmental destruction in its broader context. This often involves environmental harm pre- and post- conflict, as well as structural inequalities which shape who is able to access and use natural resources.¹²⁷ 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.¹²⁸ 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, as states struggle to economically recover from the impacts of conflict.¹²⁹ 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.¹³⁰ Indeed, the environmental justice movement has worked since the 1960s to expose these inequalities,¹³¹ highlighting how disadvantaged groups suffer disproportionately from environmental degradation and unequal distribution of natural resources.¹³² Mirroring the calls from proponents of transformative justice, environmental justice is commonly described as requiring distributive justice, procedural justice and recognition.¹³³

¹²⁵ See e.g. Ruth Rubio-Marin, *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (CUP 2009); Fionnuala Ní Aoláin, Dina Francesca Haynes, and Naomi Cahn, *On the Frontlines: Gender, War and Post-Conflict Process* (OUP 2011); Rashida Manjoo and Calleigh McRaith, 'Gender-Based Violence and Justice in Conflict and Post-Conflict Areas' (2011) 44 *Cornell International Law Journal* 11.

¹²⁶ Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Columbia University Press 2009), cited in Andrea Durbach and Louise Chappell, 'Leaving Behind the Age of Impunity' (2014) 16(4) *International Feminist Journal of Politics* 548.

¹²⁷ Lawry-White (n.66) 367.

¹²⁸ *Idem*.

¹²⁹ David M Ong, 'Prospects for Transitional Environmental Justice in the Socio-Economic Reconstruction of Kosovo' (2017) 30(2) *Tulane Environmental Law Journal*.

¹³⁰ UNEP, *Sudan: Post-Conflict Environmental Assessment* (UNEP 2007) 8.

¹³¹ See e.g. Robert Bullard, *Dumping in Dixie: Race, Class and Environmental Quality* (Westview Press 1990).

¹³² Britta Sjostedt, 'Searching for Environmental Justice in Peacebuilding – Tools Offered by International Environmental Law' (*Lund University, Nature of Peace*) <natureofpeace.blogg.lu.se/searching-for-environmental-justice-in-peacebuilding-tools-offered-by-international-environmental-law/> accessed 13 April 2020.

¹³³ See e.g. David Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (OUP 2009).

The ICC has been identified as an important organ for pursuing transformative reparations.¹³⁴ 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.¹³⁵ The TFV has similarly spoken of the importance of ensuring awards that ‘do not exacerbate the root causes of the conflict.’¹³⁶ 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.¹³⁷ 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.¹³⁸ 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 criminal justice institution, without accompanying state buy-in.¹³⁹ 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. Drumbi 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.¹⁴⁰

However, such limitations do not mean that the ICC cannot seek to integrate environmental transformative justice to the extent available. For example, guarantees of non-repetition have the potential to become a useful tool in pursuing transformation; as Sandoval has argued, such measures ‘remain crucial to realizing the transformative potential of transitional justice.’¹⁴¹ Guarantees of non-repetition are designed to prevent the reoccurrence of crimes by addressing the structural causes of violations, and are more commonly found in the context of human

¹³⁴ Durbach and Chappell (n.126).

¹³⁵ ICC (n.62) 4.

¹³⁶ *Prosecutor v. Thomas Lubanga Dyilo*: Observations on Reparations in Response to the Scheduling Order of 14 March 2012, ICC-01/04-01/06-2872.

¹³⁷ Luke Moffett, ‘Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court’ (2013) 17(3) *International Journal of Human Rights* 368; Sarah Williams and Emma Palmer, ‘Transformative Reparations for Women and Girls at the Extraordinary Chambers in the Courts of Cambodia’ (2016) 10 *International Journal of Transitional Justice* 311.

¹³⁸ Durbach and Chappell (n.126).

¹³⁹ On the IACtHR’s attempts and successes with regards to structural inequalities, see Antkowiak, 56-59.

¹⁴⁰ Mark Drumbi, Symposium on ‘International Responses to the Environmental Impact of War’ (2005-05) 17 *Georgetown International Environmental Law Review* 623.

¹⁴¹ Clara Sandoval, ‘Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition’ in Roger Duthie and Paul Seils, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 166.

rights violations and state-led reparations.¹⁴² However, the ICC's reparations decision in the case of *Al-Mahdi* demonstrated the Court's willingness to award such reparations in the context of individual accountability. Just as 'effective measures to guarantee non-repetition of the attacks'¹⁴³ were considered appropriate in the context of attacks against specific cultural sites in *Al Mahdi's* case, so might future Chambers consider the possibility of awarding guarantees against future harmful behaviour directed at the environment. In terms of implementation, the Basic Principles and Guidelines on the Right to a Remedy and Reparation identify eight examples of possible modalities, including training for law enforcement, military and security forces; promoting mechanisms for conflict resolution, and reforming laws that enabled the violations to take place.¹⁴⁴ Such measures offer the potential to entrench greater respect for the environment and fairer resource distribution post-conflict, potentially contributing to a more lasting peace. As noted by the Trial Chamber in *Al Mahdi*, such reparations may require consultation with governmental authorities, and would need to be tailored to the individual concerns regarding the natural resources.¹⁴⁵ Again, guidance might be found in the practice of the IACtHR, where guarantees of non-repetition have been awarded in cases involving victim groups' land.¹⁴⁶

It could be that some of the measures discussed in previous sections could also 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'.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹ It might be that a more holistic, eco-sensitive approach to reparations might 'deflect, subsume and eventually even transcend entrenched social conflicts'.¹⁵⁰

More broadly, representative/procedural justice elements can be incorporated by ensuring that those with an understanding of the specific environmental context in which violence occurred

¹⁴² *Ibid.*

¹⁴³ Al Mahdi Reparations Order (n.116) para 67.

¹⁴⁴ UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147.

¹⁴⁵ Al Mahdi Reparations Order (n.116) para 67.

¹⁴⁶ For an analysis of the ICC's awarding of guarantees of non-repetition and the applicability of IACtHR practice see Francesca Capone, 'An Appraisal of the Al-Mahdi Order on Relations and its Innovative Elements' (2018) 16(3) *Journal of International Criminal Justice* 645–661.

¹⁴⁷ Salween Peace Park Initiative (n.56).

¹⁴⁸ Ken Conca and Geoffrey D. Dabelko, *Environmental Peacemaking* (Johns Hopkins University Press 2002).

¹⁴⁹ Milburn (n.61).

¹⁵⁰ Ong (n.129) 222.

are heard prior to reparation orders being made and during the design and implementation of reparative projects.¹⁵¹ 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.¹⁵² Adopting an eco-sensitive approach to design and implementation as advocated above could also contribute to mainstreaming environmental concerns into the TFV's operations.¹⁵³ 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.

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?'¹⁵⁴ 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.¹⁵⁵ 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 reparation and measures of assistance to victimised communities. These challenges cannot be ignored. Yet, this chapter has sought to demonstrate that there are ways and means of adopting greater environmental awareness into the ICC's reparative framework, ranging from an increased eco-sensitivity in human-centric reparation and assistance measures, to reparation awards which explicitly respond to environmental harm, to pursuing an environmentally transformative reparations agenda.

Even at its most effective, the ICC and TFV are transitional justice mechanisms, with a limited ability to address the broader injustices, inequalities and structural forms of oppression that may have enabled the perpetration of core crimes and related environmental destruction. Proponents of broader theories of transformative justice have critiqued arguments which focus on addressing broader contexts of violence only inasmuch as existing transitional justice tools can be adapted to do so,¹⁵⁶ and would undoubtedly critique my suggestions on that basis. While

¹⁵¹ Durbach and Chappell (n.118) 551.

¹⁵² *Idem*.

¹⁵³ See Durbach and Chappell (n.118) 555 noting the value of the Trust Fund's 'gender mainstreaming' to the project of gender transformative reparations.

¹⁵⁴ *Idem*.

¹⁵⁵ Susanna Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) *Transnational Environmental Law* 128.

¹⁵⁶ Matthew Evans, 'Structural Violence, Socioeconomic Rights, and Transformative Justice' (2016) 15(1) *Journal of Human Rights* 1-20.

agreeing that more radical measures are necessary, I nonetheless argue that it is vital that we continue to explore diverse and creative ways to respond to environmental harms wherever possible.¹⁵⁷ 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. The wellbeing of humans cannot be achieved in isolation from the wellbeing of nature;¹⁵⁸ indeed, human rights and the protection of the environment are increasingly recognised as interdependent and indivisible.¹⁵⁹ Greater awareness of these interconnections in measures of reparation and victim assistance is therefore a necessary, if modest, first step 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.¹⁶⁰

¹⁵⁷ See also Dinah Shelton, 'Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk' (2015) 6(2) *Journal of Human Rights and the Environment* 139-155.

¹⁵⁸ Mwanza (n.22) 593.

¹⁵⁹ Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity—Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), IACtHR Advisory Opinion no OC-23/18, Ser A (No 23), 15 November 2017

¹⁶⁰ Milburn (n.41) 876.