To repair or not to repair: what are the questions?

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12. To repair or not to repair: What are the questions?[1]

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1. INTRODUCTION

It is an uncontroversial principle of international law that 'the breach of an engagement involves an obligation to make reparation in an adequate form'.[2] This applies equally to breaches of international law obligations that result in damage to the environment, whether in times of conflict, peacetime, or the transition between the two.[3] Wherever environmental damage has been caused by an internationally wrongful act or omission, the obligation to make reparation forms a central question within the peacebuilding process. Reparative measures sit alongside corollary obligations, such as obligations of cessation, assurances and guarantees of non-repetition (if appropriate) and a continued obligation of performance.

Reparation for wartime environmental damage can assume different forms depending on a variety of factors, including the political context, the nature of the breach that caused the damage and of the damage itself, the perpetrator, and the victim community. Meaningful reparation measures—performing, for example, a normative, material and/or expressive function—include compensation for remediation costs, legislative reform to improve natural resources governance, but also symbolic measures such as acknowledgments of the breach and apologies. Given the communal enjoyment of and responsibility for the environment, as well as the objectives of peacebuilding, many reparative measures will have a collective element.

Repairing environmental damage and installing a governance structure to respect obligations and protect resources in the future plays an important potential role in stemming conflict.[4] While damage to the environment and resources may act as a cause, catalyst and consequence of conflict, a central proposition of today's concept of environmental peacebuilding is that natural resources do not only stimulate conflict but may also form the basis of cooperation.[5] Reparation and the procedural aspects of seeking and awarding a remedy, along with its design and implementation, can represent opportunities for cooperation between former parties to the

[1] This chapter was last updated in mid-2020 and will not take into account developments after that date. The analysis, views and opinions set out in this chapter are personal to the authors and do not reflect those of any institutions with which they are or have previously been affiliated.

[2] *Factory at Chorzów (Germany v Poland)* (Jurisdiction) PCIJ Rep Series A No 9, 21.

[3] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation) [2018] ICJ Rep 15, para 41. *See also* draft principle 9 of the ILC draft principles provisionally adopted by the Drafting Committee on first reading during the 71st session: 'Protection of the Environment in Relation to Armed Conflicts' (6 June 2019) UN Doc A/CN.4/L.937 ('ILC Draft Principles on the Protection of the Environment').

[4] UNEP, 'From Conflict to Peacebuilding: The Role of Natural Resources and the Environment' (February 2009) https://wedocs.unep.org/handle/20.500.11822/7867, accessed 22 March 2023, 5.

[5] See e.g., Lesley Evans Ogden, 'Environmental Peacebuilding' (2018) 68 *BioScience* 157, at 57.

conflict, for instance through joint efforts to repair transboundary damage to the environment or to design a protective system for an ecosystem that crosses boundaries.

This chapter is structured as follows: Section 2 examines the intersection between reparation for environmental damage and peacebuilding, including the synergies and tensions between them. Section 3 examines the place of courts and other institutions in adjudicating reparation claims for environmental damage, including within the context of environmental peacebuilding. The analysis also highlights the limitations placed upon these bodies and the circumstances where the existing legal framework may hinder rather than aid environmental peacebuilding. Instances of international tribunals adjudicating environmental damage during conflict and post-conflict are rare—and the questions facing tribunals provide some insight as to why.[6] Yet, while the findings of different bodies in respect of breach and reparation form part of a much larger tapestry of efforts to reduce conflict risks and allow for sustainable use and benefit of the environment,[7] these bodies can play an important role in embedding and upholding the norms they adjudicate in the polity that is being built through the peacebuilding process.

While the survey is necessarily limited, the examination touches upon select decisions and findings of a variety of international courts and tribunals, while also drawing on the practice of other bodies that have played a role in determining reparation in peacebuilding scenarios, such as international administrative bodies and truth and reconciliation commissions. Investment treaty protections are examined in the following chapter. The present discussion does not extend to environmental damage caused by acts that are not prohibited by international law.[8] While the main focus of the analysis is on wartime environmental damage, it is important to note that the relevant mandate and norms may vary depending on whether the violations and damage occurred during or post-conflict, or both.

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[6] The international community is not agnostic as to the need to repair environmental damage absent liability. The ILC's 2006 'Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities', e.g., provide that there should be a remedy for transboundary damage caused by hazardous activities even when the relevant state took the necessary measures to prevent such damage and absent the need for a finding of liability on the part of the operator. However, liability is excepted where, despite taking all appropriate measures, damage is the result of 'armed conflict, hostilities, civil war…' (UN Doc A/61/10, 2006, Principle 4, Commentary, para 27). The conditions for exempting harm caused by lawful conduct deserve further scrutiny.

[7] This is in keeping with the definition of environmental peacebuilding adopted in this volume, *see* the introductory chapter.

[8] The present discussion is without prejudice to the recognition of the need to repair environmental damage caused by lawful conduct during armed conflict (and many of the lessons drawn from this chapter reinforce this imperative). This is especially the case as the threshold for unlawful wartime damage under international humanitarian law in particular is very high. Accordingly, much of the damage caused during conflict may not flow from a breach. Yet, states are encouraged to repair or compensate this damage. On this, see Dieter Fleck 'Legal Protection of the Environment: The Double Challenge of Non-International Armed Conflict and Post-Conflict Peacebuilding' in Carsten Stahn, Jens Iverson, and Jennifer S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (OUP 2017) 217; ILC Draft Principles on the Protection of the Environment (n 3), Draft Principle 26.

2. REPARATION AND PEACEBUILDING: SYNERGIES AND TENSIONS

2.1 Reimagining Relationships

The intersection between reparation and environmental peacebuilding depends upon the way that peacebuilding and reparation are understood. Other contributors have discussed the definition of environmental peacebuilding adopted for the purposes of this volume, as well as the interplay between environmental harm and the transition from conflict to peace.[9] The objectives of peacebuilding so defined, relate to the reduction of conflict risk, balanced with allowing societies to 'fully benefit from resources and the environment. The two dimensions of these objectives therefore envisage a reorientation of relationships between stakeholders in the management of natural resources and the environment, which incorporates greater focus on cooperation, sharing and sustainability. We posit that reparation can act as part of this reorientation.

Our examination of this claim focuses on normative questions, for the simple reason that, at time of writing, there is no empirical study examining whether reparation awarded in respect of, or allocated for, environmental damage during conflict contributes to, or detracts from, a lasting peace.

2.2 The Conceptualisation of Reparation

The landmark description of the Permanent Court of International Justice ('PCIJ') in *Chorzów Factory* of the standard and forms of reparation under international law proclaimed reparation as inherent within the 'notion of an illegal act' and directly linked (in nature and extent) to the consequences of that act.[10] The *Chorzów Factory* principle has subsequently been relied upon by multiple international tribunals and bodies, and influenced the formulation of the International Law Commission ('ILC') Articles on State Responsibility ('ARSIWA'), which prescribe a standard of 'full' reparation under international law, composed of restitution, compensation and/or satisfaction. While compensation is 'perhaps the most commonly sought [form of reparation] in international practice',[11] the concept of reparation is therefore far broader. These forms of reparation are considered by ARSIWA as sitting in a hierarchy, where restitution is preferable to compensation, and satisfaction is a 'residual' form of reparation. They may also be combined to ensure that the reparation awarded, in the words of the PCIJ, as far as possible, 'wipe[s] out' the damage caused by the illegal act.

Reparation therefore defines an element of accountability; it is not equivalent to aid. It may flow from various modalities not all of which are judicial: from administrative bodies, whether reparations-specific or otherwise, peace settlements, from the recommendations of conciliation commissions or truth and reconciliation commissions, as well as the decisions of courts and tribunals, not all of which attach a declaration of responsibility. One of the challenges is that, to date, accountability has often been a missing part of the reparative picture

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[9] See e.g., Chapter 1 in this volume.

[10] *Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Series A No 17, 47.

[11] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (3 August 2001) UN Doc A/56/83 ('ARSIWA') 99, para 2.

when it comes to environmental damage. Marja Lehto's second report in her capacity as ILC Special Rapporteur on the protection of the environment in relation to armed conflicts notes the uneven implementation of the rules of state responsibility across the board—in peace and in conflict.[12] In spite of commitments to develop and emphasise issues of liability and reparation for environmental damage,[13] '[t]he establishment of State responsibility for environmental harm has not been the rule even in peacetime. Major environmental catastrophes, whether resulting from industrial accident or military activities, have been compensated for without acknowledgement of responsibility'.[14] The lack of accountability sits at the heart of certain of the tensions and challenges discussed in the next sections.

2.3 Forms of Reparation

The standard and forms of reparation listed in ARSIWA are drawn largely from international practice and thinking in which primarily states were the recipients of reparation, and—although the commentaries mention the practice of, for example, human rights courts—the forms of reparation reflect their origins. However, in considering what accountability might look like in a peacebuilding setting, an important recognition is that environmental damage that flows from the breach of international obligations will affect entities of many different characters and standing and not only states. For example, in Sudan, where environmental damage and conflict are intricately linked, the damage affects multiple actors, including armed groups, the state, communities that lose access to safe water or sustainable livelihoods, displaced communities and host communities. In addition, each group will experience the damage differently, based on geography, ethnicity, gender, age, occupation, to name a few relevant factors. While the customary principles encapsulated in the *Chorzów Factory* underpin the relevant legal framework, the courts, tribunals or other bodies adjudicating on reparation claims may therefore invoke or be influenced by developments in the standards and forms of reparation in international law specialisms that address damage to non-state actors. Much will depend upon their jurisdiction and the basis of the case (see section 3).

The customary rules on reparation also represent 'default' rules that can be displaced by specific agreement. Bodies adjudicating a specific type of damage and violation have done just this: while drawing on customary rules, and within the bounds of their jurisdiction, they have, for example, chosen not to award forms of reparation in a hierarchy, or dismissed a standard that would seek to 'wipe out the damage' or restore the *status quo ante*.[15] The Inter-American Court of Human Rights ('IACtHR'), for example, has developed concepts such as transformative reparation.[16] Where violations occur in a situation of structural discrimination, restoration of the *status quo ante* is not adequate reparation. Reparations should aim to transform the

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[12] ILC, 'Second Report on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur' (27 March 2019) UN Doc A/CN.4/728, paras 109, 116.

[13] Declaration of the United Nations Conference on the Human Environment ('Stockholm Declaration') (16 June 1972), Principle 22, and Rio Declaration on Environment and Development ('Rio Declaration') (14 June 1992), Principle 13.

[14] Lehto Second Report (n 12), para 109.

[15] See e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

[16] Clara Sandoval, 'The Inter-American System of Human Rights and Approach' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 3.2.

pre-existing situation.[17] The underlying concept is of course that the pre-breach framework did not comply with a state's obligation to 'guarantee' rights and reforms were required to redress the balance. Similarly, legislative reform could be required under customary rules, although conceptualised slightly differently. For example, if the breach is caused by an offending legislative instrument or governance structure, a state will be required to 'cease' that offence by, for example, withdrawing or amending the legislation; if the obligation in question requires 'protection' or 'vigilance', there could be an inherent obligation to enact a protective legislative framework.

Environmental treaties and bodies adjudicating environmental harm have often emphasised remediation as the preferred form of reparation. In 1991, the Security Council established a subsidiary organ, the UN Compensation Commission ('UNCC'), with a mandate to process claims and award compensation for a wide range of harms 'directly caused' by Iraq's invasion and occupation of Kuwait as defined by Security Council resolution 687.[18] This included environmental damage whether or not it had commercial value, and whether the loss was temporary or permanent.[19] The UNCC allowed compensation for inter alia 'reasonable measures … taken to clean and restore the environment' and 'depletion of or damage to natural resources'.[20] Its practice and experience is therefore an important precedent in understanding reparation for environmental damage in a peacebuilding context. In its report on the F4 claims (claims made by governments for compensation for damage to or depletion of natural resources), the UNCC spoke specifically of remediation and defined the objective of remediation as to 'restore the damaged environment or resource to the condition in which it would have been if Iraq's invasion and occupation of Kuwait had not occurred' and that the focus on pre-invasion conditions was 'in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition'.[21] However, in pursuing this objective, the Panel was mindful of many other factors, including the location and use of the damaged environment or resource, the nature and extent of damage, the possibility of future harm and the need to avoid collateral damage during and after implementation of the proposed remediation measures.[22] It adjusted the standard of reparation proposed by international law to fit what was a reasonable approach in the circumstances of each claim.

Given the shared nature of the environment and natural resources, the growing trend of tribunals and bodies to consider the appropriateness of 'collective reparation' may be an

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[17] Ibid.

[18] UNSC Res 687 (3 April 1991) UN Doc S/RES/687, 16.

[19] UNCC, 'Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of 'F4' Claims' (30 June 2005) UN Doc S/AC.26/2005/10, paras 55–57.

[20] UNCC Governing Council Decision 7 (17 March 1992) UN Doc S/AC.26/1991/7/Rev.1, para 35.

[21] UNCC Report on F4 Claims (n 19) paras 42–43.

[22] Ibid.

important consideration.[23] Collective reparation often refers to reparations awarded to a group of people or a community and therefore to specific types of responsive measures.[24]

However, due to limits of jurisdiction, standing or the framing of a claim, many international courts and tribunals consider reparation in individual terms. The individualisation of reparation, with all the practical difficulties it entails, coupled with the fact that reparation will presumably not reach every victim, risks producing tensions in the affected community which may hinder rather than foster peacebuilding. For example, the Economic Community of West Africa States ('ECOWAS') Court of Justice found a violation by Nigeria of Article 24 of the African Charter on Human and Peoples' Rights due to Nigeria's failure to protect against and address environmental degradation and its consequences. However, because the complaint did not identify a single victim to whom compensation would be awarded, the Court did not award any compensation. The Court also expressed concern at the practicability of compensation for specific individuals, noting that:

> if [] pecuniary compensation was to be granted to individual victims, a serious problem could arise in terms of justice, morality and equity: within a very large population, what would be the criteria to identify the victims that deserve compensation? Why compensate someone and not compensate his neighbour? Based on which criteria should be determined the amount each victim would receive? Who would manage that one Billion Dollars [the sum requested]?[25]

The Court's questions explain the rationale for collective reparation in certain circumstances.

In a peacebuilding context, any sustainable peace will implicate and respond to various different interests. Individual and collective reparation usually complement, rather than supplant, each other. Collective reparation should not eclipse individual reparations or the individual element of the suffering, where sensitivity to individual circumstances, or to the plight of a particular subgroup of victims, are important components of recovery. While a 'collectivity' may have suffered the same harm, as viewed from a legal perspective, different groups are likely to have experienced that harm differently. If reparations are to be responsive, they also have to consider the identity of the victim, and *how* the harm has been experienced and suffered.

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[23] Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3 (2002); *see also Plan de Sánchez Massacre v Guatemala*, IACtHR Series C No 105 (29 April 2004), para 110; *Moiwana Community v Suriname*, IACtHR Series C No. 124 (15 June 2005), para 214; *Yakye Axa Indigenous Community v Paraguay*, IACtHR Series C No 125 (17 June 2005), para 205; *Sawhoyamaxa Indigenous Community v Paraguay*, IACtHR Series C No 146 (29 March 2006), para 224. It remains to be seen if the ICJ will award collective reparations in *Armed Activities.* Of relevance, the Court noted that both the DRC and Uganda are parties to the African Charter, which contains, in Art 21(2), the right of 'dispossessed people' to lawful recovery of its property and compensation in case of 'spoliation'. It found that Uganda was responsible for looting, plundering and illegal exploitation of natural resources in the DRC, for failing to fulfil its duty of vigilance, and for failing to comply with its obligations as an occupying power in the Ituri region*; Armed Activities on the Territory of the Congo (DRC v Uganda)* (Merits) [2005] ICJ Rep 168*,* paras 245, 250.

[24] For a discussion of collective reparation (not specific to environmental damage), see e.g., ICTJ, 'The Rabat Report: The Concept and Challenges of Collective Reparations' (February 2009) http://www.ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf accessed 22 March 2023, 12, 26, 42, explaining one example as Morocco's *L'Instance Equité et Reconciliation*, which defined as victims, and therefore as beneficiaries of reparations, not only individuals, but also communities or regions.

[25] *SERAP v Nigeria* (Judgment) ECW/CCJ/JUD/18/12 (14 December 2012), paras 113–115.

In addition, without a clear link to accountability, there is a risk that collective reparation will be understood as development aid, undermining its potential normative and symbolic contribution. However, as collective reparation is often seen as easier to design, finance and implement, there may be a tendency to skate over the necessary sensitivities. In 2007, the UN Secretary-General mandated a team to map serious violations of human rights law and humanitarian law in the Democratic Republic of Congo ('DRC') between 1993 and 2003. The mapping report drew attention to the link between the areas abundant in natural resources in the DRC and the violations that were associated with capturing, keeping and exploiting those resources. It found that 'the abundance of natural resources in the DRC and the absence of regulation and responsibility in this sector has created a particular dynamic that has clearly contributed directly to widespread violations and to their perpetuation….' The mapping report urges a 'comprehensive and creative' approach to reparations but warned that: 'Although collective reparations may appear easier to implement, individual reparation must be considered in some cases, particularly those in which the consequences of the violations continue to have a major impact on the lives of victims.'[26]

2.4 The Contributions of Reparation

Reparation may play multiple roles as part of a peacebuilding process, such as a deterrent, corrective, expressive or restorative function.[27] Some of these contributions are material, while others are normative. However, the function actually performed by reparation depends on the specific circumstances, including the nature of the damage and the identities of the victim(s) and perpetrator(s) of the wrongful act. Compensation is conceived of as 'purely compensatory' and is therefore largely corrective. As explained by the International Court of Justice ('ICJ'), when awarding compensation for environmental damage it 'should not … have a punitive or exemplary character'. In combination with other forms of reparation, however, compensation may perform a variety of functions, and may even perform a different function vis-à-vis the perpetrator, as in the minds of the victims.

Broadly conceived, reparation can both contribute to remedying the immediate damage caused and address structural causes of the conflict, for example by compensating for or funding clean-up projects for loss of, or damage to, the environment and resources, but also by requiring reforms that will protect the environment and facilitate sustainable and equitable use. It can therefore enable societies to benefit fully from their environment and can lay the foundations for economic activities, thereby creating the conditions for a durable peace.[28]

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[26] OHCHR, 'Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003' (August 2010) https://www.refworld.org/docid/4ca99bc22.html accessed 22 March 2023, para 71.

[27] Merryl Lawry-White, 'Victims of Environmental Harm During Conflict: The Potential for "Justice"' in Jens Iverson, Carsten Stahn et al (eds), *Environmental Protections and Transitions from Conflict to Peace* (OUP 2017) 367.

[28] According to Carl Bruch, Director of International Programmes at the Environmental Law Institute and Co-Founder of the Environmental Peacebuilding Association, economic livelihood recovery is a core component of successful peacebuilding; *see* Carl Bruch in UN Web TV, 'Protection of the Environment During Armed Conflict—Security Council Arria-Formula Meeting' (7 November 2018)

Within this, it can facilitate the transition to sustainable livelihoods, which are crucial to the emergence of peace.[29]

A suitable governance framework—which reflects international protections—is core to achieving the security, protection and sustainable 'use' that environmental peacebuilding seeks. Legislative reform of the environment governance framework as a form of reparation is often part of a larger series of reforms that seeks to reconfigure the relationships underlying conflict to prevent relapse into conflict.[30] For example, reparation provides an opportunity to address the structural inequalities in land tenure and access to natural resources that often exacerbate damage caused during armed conflict and that can reignite the conflict itself.

Empirical data further supports the importance of a protective governance framework for the management of the environment and resources, and a framework that reflects international obligations.[31] Conflict facilitates environmental crime, and conversely, crime fuels conflict: in 2019, it was reported that almost 50 per cent of criminal activities in conflict zones relate to environmental crime and the illegal exploitation of natural resources.[32] A robust governance structure could also facilitate the recovery of assets that may, in turn, provide resources for reparation programmes.[33]

Aside from legislative and regulatory reform as part of cessation, reparation and guarantees of non-repetition, meaningful reparation in all its forms has an important normative role to play in reinforcing the value of the laws and regulations that facilitate environmental protection via a measure of accountability for breaches. However, where there is no accountability for breaches, the nature and value of the violated norm, and the place of the interests it safeguards in the polity, are implicitly queried.

Inherent in the concept of peace 'building' is a recognition that achieving peace is a process—it takes time, it requires the involvement of many different groups of people, and priorities will evolve. As part of this process, reparation can also foster peacebuilding by creating opportunities for dialogue, cooperation and confidence-building between former parties to a conflict to help align priorities over time.[34] As noted by Payne, the 'inherently transboundary nature of the environment does in fact, create unique opportunities for cooperation at the end

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16:00 http://webtv.un.org/en/ga/watch/protection-of-the-environment-during-armed-conflict-security-council-arria-formulameeting/5859032430001/?term=?lanchinese&sort=date accessed 22 March 2023.

[29] Richard Matthew, Oli Brown and David Jensen, UNEP Expert Advisory Group on Environment, Conflict and Peacebuilding, 'From Conflict to Peacebuilding: The Role of Natural Resources and the Environment' (2009), https://wedocs.unep.org/bitstream/handle/20.500.11822/7867/pcdmb_policy_01.pdf, accessed 31 March 2023, 19.

[30] Lawry-White (n 27) 367, 393.

[31] Carl Bruch et al, 'Facilitating Peace or Fuelling Conflict? Lessons in Post-Conflict Governance and Natural Resource Management' in Carl Bruch, Carroll Muffet, and Sandra S. Nichols (eds), *Governance, Natural Resources and Post-Conflict Peacebuilding* (Routledge 2016) 953.

[32] Jean-Claude Brunet, 'Strengthening Good Environmental Governance and International Cooperation: The Case for Preventing and Fighting Environmental Crime in the OSCE Region' (27th OSCE Economic and Environmental Forum, 12 September 2019) https://www.osce.org/secretariat/429728?download=true accessed 22 March 2023, 1.

[33] Gambia's Truth, Reconciliation and Reparations' Commission received a USD 1 million contribution to its truth fund as a result of the recovery of assets of former President Jamneh, see Mustapha K. Darboe, 'Gambia: Jammeh's Wealth to Go to His Victims' (*JusticeInfo*, 21 October 2019) https://www.justiceinfo.net/en/reparations/42679-gambia-jammeh-wealth-victims.html accessed 22 March 2023.

[34] UNEP (n 4) 19–27.

of conflict'.[35] For example, the UNCC environmental programme arguably made a distinctive contribution to reconciliation, specifically in the form of multilateral efforts to rebuild the regional environment.[36] Moreover, many environmental norms themselves encompass a procedural obligation, requiring a certain posture or series of steps that must be taken, such as impact assessments, information sharing, cooperation and consultation. The environmental damage may also overlap with damage to other rights that will require a process, for example, to enshrine truth and memory. 'Repairing' any failure to take these procedural steps in the past provides another potential opportunity to facilitate participation and cooperation.

A procedural element is also inherent in the concept of remedy. In a peacebuilding context, the legitimacy of the institutions that take part in the peacebuilding is crucial to facilitating that process. The legitimacy of a court, tribunal or administrative body, is tied together with their process (e.g., compliance with due process norms), including the way they treat victims, as well as the process of their establishment and the appointment of members or commissioners. This procedural element often also acts as an essential complement to the substantive outcome: a process without an outcome may dash expectations that will detract from the legitimacy of the peacebuilding process; yet a substantive outcome without process will also detract from the legitimacy and suitability of the outcome, including because the damage and needs are not properly assessed.

Reparation is also often seen as a 'victim-centred' form of post-conflict justice and therefore as having a role in promoting participation of victims and other citizens. The proceedings and participation surrounding reparation can be the way in which victims' experiences and needs are canvassed, considered and addressed.[37] According to Firchow and Ginty, the objective of reparations in a peacebuilding context in general is 'to provide the necessary structural and restorative elements to facilitate the process of reconciliation and consolidation of peace' with a particular focus on assisting victims.[38] Brett and Malagon, who consider a 'transformative peacebuilding' model note that reparation may inter alia: 'address[] and redress[] a broad and integral human rights framework' (including both civil and political as well as socio-economic rights and addressing the human need for recognition) and 'promot[e] the participation of victims in and their ownership of the reparations process, leading to a "peace infrastructure"'.[39]

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[35] Cymie R. Payne, 'Developments in the Law on Environmental Reparations: A Case Study of the UN Compensation Commission' in Carsten Stahn, Jens Iverson, and Jennifer S, Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (OUP 2017) 329, 360. *See also* Bruch et al (n 31) 992, 1013, highlighting the potential of natural resources as an entry point for transboundary cooperation exemplified by the transboundary park between Peru and Ecuador and the negotiations of a convention regarding the Sava river as a means of confidence building after the dissolution of the former Yugoslavia.

[36] Payne, ibid., 329, 363.

[37] OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Reparations Programmes' (2008) HR/PUB/08/1, 2 ('[R]eparations may play a particularly important role in a comprehensive policy to redress human rights abuses for the simple reason that they are the only measure that immediately and specifically targets victims …').

[38] Pamina Firchow and Roger Mac Ginty, 'Reparations and Peacebuilding: Issues and Controversies' (2013) 14(3) *Human Rights Review* 231, 234.

[39] Roddy Brett and Lina Malagon, 'Overcoming the Original Sin of the 'Original Condition': How Reparations May Contribute to Emancipatory Peacebuilding' (2013) 14(3) *Human Rights Review* 257, 260.

Local empowerment is an important part of this equation, and the durability of environmental protection projects that focus upon increasing agency has been recognised internationally.[40]

2.5 The Limitations of Reparation's Contribution to Peacebuilding

There are also significant limitations to the role that reparation may play in each of these respects.

The *first* is the reality described by the ICJ of the 'often irreversible character of damage to the environment' and 'the limitations inherent in the very mechanism of reparation of this type of damage'.[41] The emphasis of international environmental norms on prevention and structures to operationalise prevention is no accident: it is a recognition that there is an intrinsic and functional loss that may be impossible to repair even through different forms of reparation, considerations of equivalence, and the proposal of alternatives. The focus has therefore been very firmly on prevention, compliance, as well as civil liability regimes, defined through domestic law, rather than on accountability at the international level. The result has been 'a distinct lack of case law concerning state responsibility for environmental damage'.[42]

Second, there is no inevitability that reparations will act as a means to foster cooperation and dialogue and as a restorative mechanism. The *manner* in which different stakeholders are engaged and in which their needs are considered will play a part in determining whether reparations are meaningful and reforms achieve the objectives of peacebuilding. As noted above, the process is important, and the contribution of the reparation process will depend upon design, implementation and outcomes. And the manner in which stakeholders are engaged will also need to take account of the potential scope of reparation from different bodies. For example, when international courts and tribunals adjudicate reparation claims, they do so within the—sometimes narrow—constraints of their jurisdiction, as we discuss in Section 3 below. The reparation that is provided as a result of these proceedings may only be partial, because it will attach to the specific breaches subject to that tribunals' jurisdiction. Yet, the damage may affect far more stakeholders than the right that has been breached attaches to. If the reparation awarded benefits one community over another or is perceived to be distributed unfairly, it entails a risk of recreating or fuelling existing tensions. It thus becomes a risk factor for the relapse into conflict. Firchow and Ginty note that depending on the format and scale of reparations as well as their enforcement, reparations may contribute to reconciliation or give rise to new grievances instead.[43] A holistic view that considers any limitations in the scope of reparation will therefore be important.

Third, this series of considerations is made more complex by the fact that reparations during peacebuilding will often reflect the political reality that established itself during or after conflict—and the function that reparation can play will reflect this reality. The power relationships and cost/benefit analysis applicable on the ground also counsel that it is wise to manage expectations and consider the various functions of reparation flexibly, rather than, for

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[40] John Vidal, 'Nobel Peace Prize for Woman of 30m trees' (*The Guardian*, 9 October 2004) https://www.theguardian.com/world/2004/oct/09/society.kenya accessed 22 March 2023.

[41] *Gabcikovo-Nagymaros Project (HungarylSlovakia)* [1995] ICJ Rep 7, para 140.

[42] Letho Second Report (n 12) para 109 (*citing* Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Martinus Nijhoff 2004) 68).

[43] Firchow and Mac Ginty (n 38) 234.

example, requiring that it have a deterrent effect. Reparation is unlikely to play a deterrent role in the context of environmental damage in conflict—once a state or armed group feels compelled or wishes to resort to force, the risk of a potential, uncertain financial penalty at some point in the future that may not be adjudicated or enforced is unlikely to deter it. Nor will the comparatively small amounts that are often awarded for environmental damage.[44]

The 'uneven' picture of state responsibility especially after conflict owes much to its reflection in negotiated peace settlements and the power play inherent within them. If consent to adjudication of a particular issue is based on a peace settlement, that consent will likely reflect the negotiating power as it stood at a particular point of time. While 'victor's justice' is an oversimplified concept in most conflicts today, the opportunity for a balanced consideration that will speak to the victims of all parties' actions may also be limited. The mandates of bodies that write the history, the role of media in memory and the evidence that is deemed worthy of preservation are all elements that will affect the reparative and restorative picture. *Ex gratia* payments may be a feature of peace agreements, or otherwise of settlement agreements.[45] The funds themselves can contribute to remediating environmental harm; however, the failure to allocate or accept liability can undermine other objectives of reparation. They may, however, carry or be seen to carry an implicit acknowledgment of involvement or a sense of responsibility, and may be more quickly received than if reparation is adjudicated via an administrative or judicial process.

Interrelatedly, reparations for conflict damage are often awarded long after the conflict is over, once peace and political relations have been re-established. But environmental damage—and its consequences on human and animal life—frequently requires swift action in order to remediate existing damage and prevent further harm. To the extent that reparation linked to adjudication or fact-finding post-conflict is the basis of environmental recovery, the delay will impact the challenges we address in the next section.

3. CONSIDERATIONS AND CONSTRAINTS OF INTERNATIONAL ADJUDICATION OF REPARATION

International bodies step into this broader legal and political framework when they become part of seeking accountability for, and 'repairing' environmental damage that flows from conflict and post-conflict violations. This section addresses some of the major hurdles that

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[44] Eliana Cusato, 'Overcoming the Logic of Exception: A Critique of the UN Security Council's Response to Environmental Damage from the 1990–91 Gulf War' (2019) 9 *Asian Journal of International Law* 75, 95, referring to Michael Schmitt, 'Green War: An Assessment of the Environmental Law of International Armed Conflict' (1997) 22(1) *Yale Journal of International Law* 1, 91.

[45] The *Rongalap Atoll* case is an example of an *ex gratia* payment for environmental damage: the US paid a set sum for contamination of the land with radioactive material following hydrogen atom tests; see Tarcisio H. Reis, *'Compensation for Environmental Damages under International Law: The Role of the International Judge'* (Kluwer Law International 2011) 122. Greenwood also notes that '[t]he United States also offered an *ex gratia* payment to the families of those killed when the *USS Vincennes* shot down a civil airliner in 1988 at a time when United States forces were engaged in fighting with Iranian forces'; *see* Christopher Greenwood, 'State Responsibility and Civil Liability for Environmental Damage Caused by Military Operations' in Richard J Grunawalt, John E. King, Ronald S. McClain (eds), *Protection of the Environment During Armed Conflict* (1996) 403.

international courts and other mechanisms face in doing so. These hurdles affect the potential for reparation for environmental damage and the potential for international bodies to map onto the peacebuilding processes in a way that furthers the processes' objectives.

3.1 Access, Jurisdiction and Standing

As the obligation to make reparation is a consequence of international responsibility, threshold requirements for an international tribunal to adjudicate a claim for breach and reparation include (i) that the norm and respondent in question are caught by its jurisdiction; and (ii) that a claimant has standing to invoke that responsibility.

For example, the ICJ is only open to states parties to its Statute,[46] leaving other entities such as local communities with no standing to bring claims. In 2004, the Court dismissed an application brought by the Federal Republic of Yugoslavia ('FRY') on the ground that it was not UN member state—and thus not a party to the ICJ Statute—when it filed its clam in April 1999.[47] The application concerned airstrikes during operation Allied Force, which had hit 'environmentally sensitive targets' such as oil refineries, petrochemical, chemical and pharmaceutical plants, and caused environmental damage.[48]

Human rights supervisory bodies have adopted a specific—anthropocentric—perspective to environmental damage, in line with their jurisdiction and mandate. For example, the European Court of Human Rights (ECtHR) will only take environmental damage into account to the extent that it adversely (and 'sufficiently') affects one or more rights enshrined in the ECHR.[49] The Court has emphasised that none of the ECHR protections 'are specifically designed to provide general protection of the environment as such'.[50] The Inter-American Commission on Human Rights ('IAComHR') has taken a similar view regarding complainants' standing to invoke responsibility for environmental harm.[51] In a landmark advisory opinion in 2017, the IACtHR interpreted its jurisdiction to include a right to a healthy environment as an autonomous right, even if it is not explicitly mentioned in the American Convention on Human Rights ('ACHR'). The Court held that the right to a healthy environment is instrumental to the enjoyment of a number of other rights enshrined in the ACHR, but is also independently

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[46] Statute of the International Court of Justice (entered into force 24 October 1945) 993 USTS 3, Arts 34–35. Art 35(2) determines the conditions for states that are not parties to the Statute, to be parties to cases before the Court.

[47] *Case concerning Legality of Use of Force (Serbia and Montenegro v Belgium) (Serbia and Montenegro v Canada) (Serbia and Montenegro v France) (Serbia and Montenegro v Germany) (Serbia and Montenegro v Italy) (Serbia and Montenegro v Netherlands) (Serbia and Montenegro v Portugal) and (Serbia and Montenegro v United Kingdom)* (Preliminary Objections) [2004] ICJ Rep 887.

[48] Richard Falk, 'The Inadequacy of the Existing Legal Approach to Environmental Protection in Wartime' in Jay E. Austin and Carl E. Bruch (eds), *The Environmental Consequences of War: Legal, Economic and Scientific Perspectives* (CUP 2000), 149 and fn 19. Serbia and Montenegro claimed that the states conducting the airstrikes had breached their international obligations banning the use of force against another state, and inter alia the obligation to protect the environment and had sought compensation for not further specified damages.

[49] See e.g., Alan Boyle, 'Environment and Human Rights' in *Max Planck Encyclopedia of Public International Law* (OUP 2009), para 34.

[50] *Case of Kyrtatos v Greece* App no 41666/98 (ECtHR, 22 August 2003), para 52.

[51] *Metropolitan Nature Reserve v Panama Case* (Inadmissibility), IACtHR Series L/V/II.118 No 70 rev. 2 (22 October 2003), para 34.

encompassed in its Article 26.[52] Through an evolutive interpretation of the Convention, the IACtHR paved the way for individual petitions for breaches of the right to a healthy environment. And yet, in line with their jurisdiction, the perspective is still on the rights of, and damage suffered by, the individual.

The UNCC was also designed with a specific mandate that circumscribed the extent to which its compensation awards could contribute to peacebuilding. As noted above, the UNCC's mandate was limited to assessing Iraq's liability for violations of the *jus ad bellum*.[53] Without detracting from the significance of the Commission's work—it was the first institution that was set up with a mandate to award compensation for environmental damage—this circumscribed its normative mandate.[54] Most notably, the UNCC was not empowered to adjudicate claims that flowed from violations of specific international humanitarian law ('IHL') norms.

There has been extensive debate as to whether proceedings before the International Criminal Court ('ICC') contribute to or hinder peacebuilding. The ICC's power to award reparation under Article 75 of the Rome Statute contributes to this debate. But in respect of environmental damage this power is constrained by the ICC's territorial, temporal and personal jurisdiction, as well as the high bar set by the relevant substantive protections.[55] For example, Drumbl has noted 'it [is] going to be very difficult, as it rightly should be, to secure a conviction' under Article 8(2)(b)(iv), which concerns widespread, long-term and severe damage to the natural environment as a war crime.[56] In addition, reparation is limited by the scope of the charges on which the Prosecutor secures a conviction: the ICC Appeals Chamber has confirmed that reparation is 'intrinsically linked to the individual whose criminal liability is established in a conviction'.[57] There also needs to be a causal link between the harm suffered by the victim and a crime for which the accused was convicted.[58] Thus, the Court's potential to 'repair' war-related environmental damage is significantly limited by its jurisdiction.

To date, relatively few inter-state cases have been adjudicated regarding harm by one state on the territory of the claimant state in the course of an international armed conflict ('IAC') or military occupation, or transboundary harm during an IAC.[59] But even more complex are

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[52] *The 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) of the American Convention on Human Rights)* (Advisory Opinion), IACtHR Series A No 23, OC-23/17 (15 November 2017), paras 57, 62–63. For a commentary on the opinion see Maria L Banda, 'Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights' (2018) 22(6) *ASIL Insights* https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human accessed 22 March 2023.

[53] UNSC Res 687 (n 18).

[54] Cusato (n 44) 90.

[55] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 3, Arts 11, 12(2)(a) and (b), 13(b).

[56] Mark Drumbl, 'Symposium on 'International Responses to the Environmental Impact of War' (2004–05) 17 *Georgetown International Environmental Law Review* 565, 626.

[57] *Prosecutor v Thomas Lubanga Dyilo* (Judgment) ICC-01/04-01/06-3129 (3 March 2015), para 65.

[58] Ibid., para 81.

[59] See e.g., *Armed Activities* (n 23) paras 245, 250; EECC, *Partial Award: Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims, 1, 3, 5, 9–13, 14, 21, 25 and 26* (19 December 2005) XXVI UNRIAA 291. The UNCC F4 Panel adjudicated claims by governments and international organisations for environmental harm caused by Iraq due to its unlawful invasion and occupation of Kuwait. *See* UNCC Report on F4 Claims (n 19). The case brought by Ecuador against Colombia before

questions of available fora and standing for claims regarding environmental damage caused in a non-international armed conflict ('NIAC') where no other state is harmed in the process. Those studying the topic have noted that whether armed groups have an obligation to make reparation under IHL is not settled.[60] In any event, there are no fora at international level for holding armed groups accountable as such—by definition, such damage cannot be attributed to the state against which the groups are fighting.[61] One option would be pursuing the criminal liability of individual fighters under international criminal law and seeking a reparation order against them if convicted. Another is engaging the responsibility of the territorial state where it is obliged to protect or fulfil a duty of vigilance, if it can be shown that the territorial state failed to take the necessary measures to protect the environment from the conduct of the armed group or other third parties. In *Armed Activities (DRC v Uganda)*, in the context of an inter-state conflict, Uganda—as the occupying power of Ituri—failed to fulfil its duty of vigilance vis-à-vis its own troops and armed groups operating in occupied territory.[62] Regardless of the limited avenues for holding armed groups to account, scholars have shown that some armed groups have engaged in conduct that is analogous to symbolic measures of reparation, such as acknowledgments of the truth and apologies, although there is no practice concerning the causing of environmental harm specifically.[63]

Another option is for environmental damage caused by a state during a NIAC to be actionable by third states in inter-state proceedings. If no transboundary harm is caused, this would require characterising the underlying environmental protection as of *erga omnes* character, as defined by the ICJ in the *Barcelona Traction* case: '[i]n view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*'.[64]

Given the nature of environmental damage and the threat addressed by international obligations protecting the environment, certain of these obligations are arguably of interest to all

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the ICJ concerning the damage caused by Colombia's aerial spraying of herbicides in the course of its military campaign against the FARC was settled by agreement between the parties. *See Aerial Herbicide Spraying (Ecuador v Colombia)*, ICJ Press Release No 2013/20 (17 September 2013).

[60] Lehto Second Report (n 12), para 57 (referring to Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Vol. I: Rules* (CUP 2005) 550). For more comprehensive studies on the accountability of armed opposition groups, see Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (CUP 2002), 133ff; Ezequiel Heffes, 'The Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law: Challenging the State-Centric System of International Law' (2013) 4 *Journal of International Humanitarian Legal Studies* 81, 91–92.

[61] See the rules of attribution of conduct codified in ARSIWA (n 11), Arts 4–11. Specific attribution regimes, including within IHL, render states liable to pay compensation for '*all acts*' committed by their armed forces. E.g., Art 3 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 2010); Art 91 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978).

[62] *Armed Activities* (n 23) para 248.

[63] Ron Dudai, 'Closing the Gap: Symbolic Reparations and Armed Groups' (2011) 883 *IRRC* 783–808.

[64] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Merits) [1970] ICJ Rep 3, para 33. *See also Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Rep 1951, 8.

states. According to Article 48 ARSIWA, which is designed to give effect to the ICJ's decision in *Barcelona Traction*, non-injured states can invoke the responsibility of the wrongdoing state in respect of an obligation 'owed to a group of States including that State, and [] established for the protection of a collective interest of the group'; or 'owed to the international community as a whole'. However, as explained by the ILC Special Rapporteur, Article 48 ARSIWA was not intended as a codification of existing law, but as a feature of progressive development.[65] This area of law is therefore unsettled. In practice, there are certain disincentives for third states that have not suffered realisable damage to their territory to invoke the responsibility of another state. In spite of this dictum, at the time of writing, no state has invoked obligations *erga omnes* (as opposed to *erga omnes partes*) before the ICJ as the basis of a claim where that state has not suffered harm, for environmental damage or otherwise. The Court's case law on this point has therefore had limited opportunity to develop.

The question of responsibility *erga omnes partes* arose in the *Construction of a Road* case, where Nicaragua sought to invoke Costa Rica's responsibility for transboundary environmental harm, but also harm to Costa Rica's territory, including in violation of the Convention on Biological Diversity. Arguing that those obligations are *erga omnes partes*, Nicaragua sought a ruling from the Court declaring the responsibility of Costa Rica for harm caused to its own territory.[66] However, this claim was not included in Nicaragua's submissions and the Court simply swept it under the carpet. On the other hand, the concept of obligations *erga omnes partes* as the basis for standing *has* been invoked in the cases of treaties concerning conservation, human rights and genocide. In *Whaling in the Antarctic*,[67] the Court implicitly recognised Australia's standing under Article 48(1)(a) ARSIWA to invoke the responsibility of Japan for breaches of the International Convention for the Regulation of Whaling, even though Australia was not directly injured by Japan's conduct. Interestingly, Japan did not challenge Australia's standing, nor did the Court address the matter.[68] However, the contours of Article 48(1)(a) ARSIWA remain unsettled.[69] After seemingly interpreting the rule in Article 48 in a more restrictive sense, the Court accepted the invocation of responsibility by non-injured States in case of obligations *erga omnes partes* in *Obligation to Prosecute or Extradite*[70] and later on a *prima facie* basis in the case brought by The Gambia against Myanmar for violation of the Genocide Convention.[71]

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[65] In the words of the Special Rapporteur at the time ARSIWA were adopted, 'Article 48 emerged not as a codification of established practice, but to provide a basic framework for the further development of the law.' See James Crawford, *State Responsibility: The General Part* (CUP 2013) 552.

[66] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Reply of the Republic of Nicaragua, Vol I (4 August 2014), para 4, 11.

[67] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Merits) [2014] ICJ Rep 226.

[68] Pirya Urs, 'Guest Post: Are States Injured by Whaling in the Antarctic?' (2014) *OpinioJuris*, http://opiniojuris.org/2014/08/14/guest-post-states-injured-whaling-antarctic/ accessed 22 March 2023.

[69] The ICJ analysed the object and purpose of the UN Convention against Torture before drawing the conclusion that any state party could invoke its breach. *See Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422, 67–70.

[70] Ibid.

[71] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, (Provisional Measures Order) 2020 https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf accessed 22 March 2023, 42 (accepting that The Gambia has *prima facie* standing to invoke the responsibility of Myanmar).

In relation to IHL obligations specifically, Common Article 1 to the Geneva Conventions—that states parties must 'ensure respect' for its protections—has been widely interpreted to impose a positive obligation, including to 'take measures to put to an end ongoing violations'.[72] Such measures could include adjudication and/or the payment of reparation.

As discussed for instance in Chapter 18 in this volume, remedying harm suffered by local or indigenous communities as a result of conflict is likely to form a central question in peacebuilding. Article 48 ARSIWA further provides that non-injured states can demand performance of the obligation of reparation in the interest of the beneficiaries of the obligation breached,[73] which, in the case of environmental harm, could encompass these communities. Yet, while consultation with communities to ensure reparation is meaningful (see Section 2) and reflects best practice, it is not encapsulated in the legal obligations proper codified in ARSIWA. In certain cases a related human rights obligation might impose a duty to consult. In a different (but related) context, it will be interesting to see what reparation The Gambia will ask at the merits stage for the benefit of the Rohingya people.[74]

3.2 Proving Breach, Causation and Damage

A reparation award hinges on proof of breach of an applicable protection, the existence of a causal connection between the wrongful conduct and the ensuing environmental damage, and the extent and nature of that damage. However, in a post-conflict context, there are many hurdles to proving each of these conditions are satisfied. The complexity of proving harm to the environment is compounded by the destruction of evidence during conflict, the frequently shifting conditions, and the limited evidence-gathering powers of international courts and tribunals, which can result in partial or incomplete assessments of the damage caused.

As an initial point, environmental protection during conflict stems from a patchwork of norms: environmental treaties and customary law, IHL rules, ICL, human rights law, but also non-binding instruments.[75] There are many open questions concerning the reach of certain environmental protections during conflict, and whether they can be enforced given that they are 'phrased in aspirational or vague terms',[76] or impose stringent conditions. Thus, the nature and scope of the primary norms make it challenging to establish breaches and to seek reparation through adjudication.

In addition, the required burden and standard of proof are unclear. As a general rule, it is for the party which alleges a particular fact in support of its claims to prove the existence of that

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[72] See Knut Dörmann and Jose Serralvo, 'Common Article 1', (2014) 96 *IRRC* 707.

[73] ARSIWA (n10) Art 48(2).

[74] In the Application, The Gambia asks the Court to adjudge and declare that Myanmar:
> must perform the obligations of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group, including but not limited to allowing the safe and dignified return of forcibly displaced Rohingya and respect for their full citizenship and human rights and protection against discrimination, persecution, and other related acts, consistent with the obligation to prevent genocide under Article I.

See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Application) 2019 https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf accessed 22 March 2023, 112.

[75] For a non-exhaustive overview of the relevant protections, *see* Lawry-White (n 27) 367, 371–79.

[76] Ibid., 378.

fact.[77] Thus, it would be for the claimant to demonstrate the extent of environmental damage suffered. However, the ICJ has said it will exercise some flexibility in assigning the burden of proof where, for example, the respondent is in a better position to establish certain facts.[78] This may well be the case for damage caused during armed conflict, as, for example, the party carrying out an attack would be in a better position to establish the facts that informed its targeting decisions. Similarly, in case of damage caused in NIAC, if the claim is brought by a third state, it would be very difficult for the claimant to produce evidence concerning damage and causation without the cooperation of the respondent. Similar considerations apply in cases of reparation claims before human rights bodies, where respondent states control the means to verify acts that occurred within their jurisdiction as well as efforts they have taken to comply with procedural or due diligence obligations.[79]

As noted by the ILC, the standard of proof hinges on the definition of environmental damage that a particular body adopts.[80] It also depends on the nature of the norm in question and the nature of the body itself. Criminal courts, for example, apply a criminal standard (beyond reasonable doubt); but even bodies adjudicating state responsibility apply a variety of standards. There is no commonly accepted definition of environmental damage, leaving uncertainty as to the required standard as well as the amount and type of evidence that is necessary to prove claims.[81]

Moreover, the gathering of the necessary data requires significant expertise and resources, including time and access. In this usually technical context, international courts and tribunals frequently step into their role with often limited evidence gathering powers and environmental expertise. Courts have been criticised from within and from without for their failure to grapple with scientific facts. In the *Pulp Mills* case—concerning, inter alia, contamination of natural resources—Judges Simma and al-Khasawneh criticised the ICJ for the manner in which it had evaluated scientific evidence in a case that was 'exceptionally fact-intensive'.[82] The technical nature of the evidence often invoked in environmental claims is also reflected in the Permanent Court of Arbitration's Optional Rules for Arbitration and Conciliation of Disputes Relating to the Environment and/or Natural Resources, which establish a list of potential arbitrators and conciliators, as well as expert witnesses, with specific technical expertise.[83] Another consideration is the impact on the length of proceedings: establishing and examining complex evidence takes time. Yet, environmental damage is often exacerbated over time, making it harder to redress and changing the picture between the beginning and end of proceedings. This, in turn, may render the different roles that reparation may play in facilitating peacebuilding harder to achieve.

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[77] *Certain Activities* (n 3) para 33.

[78] Ibid.

[79] See e.g., Alberto Bovino, 'Evidential Issues before the Inter-American Court of Human Rights' (2005) Revista *Internacional de* Direitos Humanos 60, 63–65.

[80] ILC, 'Third Report on the Protection of the Environment in relation to Armed Conflicts Submitted by Marie G. Jacobsson, Special Rapporteur' (3 June 2016) UN Doc A/CN.4/700, 147.

[81] Ibid.

[82] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Simma and al-Khasawneh Dissent) [2010] ICJ Rep 14, para 3.

[83] PCA, Optional Rules for Arbitration and Conciliation of Disputes Relating to the Environment and/or Natural Resources, Introduction and Arts 4(4), 7(4).

To assess the extent of the damage, decision-makers would need baseline studies on the condition of the environment prior to the conflict or before the breach. Yet, this evidence may not be available. For example, in *Certain Activities* (which concerned damage caused during peacetime), there was no evidence of the state of the environment before the breach of territorial sovereignty by Nicaragua.[84] This made it difficult for the Court to determine the extent of the damage that had been caused, and for which reparation was required. To overcome this problem, one could build a hypothetical model, but this is a complex exercise and in turn requires advanced scientific knowledge and the acceptance of a degree of uncertainty. Conflict scenarios often present further complexities in this regard due to the destruction of key evidence.

In a different context, Ethiopia's claim for reparation for environmental damage in Tigray failed because the Ethiopia-Eritrea Claims Commission ('EECC') held that Ethiopia did not adequately prove its allegations and that there were manifold errors in its damages calculation. Specifically, Ethiopia presented a claim for more than USD 1 billion in two pages of its Memorial and sought to substantiate it by presenting claims forms prepared by the Tigray Regional Agricultural and Natural Resources Development Bureau. The EECC deemed the forms to be insufficient evidence—neither identifying the location of the damaged plants nor the circumstances of their alleged destruction.[85]

When dealing with claims arising out of military operations, decision-makers would also need to be well-versed in military strategy and battlefield analysis as assessing damage to the environment requires a balancing exercise between military necessity and the military advantage gained, on the one hand, and the damage caused, on the other.[86] For example, the International Criminal Tribunal for the former Yugoslavia ('ICTY') Office of the Prosecutor established a Special Committee to advise whether 'there is a sufficient basis to proceed'[87] with an investigation into some or all the allegations related to the NATO bombing campaign over the FRY. The Committee found that there had been 'some' damage to the environment from attacks on chemical and oil plants, but that the extent and impact of the damage was unclear and difficult to measure.[88] It further held that the applicable norms (Arts 35(3) and 55 of Additional Protocol I to the 1949 Geneva Conventions) had a high threshold of application and that it was difficult to evaluate what constitutes 'excessive' environmental damage in relation to military advantage.[89] The Committee concluded that the Prosecutor should not start investigations into the collateral environmental damage in particular and the NATO bombing campaign overall.[90]

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[84] *Certain Activities* (n 3) para 76.

[85] *Final Award, Ethiopia's Damages Claims* (17 August 2009) XXVI UNRIAA 631, 421–25. See also Ilias Plakokefalos, 'Reparation for Environmental Damage in *Jus Post Bellum*. The Problem of Shared Responsibility' in Carsten Stahn, Jens Iverson, and Jennifer S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (OUP 2017) 257, 263.

[86] Payne (n 35) 329, 346.

[87] Updated Statute of the International Criminal Tribunal for the former Yugoslavia (September 2009), Art 18(1).

[88] ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (2006), para 14.

[89] Ibid., para 23.

[90] Ibid., para 25.

Establishing the chain of causation for environmental damage is also a complex exercise. As noted by the ICJ, complex causation (damage resulting from several concurrent causes) is a common feature of environmental harm, which can make it difficult to prove the causal nexus between acts and harm.[91] Intervening acts are also common, further complicating the task of proving causation.[92] Moreover, the state of scientific knowledge on the causal link between acts and the ensuing damage to the environment may be uncertain.[93] The conflict context often makes it even more difficult to gather the necessary evidence to prove causation. These difficulties inevitably have repercussions on reparation claims. In her review of amounts claimed and amounts awarded by the UNCC for environmental damage, Payne argues that the difference between the two can be attributed to the 'difficulty of proving causation and the claimants' significant overstatement of remediation costs'.[94] By way of illustration, she explains that 'Iran claimed more than USD 13.5 billion for damage to its terrestrial and marine resources, cultural resources, and public health, but was awarded only USD 27 million, largely because of insufficient evidence of damage or causation'.[95] Clearly, the lesser the amounts awarded in reparation compared to the actual damage or remediation costs, the smaller the material, and potentially normative, contribution to peacebuilding.

Moreover, the required standard of causation is uncertain. The ICJ, for example, held that there must be a 'sufficiently direct and certain causal nexus between the wrongful act… and the injury suffered by the Applicant'.[96] This is a high standard, which may be difficult to meet, although as already noted, the ICJ will exercise flexibility in assigning the burden of proof.[97] The UNCC, as already mentioned, was to award for compensation for 'direct' loss, suffered 'as a result of" Iraq's invasion and occupation of Kuwait.[98] The Governing Council attempted to provide clarity on what this meant, by defining specific types of losses as direct or not. In practice, the UNCC panels ended up using different tests.[99] There has been much debate in legal literature on whether the UNCC actually adopted a standard of direct or proximate causation for compensable claims, the latter being less stringent than the former.[100] Depending on the circumstances, it may be very difficult to establish 'direct' causation.

Other institutions have adopted a less stringent standard to assessing causation. For example, the EECC surveyed the prior practice of various bodies before settling on a 'proximate cause' test.[101] The ECtHR has assessed whether there is a 'sufficiently close link' between the dangerous effects of an activity to which individuals have been exposed and the enjoyment of

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[91] *Certain Activities* (n 3) para 34. *See also* Payne (n 35) 329, 347–48.

[92] Payne (n 35) 348.

[93] *Certain Activities* (n 3) para 34.

[94] Cymie R Payne, 'Legal Liability for Environmental Damage: The United Nations Compensation Commission and the 1990-1991 Gulf War' in Carl Bruch, Caroll Muffet, and Sandra S. Nichols (eds), *Governance, Natural Resources and Post-Conflict Peacebuilding* (Routledge 2016) 719, 728.

[95] Ibid., 728.

[96] *Certain Activities* (n 3) para 32.

[97] Ibid., para 33.

[98] UNSC Res 687 (n 18). *See also* UNCC Decision 7 (n 20) para 6.

[99] Payne (n 35) 347.

[100] For a comprehensive review of the issues raised by questions of causation in the F4 claims *see* ibid., 347–52.

[101] *Decision 7 – Guidance Regarding Jus Ad Bellum Liability* (27 July 2007) XXVI UNRIAA para 13.

one of more rights enshrined in the ECHR.[102] Such a standard leaves ample discretion to the ECtHR to decide whether a certain claim is proven on the basis of the evidence before it and the circumstances of the case. One commentator argued that such a loose standard was used to expand the scope of Article 8 ECHR 'to address the proper procedures for taking decisions relating to the environment in human rights terms'.[103]

The foregoing considerations have led certain international courts and tribunals to exhibit more flexibility in the evidentiary standards for assessing the extent of damage. For example, in *Certain Activities,* the ICJ cited *Trail Smelter* and endorsed its reasoning in *Diallo* that if damage cannot be established with certainty on the basis of the evidence, 'it will be enough if the evidence shows the extent of damages as a matter of just and reasonable inference, although the result be only approximate'.[104] It is also open to the Court to determine the amount of compensation due on the basis of equitable considerations.[105]

Similarly, administrative mechanisms showed greater flexibility in the handling of claims. For example, the UNCC F4 Panel required governments to produce 'documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss'.[106] The evidence presented varied greatly, including survey reports, monitoring and assessment studies, satellite images, photographs, computer models, witness statements. The evidentiary standards adopted reflected the value and complexity of the claims, some of which were large environmental claims.

3.3 Valuation Methodology

Alongside questions of evidence sit questions of valuation methodology. To award reparation, adjudicative bodies would need to decide the value to be assigned 'to the restoration of the damaged environment as well as to the impairment or loss of environmental goods and services prior to recovery'.[107] This is an essential step for reparation to effectively contribute to the peacebuilding process. If the evaluation of the damage caused does not permit effective reparation of the wrongful act, the material function of reparation will be seriously impaired. While it may still retain its normative function, that may be compromised by insufficient reparation to reach those that have been victimised.

Part of the problem is that international law neither prescribes nor prohibits a particular valuation method, as was confirmed by the ICJ in *Certain Activities*.[108] Different bodies have adopted different approaches to damage valuation. On the one hand, this may be a reflection of different factual scenarios. Specifically, the ICJ held that in choosing an appropriate valuation methodology, it is necessary to take into account the specific circumstances and characteristics

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[102] *Taskin and Others v Turkey* App No 46117/99 (ECtHR, 10 November 2004), para 113.

[103] Boyle (n 49) para 32.

[104] *Certain Activities* (n 3) para 35, referring to the *Diallo* case (*Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation) [2012] ICJ Rep 337, para 33) and the *Trail Smelter* arbitration (*Trail Smelter (United States, Canada)* [1938 and 1941] III RIAA para 1920).

[105] Ibid.

[106] UNCC Decision 7 (n 20) para 37; UNCC Governing Council Decision 10 (26 June 1992), UN Doc S/AC.26/1992/10, Art 35.

[107] *Certain Activities* (n 3) para 53.

[108] Ibid., para 52. *See also* UNCC Report on F4 Claims (n 19) para 80.

of each case.[109] However, on the other, it is also a reflection of the lack of scientific certainty concerning the appropriate methodology for the valuation of environmental harm. This uncertainty is also often reflected in the application of different valuation methodologies to the same circumstances in the same case.[110] In *Certain Activities,* Costa Rica advocated for an 'ecosystem services methodology' to damage valuation, taking into account the reduction or loss of the environment's ability to provide goods and services.[111] In contrast, Nicaragua argued that replacement costs should be awarded.[112] Rather than attributing values to specific categories of environmental goods and services and estimating recovery periods for each of them, the Court decided to adopt an 'overall assessment of the impairment or loss of environmental goods and services prior to recovery'.[113]

Another point of confusion arises from the extent of damage that is deemed compensable. The commentaries to the ARSIWA expressly address the question of compensation for environmental damage, noting that:

> [i]n cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured state for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property.[…] However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (such as bio-diversity and amenity—sometimes referred to as 'non-use values') is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.[114]

One difficulty that may arise is valuing damage to environmental resources that are not traded in the market or otherwise placed in economic use. In this respect, the UNCC set an important precedent in awarding compensation for 'pure' environmental damage (such as loss in biodiversity), and the ICJ followed suit in its 2018 Judgment.[115] The ILC Special Rapporteur Maria Lehto has also noted that the commentaries to the ARSIWA clarify that pure environmental damage is compensable.[116] This must be the right interpretation, given that reparation addressed 'damage caused' by the wrongful act, and in seeking to protect the environment, international law is not only concerned with the loss of its utility to human beings. The takeaway from *Certain Activities* is that 'valuation of "pure" environmental damage is inevitably an approximation based on just and reasonable inferences'.[117]

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109 Ibid.

110 As detailed above, calculation errors can also undermine valuation claims. See *Final Award, Ethiopia Damages Claims*, (n 85) paras 424–425.

111 *Certain Activities* (n 3) paras 45–46.

112 Ibid., para 49.

113 Ibid., paras 78, 86. For a commentary to the case and a more in-depth analysis of the valuation methodologies proposed by the parties see Jason Rudall, *Compensation for Environmental Damage under International Law* (Routledge 2020) 25–32.

114 ARSIWA (n 11) 101, para 15.

115 *Certain Activities* (n 3) para 41.

116 Letho Second Report (n 12) paras 135–136.

117 Separate Opinion of Judge Donoghue in *Certain Activities* (n 3) para 32.

In awarding compensation to remediate environmental damage,[118] the UNCC F4 Panel focused on primary restoration, that is restoration of ecological functioning rather than a specific physical condition, wherever possible. It awarded compensatory restoration only when the evidence showed that 'after the primary restoration measures have been undertaken, there are, or there are likely to be, uncompensated losses'.[119] However, attributing an economic value to non-traded natural resources was a difficult exercise.[120]

Notwithstanding the difficulties in selecting and applying a valuation methodology, and the inevitable approximation in the calculations, these discussions provide transparency and some degree of clarity on these bodies' reasoning. They also provide a basis for debate. In contrast, human rights supervisory bodies tend to arrive at a figure without much elaboration. For example, in *Saramaka People v Surimane*—concerning the damage caused by the construction of a dam by Suriname in a territory traditionally occupied by an indigenous people, and the granting of logging and mining concessions without consulting the Saramaka people—the IACtHR assigned a monetary value to the damaged environment as well as to the impairment or loss of environmental goods or services. It awarded USD 75,000 for the amount of timber extracted from the territory and for the material damage caused by the logging concessions without consulting the Saramaka people.[121] In awarding compensation for pecuniary damages, it is not clear what methodology the Court used to reach its conclusion. This is clearly an area where further research, consideration and practice would be valuable.

3.4 Implementation

As mentioned in Section 2, reparation may make a material and normative contribution to a peacebuilding process. In our view, a reparation award fulfils the normative function of reparation and has an expressive function in acknowledging the existence and extent of damage as a wrongful act and establishing responsibility for it. This may reinforce the value of the primary norm breached and communicates that there is accountability for its breach; thus, it sets the foundations for re-establishing the rule of law after conflict. However, if the material function of reparation is never fulfilled, for example, if reparation is not paid or does not reach the victims, this implicitly detracts from the normative function served by the original decision that reparation is due. It also leads to dashed expectations and a failure of trust, which can destabilise peace processes.

The effectiveness of reparation in this regard therefore depends upon implementation. Ongoing lack of implementation is detrimental to peacebuilding, and can exacerbate tensions if there are no resources to redress the environmental damage in question. Whether reparation awards are complied with depends on a variety of factors, including the relations between the parties to the case, their reciprocal interests, the circumstances surrounding the violations, the specific measures that would need to be put in place, the timing, and the broader political

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[118] UNCC Decision 7 (n 20) para 35.

[119] UNCC Report on F4 Claims (n 19) para 82.

[120] Cusato (n 44) 93.

[121] *Case of the Saramaka People v Suriname*, IACtHR Series C No 72 (28 November 2007), para 194(e). In addition, the Court awarded USD 600,000 in non-pecuniary damages.

context at the time of implementation.[122] Most of these factors are outside the control of adjudicative bodies. What adjudicative bodies have control over is the type of reparation that is appropriate in the circumstances to remedy the damage caused by the respondent's wrongful conduct. In this sense, they may have an eye to awarding measures that can be realistically implemented. This is a difficult balance to strike—clearly adjudicatory bodies have a role in upholding the requisite norms and standards. However, unsurprisingly, research shows that 'low-cost' judgments (i.e., judgments that do not affect important state interests in a significant manner, such as those ordering the payment of just satisfaction without more significant legislative reforms) are complied with more than 'high-cost' judgments.[123] High-cost judgments are those significantly affecting state interests; for example, an apology or legislative reforms may prove politically difficult. In this sense, there may be questions as to whether transformative reparation—which may be far-reaching in attempting to address long-standing structural violations—is the type of reparation that makes the most effective contribution to the peacebuilding process.

To facilitate implementation, it may be helpful to provide a timeline for implementation and designate a supervisory body. The experience of the UNCC is instructive. A follow-up programme was established to monitor the use of funds and life of funded projects, to ensure they retained their purpose or character. These efforts were financed by beneficiary states, not the Compensation Fund and thus did not constitute additional financial sanctions on Iraq.[124]

In inter-state dispute resolution mechanisms, there may be questions as to how the communities that suffered damage are to benefit from reparation as part of holistic peacebuilding strategy. Where the only relevant forum is dependent upon a diplomatic protection claim, reparation is awarded to the state bringing the claim, and not to the victims directly. Thus, the communities' recovery after conflict is dependent on the state passing the reparation onto the victims. Clearly, the potential of reparation to contribute to a peacebuilding strategy is enhanced if reparation reaches the true victims.

4. CONCLUSIONS

A peacebuilding process usually involves many different stakeholders, and the remodelling of relationships between them—and the environment itself adds another relational dimension to this process. Peacebuilding requires flexibility in the manner in which reparation is consid-

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[122] In this sense, the question of implementation is seen as part of the broader question of compliance with judgments and decisions. See e.g., Heather L. Jones, 'Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua' (2010) 12 *Chicago-Kent International & Comparative Law* 58; Chiara Giorgetti, 'What Happens after a Judgment is Given? Judgment Compliance and the Performance of International Courts and Tribunals' in Theresa Squatrito, Oran R. Young and Andreas Follesdal (eds), *The Performance of International Courts and Tribunals* (CUP 2018) 324; Yuval Shany, 'Compliance with Decisions of International Courts as Indicative of Their Effectiveness: A Goal-Based Analysis' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (Hart 2010) 231.

[123] Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights' (2010) 6(1) *Journal of International Law and International Relations* 35.

[124] Lawry-White (n 27) 367, 392.

ered, designed and implemented, taking into account these relationships, as well as the causes of conflict and the needs of victims. To make an effective contribution to peacebuilding, reparation measures need to be carefully designed and tailored to the circumstances of the case, and managing expectations about what reparation can achieve is central to achieving cooperation and participation in line with the objectives of environmental peacebuilding.

This chapter has explained the important and potentially multifaceted role that reparation may play as part of environmental peacebuilding. Reparation is a mechanism for accountability and thus has an important normative and expressive function in reinforcing the value of the obligation breached, as well as act as a vehicle for cooperation and dialogue between the parties to the conflict. As the UNCC experience illustrates, reparation can also make a significant material contribution to environmental recovery. In contrast, its potential to deter future violations appears limited.

The chapter has also considered some of many challenges that courts, tribunals and other bodies face in adjudicating claims of reparation for environmental damage flowing from violations of international protections, and particularly in a conflict scenario. There are gaps and uncertainties in the relevant legal framework—most notably the lack of a commonly accepted definition of environmental damage, the lack of uniform rules concerning the required burden and standard of proof, and inconsistencies in the causation standard and valuation methodologies adopted by different bodies. These gaps are compounded by scientific uncertainty—surrounding both the cause and repair of environmental damage. These gaps represent areas for further research.

As these bodies grapple with addressing harm to natural resources and the environment, they intrinsically engage with the peacebuilding process to some degree. As far as possible, it would be beneficial to keep an eye on the overall picture as institutions and individuals try to reduce conflict risk and inspire unity. Given the multiplicity of roles reparation can play within a peacebuilding process, the many stakeholders involved and the specific and often limited mandates of courts, tribunals and other bodies, a holistic or integrative approach is crucial. And without coordination, bodies that are designed to safeguard or to address violations of a particular type of specialism may map imperfectly onto peacebuilding efforts.