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Article

Reckoning with Conservation Violence on Indigenous Territories: Possibilities and Limitations of a Transitional Justice Response

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ABSTRACT

This article reflects on the merits of applying transitional justice to wrongs caused by the creation and enforcement of protected areas on Indigenous Peoples' territories, referred to herein as 'conservation violence.' Conservation violence commonly infringes on an interrelated set of human rights, constituting a principal threat to both Indigenous Peoples and the environment. This wrongdoing has not been adequately scrutinized in transitional justice discourse, despite the field's recent expansion into areas of Indigenous and environmental harm. This article argues there are sound conceptual and pragmatic reasons for transitional justice to engage with conservation violence, with potential benefits flowing to both Indigenous Peoples and nature. Yet, it is unlikely to deliver what Indigenous Peoples principally demand, namely restitution of their lands, territories and resources. This raises concerns regarding the suitability of applying conventional transitional justice in this context and dictates that any process should be approached modestly, cautiously and in complement to broader, long-term reforms aimed at land restitution and decolonization.

KEYWORDS: Conservation, environmental justice, indigenous peoples, land restitution, transitional justice

INTRODUCTION

As transitional justice migrates towards engaging with environmental harm in more meaningful ways, this article considers how a form of environmental protection, itself, has been used to inflict violence on Indigenous Peoples. It reflects on the merits of applying the conceptual frameworks and tools of transitional justice to large-scale harm caused by the creation and enforcement of protected areas on Indigenous Peoples' territories, referred to herein as 'conservation violence.' It argues there are compelling reasons for transitional justice to meaningfully engage with conservation violence, but it is ultimately unlikely to deliver what affected Indigenous Peoples principally demand, namely the restitution of their lands, territories and resources.

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For 150 years, Indigenous Peoples across the world have suffered from large-scale human rights abuses committed through the creation and enforcement of protected areas on their territories. According to the Convention on Biological Diversity (CBD), a protected area is 'a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.'[1] They are often denominated as national parks, wildlife reserves, wilderness areas, and nature reserves, among other labels. Very few of the world's protected areas are governed by Indigenous Peoples, while the vast majority are State-managed.[2]

The full scale of abuses associated with protected areas is not known, but they have had severe consequences on Indigenous Peoples and questionable environmental efficacy. State-managed protected areas have largely disregarded Indigenous Peoples' land tenure, dispossessed them of their lands, excluded them from accessing resources and cultural sites, denied their participation in conservation management, and criminalized them for merely existing in their homelands. Heavily militarized enforcement of protected area boundaries has inflicted further abuses through various forms of harassment, coercion and overt violence.[3] All the while, State-managed protected areas consistently fail to stem rapid biodiversity loss or otherwise meet environmental expectations and objectives.[4]

Human rights abuses of such a scale and severity are normally expected to be addressed by some modality of transitional justice. It is now endorsed at the international level as a normative human rights intervention and a near default response to episodes of large-scale harm.[5] Yet, conservation violence has not been the subject of transitional justice scrutiny. This is the case even though the traditional boundaries of the field are constantly expanding into areas far beyond what was initially contemplated, including in response to historical injustices suffered by Indigenous Peoples, as well as issues of environmental harm. This article seeks to address this gap in the discourse by examining the possibilities, dilemmas and limitations associated with treating conservation violence as a transitional justice case.

Theoretically, confronting conservation violence through a transitional justice response is conceptually justified, even under a traditional theorization of the enterprise. The human rights abuses associated with conservation violence are often large-scale, on par with violations present in the more orthodox cases of armed conflict or political repression. Moreover, a discernible transition is arguably present with the mainstream conservation industry increasingly embracing an Indigenous rights consciousness vis-à-vis nature conservation. If we accept that transitional justice is fundamentally about coming to terms with legacies of large-scale harm during a period of transition, then conservation violence seems conceptually ripe for scrutiny.

There are also pragmatic reasons to meaningfully address conservation violence in transitional justice. It is now well-accepted that biodiversity loss cannot be adequately stemmed without increasing Indigenous governance, participation, and consent in nature conservation projects.[6] Absent extraordinary measures, Indigenous Peoples are likely to remain marginalized in the conservation management of their own lands and resources. Additionally, unresolved, historic grievances associated with protected areas often prevent Indigenous Peoples from supporting State-led conservation initiatives, leading to poor environmental outcomes.

[1] The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69), Art. 2.

[2] UN Environment Programme (UNEP), et al., *Protected Planet Report: Tracking Progress towards Global Targets for Protected Areas* (Cambridge, UK; Gland, Switzerland; and Washington, D.C., USA: UNEP-WCMC, IUCN and NGS, 2018)1, 31.

[3] Esther Marijnen and Judith Verweijen, 'Selling green militarization: the discursive (re) production of militarized conservation in the Virunga National Park, Democratic Republic of the Congo,' *Geoforum* 75 (2016): 274–85.

[4] Aili Pyhälä, Ana Osuna Oroza, and Simon Counsell, *Protected Areas in the Congo Basin: Failing both People and Biodiversity?* (London, UK: Rainforest Foundation UK, 2016), 6.

[5] Jennifer Balint and Julie Evans, 'Transitional Justice and Settler States,' *The Australian and New Zealand Critical Criminology Conference* (2011), 1.

[6] Kyle Artelle, et al. 'Supporting resurgent Indigenous-led governance: A nascent mechanism for just and effective conservation,' *Biological Conservation* 240 (2019): 108284.

It is also axiomatic that strategies and programming should be responsive to what victims and survivors want and expect of transitional justice.[7] Indigenous Peoples displaced through conservation violence principally demand the return of their lands, territories and resources. Restitution of lands and other property is recognized as an established form of reparation in the field,[8] but there is little evidence so far to suggest that traditional mechanisms are particularly effective at effectuating land restitution. It is fair to question whether conventional transitional justice processes can meet such demands. Absent restitution, there is a risk that transitional justice measures may distract from broader reforms concerning land and decolonization. Accordingly, transitional justice responses to conservation violence should be approached modestly, cautiously and in complement to broader, longer-term reforms.

This does not necessarily mean that transitional justice has no value in confronting conservation violence; rather, it merely recognizes the limits of an extraordinary enterprise, so as not to saddle it with expectations that are unlikely to be met, and all to the detriment of Indigenous victims. Among other things, transitional justice has the potential to properly recognize Indigenous Peoples as victims of large-scale human rights abuses, challenge dominant narratives around conservation and create space for a more just relationship with the global conservation industry, one in which Indigenous Peoples increasingly own, govern and manage their lands and support conservation objectives in line with their traditional practices and worldviews.

This article begins by describing the scale and nature of harm Indigenous Peoples endure globally through conservation violence. It then situates such harm in a broader, critical history of nature conservation, reflecting on its relationship with colonial projects, ideologies, and legacies. In the face of such violations, Indigenous Peoples have resisted and challenged the existence of protected areas on their territories and pushed for a historical reckoning, invoking the language and tools of transitional justice. This article then proceeds to analyze various conceptual and pragmatic justifications and dilemmas associated with addressing conservation violence through the lens of transitional justice and reflects on the fields' seeming incapacity to deal with the core problem of stolen Indigenous land. Lastly, it concludes by thinking through the potential value-add transitional justice offers in redressing conservation violence.

CONSERVATION VIOLENCE

Conservation violence is used in this article to describe the large-scale human rights abuses perpetrated against Indigenous Peoples through the creation and enforcement of protected areas on their territories. Protected areas have routinely led to the forced evictions of Indigenous Peoples, ongoing exclusion from their natural resources and other serious violations of their human rights.[9] This violence is often discussed and encompassed under the banner of 'fortress conservation', a term broadly used to describe nature conservation approaches that displace Indigenous Peoples and other land-dependent communities from their lands to establish strictly protected, State-managed protected areas.[10]

Importantly, conservation violence extends beyond strictly land dispossession and resource exclusion. Many protected areas are policed in increasingly violent ways, including through

[7] Lieselotte Viaene and Eva Brems, 'Transitional Justice and Cultural Contexts: Learning from the Universality Debate,' *Netherlands Quarterly of Human Rights* 28(2) (2010): 212.

[8] 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, UN General Assembly Resolution 60/147 (16 December 2005) (Basic Principles and Guidelines), para 19.

[9] See, e.g., Mark Dowie, *Conservation Refugees: The Hundred-year Conflict Between Global Conservation and Native Peoples* (Cambridge, USA: MIT Press, 2011).

[10] See, e.g., Dan Brockington, *Fortress Conservation: The Preservation of the Mkomazi Game Reserve, Tanzania* (Bloomington, USA: Indiana University Press, 2002).

the use of heavily militarized tactics, commonly called 'green militarization.'[11] This has contributed to numerous instances where park rangers have killed, maimed, raped or tortured Indigenous Peoples seeking to live in or access the protected areas created on their lands.[12] Force, including lethal force, is justified as a proportionate response to suspected trespassers inside protected areas, often those who access and use their territories as they did prior to being displaced. Conservation violence also encompasses the systemic structural and cultural violence that accompanies conservation projects. Evictions commonly render Indigenous Peoples landless and State-dependent, forced into extreme poverty on the outskirts of their homelands. Beyond socio-economic deprivations, there is also significant religious and cultural loss. That is because Indigenous cultural and spiritual identities are inextricably intertwined with their lands, territories and resources.[13]

In addition to human harms, there are also severe environmental costs associated with conservation violence. Rapid biodiversity loss is occurring alongside the proliferation of State-managed protected areas,[14] many of which are not adequately protecting biodiversity.[15] Studies have observed increased poaching in protected areas,[16] with some suffering serious environmental deterioration.[17] This is at odds with the prevailing notion that State-managed protected areas are a principal solution to biodiversity protection and a key climate change mitigator.

CONSERVATION AS A TOOL OF COLONIALISM

In many ways, nature conservation has been one of the latest iterations of the broader colonial project designed to oppress Indigenous Peoples and dispossess them of their territories. This idea was aptly summarized by Indigenous delegates at the International Union for Conservation of Nature's (IUCN) Vth World Park's Congress (WPC) in 2003 when they stated '[f]irst we were dispossessed in the name of kings and emperors, later in the name of state development, and now in the name of conservation.'[18] Indeed, a critical examination of the history of conservation, and protected areas in particular, illustrates a close entanglement with colonial objectives and ideologies. These have persisted well into the 21st century, shaping modern conservation practice to the detriment of Indigenous Peoples and their territories.

Fortress-style conservation is commonly traced to the United States,[19] where Westward expansion in the 19th century brought European settlers into contact with some of the most pristine ecosystems on the planet, as well as their long-standing stewards – the various American Indian nations that occupied and safeguarded these territories for millennia. Pressure from early American environmentalists to preserve, rather than exploit these landscapes, led to the establishment of the world's first protected areas: Yellowstone National Park in 1872 and

[11] Elizabeth Lunstrum, 'Green militarization: anti-poaching efforts and the spatial contours of Kruger National Park,' *Annals of the Association of American Geographers* 104(4) (2014): 817.

[12] See, e.g., Robert Flummerfelt, *'To Purge the Forest by Force': Organized Violence to Expel Batwa Communities from the Kahuzi-Biega National Park 2019–2020* (London, UK: Minority Rights Group International, 2022).

[13] Jérémie Gilbert and Kanyinke Sena, 'Litigating indigenous peoples' cultural rights: comparative analysis of Kenya and Uganda,' *African Studies* 77(2) (2018): 205–206.

[14] Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), *Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers* (Bonn, Germany: IPBES, 2019).

[15] Hannah S. Wauchope, et al. 'Protected areas have a mixed impact on waterbirds, but management helps,' *Nature* 605 (2022): 1–5.

[16] See, e.g., Ngambouk Vitalis Pemunta, 'Fortress conservation, wildlife legislation and the Baka pygmies of southeast Cameroon,' *GeoJournal* 84(4) (2018): 1035; *see also* Prakash Kashwan, 'Inequality, democracy, and the environment: a cross-national analysis,' *Ecological Economics* 131 (2016): 139.

[17] Sean Maxwell, et al. 'Area-based conservation in the twenty-first century,' *Nature* 586 (2020): 217–227.

[18] Dowie, supra n 9 at xv.

[19] The English enclosure movement was also influential in promoting fortress conservation models, particularly in Africa. James Igoe, *Conservation and Globalisation: A Study of National Parks and Indigenous Communities from East Africa to South Dakota* (Wadsworth, 2004).

Yosemite National Park in 1890.[20] Most of these same environmentalists held racist and colonial views that influenced early thinking about nature protection. With only limited variance, they coalesced around an ideology that humans are incompatible with and superior to nature, an insidious idea that corrupted early thinking about conservation[21] and the environmental movement more generally.[22]

Central to dominant conservation ideology is the 'wilderness myth', the idea that there were places where humans had been but had never occupied or influenced.[23] The preservation of 'wilderness' was a stated aim of these early protected areas, but their creation was only made possible through the coerced and forced displacement and ongoing exclusion of Indigenous Peoples. In discussing America's national parks, Treuer (Ojibwe) remarks:

> all of them were founded on land that was once ours, and many were created only after we were removed, forcibly, sometimes by an invading army and other times following a treaty we'd signed under duress.[24]

As Spence argues, wilderness did not just exist, it had to be created through the dispossession of Indigenous Peoples.[25] By treating such lands as wild spaces, despite occupation and use over millennia, colonial powers rationalized stripping Indigenous Peoples of their customary land rights and seizing their territories.[26] Even today, conservation stakeholders focus on preserving 'wilderness' without understanding how the idea is grounded in and furthers Indigenous erasure.[27]

The fortress conservation model developed in the United States was subsequently exported to other parts of the world under the basic premise that nature can only flourish when sequestered from humans. It was embraced first by European colonial powers. Cordoning off land for protected areas under State authority became a colonial tool to extend control over remote territories and reluctant populations.[28] Later, it was adopted by successor postcolonial states which saw protected areas as a key source of tourist revenue and international prestige.[29] The fortress conservation model ultimately became institutionalized in the 'conservation industry' – the host of global conservation nongovernmental organizations (NGOs), large statutory donors, conservation scientists, intergovernmental agencies and technical partners that largely determine global conservation policy.

[20] Mark David Spence, *Dispossessing the Wilderness: Indian Removal and the Making of the National Parks* (Oxford, UK: Oxford University Press, 1999).

[21] Esme Murdock, 'Conserving dispossession? A genealogical account of the colonial roots of western conservation,' *Ethics, Policy & Environment* 24(3) (2021): 235–249.

[22] Prakash Kashwan, 'American environmentalism's racist roots have shaped global thinking about conservation,' *The Conversation* (2 September 2020), https://theconversation.com/american-environmentalisms-racist-roots-have-shaped-global-thinking-about-conservation-143783 (accessed 3 October 2022).

[23] Dan Brockington, 'Community Conservation, Inequality and Injustice: Myths of Power in Protected Area Management,' *Conservation and Society* (2004): 411–432.

[24] David Treuer, 'Return the national parks to the tribes: the jewels of America's landscape should belong to America's original peoples,' *The Atlantic* (12 April 2021), https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395/ (accessed 25 October 2022).

[25] Spence, supra n 20.

[26] Treating land as unoccupied was a common colonial tactic, most famously embodied in the concept of *terra nullius*, used by imperial powers to take Indigenous territories to enrich themselves.

[27] Kyle Whyte, 'White Allies, Let's Be Honest About Decolonization,' Yes! Magazine (3 April 2018), https://www.yesmagazine.org/issue/decolonize/2018/04/03/white-allies-lets-be-honest-about-decolonization (accessed 25 October 2022).

[28] Roderick Neumann, *Imposing Wilderness: Struggles over Livelihood and Nature Preservation in Africa*, (Berkeley, USA: University of California Press, 1998), 11.

[29] Dan Brockington, 'The enduring power of fortress conservation in Africa,' *Proceedings of the Conference: Protected Areas, Biodiversity and Communities: Learning from Conservation Experiences in Africa* (2015).

INDIGENOUS RESISTANCE AND CALLS FOR A HISTORICAL RECKONING

Indigenous Peoples have long resisted and challenged the deleterious impacts of protected areas on their lands and livelihoods. As the Indigenous rights movement gained steam in the 1960s and 1970s, activists began to confront the conservation industry, demanding that stakeholders respect and accommodate Indigenous Peoples' rights in the creation and management of protected areas.[30] This resistance was on full display at the IUCN's Vth WPC in 2003 when over 120 Indigenous representatives rebuked prevailing conservation models and the actors who were enabling and promoting it. It represented the first time Indigenous Peoples were recognized as valuable and effective partners in conservation and various commitments were made to respect their rights to lands, territories and resources.[31]

Indigenous activism and advocacy have produced a growing consensus, even among mainstream conservation actors, that biodiversity agendas wholly divorced from Indigenous Peoples constitute fundamentally unjust and environmentally unsound policy.[32] Conservation NGOs, government donors and international organizations subsequently adopted policies undertaking to respect Indigenous Peoples' rights in connection with their conservation initiatives. Despite these commitments, strict protectionist approaches continue to be embraced in many parts of the world.

Sporadic calls have been made for some sort of historical reckoning with the legacies of conservation violence. In a 2016 thematic report, the former UN Special Rapporteur on the rights of Indigenous Peoples (UNSR IP) observed that '[r]ights-based conservation measures continue to be hampered by the legacy of past violations…'[33] Experts have explicitly called for the creation of a truth commission to address injustices around protected areas[34] and scholars have examined the nexus between protected areas and reconciliation frameworks,[35] as well as their role in post-conflict societies.[36] Demands for historical redress have also been explicitly made by civil society groups.[37]

At an institutional level, these discussions have primarily occurred at the IUCN, the largest intergovernmental organization focused on nature conservation. During its Vth WPC in 2003, the IUCN adopted a recommendation that 'governments, intergovernmental organisations, NGOs, local communities and civil societies' should establish 'a high level, independent Commission on Truth and Reconciliation on Indigenous Peoples and Protected Areas.'[38] More recently, during the IUCN's World Conservation Congress in 2021, a motion was adopted that requested the IUCN Council establish a Truth and Reconciliation Working Group within the organization. The resolution further called on States to consider establishing truth and reconciliation commissions to challenge narratives around the 'Doctrine of Discovery' – the

[30] Dowie, supra n 9 at xv.

[31] Stan Stevens, 'Introduction,' in *Indigenous Peoples, National Parks, and Protected Areas*, ed. Stan Stevens (Tucson, USA: University of Arizona Press, 2014), 7.

[32] See, e.g., David Boyd and Stephanie Keane, *Human Rights-Based Approached to Conserving Biodiversity: Equitable, Effective and Imperative*, A Policy Brief from the UN Special Rapporteur on Human Rights and the Environment, Policy Brief No. 1 (August 2021).

[33] Report of the Special Rapporteur on the rights of indigenous peoples, UN Doc. A/71/229 (29 July 2016), para 68.

[34] Victoria Tauli-Corpuz, et al. 'Cornered by PAs: adopting rights-based approaches to enable cost-effective conservation and climate action,' *World Development* 130 (2020): 10; *see also* Robert E. Moiöse, *Partnering with Indigenous Peoples in CARPE Initiatives: Towards a New Conservation Practice* (Washington, D.C., USA: CARPE and USAID, 2020), 10.

[35] Chance Finegan, 'Reflection, Acknowledgement, and Justice: A Framework for Indigenous-Protected Area Reconciliation,' *International Indigenous Policy Journal* 9(3) (2018); *see also* Melanie Zurba, et al. 'Indigenous protected and conserved areas (IPCAs), Aichi Target 11 and Canada's Pathway to Target 1: Focusing conservation on reconciliation,' *Land* 8(1) (2019): 10.

[36] Yogesh Dongol and Roderick Neumann, 'State Making Through Conservation: The Case of Post-Conflict Nepal,' *Political Geography* 85 (2021): 102327.

[37] See, e.g., Colin Luoma, *Fortress Conservation and International Accountability for Human Rights Violations against Batwa in Kahuzi-Biega National Park* (London, UK: Minority Rights Group International, 2022), 53.

[38] IUCN WPC Recommendation 5.24 (2003), http://danadeclaration.org/pdf/recommendations24eng.pdf (accessed 3 June 2022).

discredited legal principle that provided a justification for colonial powers to lay claim to Indigenous lands.[39]

Mainstream conservation actors have also started to invoke certain transitional justice language in their own messaging. For example, in response to ongoing human rights violations committed inside the Kahuzi-Biega National Park in the Democratic Republic of the Congo, the Wildlife Conservation Society has publicly agreed to redress historical and contemporary injustices faced by the Indigenous Batwa people, including through 'a broader strategy that looks at truth and reconciliation processes.'[40] Similarly, in Canada, the World Wide Fund for Nature has committed to 'truth and reconciliation' in line with the Calls to Action stemming from Canada's 2015 Truth and Reconciliation Commission.[41] Despite these demands and various commitments to seek increased accountability and historical redress, conservation violence seems to have evaded scholarly attention as a possible transitional justice case. This article addresses this gap by beginning to think through the value of such an endeavour.

ASSESSING THE MERITS OF A TRANSITIONAL JUSTICE RESPONSE TO CONSERVATION VIOLENCE

This article now analyzes the merits of using the conceptual frameworks and tools of transitional justice to respond to conservation violence. It discusses key theoretical and pragmatic justifications, including the central role that Indigenous Peoples have in protecting the Earth's remaining biodiversity. It also interrogates some of the core attendant dilemmas, including the obstacle of returning stolen land to Indigenous Peoples, a limitation that severely complicates the application of transitional justice to conservation violence.

Theoretical Justifications and Dilemmas

As originally conceived and implemented, the transitional justice project did not envision tackling the types of large-scale abuses inherent in establishing protected areas on Indigenous Peoples' territories. As recounted exhaustively in the literature, transitional justice was initially and narrowly conceived as a framework to address relatively recent acts of physical and political violence in countries transitioning away from either repressive rule or armed conflict.[42] Large-scale harm against both Indigenous Peoples and the environment was almost entirely overlooked.

In recent years Indigenous Peoples have been increasingly viewed as the proper beneficiaries of transitional justice, leading to the adoption of mechanisms designed to confront abuses perpetrated against them, including through truth commissions,[43] national apologies,[44] quasi-judicial bodies[45] and reconciliation initiatives.[46] This has been accompanied by a growing interest

[39] IUCN WCC Motion 048 (2021), Renunciation of the Doctrine of Discovery to Rediscover care for Mother Earth (2021), https://www.iucncongress2020.org/motion/048 (accessed 3 June 2022).

[40] Sushil Raj and Albert Kwokwo Barume, 'A conservation paradigm based on Indigenous values in DR Congo (commentary),' *Mongabay* (17 February 2022), https://news.mongabay.com/2022/02/wcs-conservation-in-the-drc-needs-indigenous-values-and-a-paradigm-shift-commentary/ (accessed 3 June 2022).

[41] WWF-Canada, 'Our Commitment to Truth and Reconciliation', https://wwf.ca/stories/truth-and-reconciliation-day/ (accessed 3 June 2002).

[42] James Cavallaro and Sebastián Albuja, 'The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond,' in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, eds. Kieran McEvoy and Lorna McGregor (London, UK: Hart Publishing, 2008), 121.

[43] See, e.g., Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing Them Home (1997); Truth and Reconciliation Commission of Canada, 'The Legacy,' in Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada (2015); Beyond the Mandate, Continuing the Conversation: Report of the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission (2015).

[44] See, e.g., Office of the President, Republic of China (Taiwan), 'openning quotes President Tsai apologizes to indigenous peoples on behalf of government' (1 August 2016), https://english.president.gov.tw/NEWS/4950 (accessed 3 June 2022).

[45] *See, e.g., The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi*, https://waitangitribunal.govt.nz (accessed 3 June 2022).

[46] See, e.g., Uluru Statement from the Heart, https://ulurustatement.org/the-statement (accessed 3 June 2022).

amongst academics in using transitional justice as a framework to engage with historical wrongdoing against Indigenous Peoples.[47] At the same time, transitional justice has not approached violence against Indigenous Peoples with adequate deference to their rights under international law or necessarily been responsive to their needs and priorities.

Environmental harm has also recently been given more attention in the discourse, as evidenced by this special issue. Indeed, links have been explored between transitional justice and natural disasters,[48] climate change,[49] environmental degradation,[50] wildlife crime,[51] and environmental heritages and identities.[52] The push to enshrine ecocide as an international crime has been the subject of both scholarly[53] and media attention.[54] Notwithstanding, transitional justice praxis rarely accounts for the role of the environment in conflict or past wrongdoing, rendering it a blind spot in the field.[55]

Despite the field's tendency to marginalize Indigenous Peoples and environmental issues, conservation violence can be conceptually justified as a transitional justice case, even under the field's mainstream theory. While it is very much still debated what is and what is not transitional justice, two main criteria tend to differentiate it from ordinary forms of justice. First, transitional justice principally responds to large-scale past abuses, not discrete or isolated instances of wrongdoing. Second, such a response ordinarily takes place in the context of a bona fide transition.

Large-scale Harm

Conservation violence entails large-scale human rights abuses across many different geographic and cultural contexts. On a global level, it is difficult to determine the number of Indigenous Peoples negatively impacted by the establishment of protected areas, but we know that the scale of harm is immense. Approximately half of the world's protected areas have been established on lands occupied or regularly used by Indigenous Peoples.[56] One estimate suggests that between 8 and 136 million people in total have been displaced in just 50 percent of the areas under protected status as of 2018.[57] Other estimates are more modest,[58] but regardless, the number of victims and scale of harm is massive.

[47] See, e.g., Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous Peoples in a Non-Transitional Society,' in *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, ed. Paige Arthur (Cambridge, UK: Cambridge University Press, 2010); Rosemary Nagy, 'The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission,' *International Journal of Transitional Justice* 7(1) (2013): 52–73; Jennifer Balint, Julie Evans, and Nesam McMillan, 'Rethinking transitional justice, redressing indigenous harm: A new conceptual approach,' *International Journal of Transitional Justice* 8(2) (2014): 194–216; Augustine Park, 'Settler Colonialism, Decolonization and Radicalizing Transitional Justice,' *International Journal of Transitional Justice* 14(2) (2020): 260–279.

[48] Megan Bradley, 'More than Misfortune: Recognizing Natural Disasters as a Concern for Transitional Justice,' *International Journal of Transitional Justice* 11(3) (2017): 400–420.

[49] Sonya Klinksy and Jasmina Brankovic, *The Global Climate Regime and Transitional Justice* (Oxfordshire, UK: Routledge, 2019).

[50] Karen Hulme, 'Using a framework of human rights and transitional justice for post-conflict environmental protection and remediation,' in *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles and Practices*, eds. Carsten Stahn, Jens Iverson and Jennifer Easterday (Oxford, UK: Oxford University Press, 2017), 119–142.

[51] Let's Look at Wildlife Crimes, *Asymmetrical Haircuts* (26 September 2022), https://www.justiceinfo.net/en/107018-wildlife-crimes.html (accessed 28 October 2022).

[52] Murdock, supra n 21.

[53] See, e.g., Rachel Killean, 'From Ecocide to eco-Sensitivity: "Greening" Reparations at the International Criminal Court,' *The International Journal of Human Rights* 25(2) (2021): 323–347.

[54] See, e.g., Josie Fischels, 'How 165 Words Could Make Mass Environmental Destruction An International Crime,' *National Public Radio* (27 June 2021), https://www.npr.org/2021/06/27/1010402568/ecocide-environment-destruction-international-crime-criminal-court?t=1653912869882 (accessed 3 June 2022).

[55] Rachel Killian and Lauren Dempster, '"Green" transitional justice?', in *Beyond Transitional Justice: Transformative Justice and the State of the Field* (or non-field), ed. Matthew Evans (Oxfordshire, UK: Routledge, 2022).

[56] Special Rapporteur on the rights of indigenous peoples, supra n 33 at para 14.

[57] Charles Geisler, 'A new kind of trouble: evictions in Eden,' *International Social Science Journal* 55(175) (2003): 69–78; see also Rights and Resources Initiative, *Rights-based Conservation: The Path to Preserving Earth's Biological and Cultural Diversity?* (RRI, November 2020), https://rightsandresources.org/wp-content/uploads/2020/11/Final_Rights_Conservation_RRI_05-01-2021.pdf (accessed 28 October 2022).

[58] See, e.g., Dowie, supra n 9.

Even if one was to evaluate it on a country-level or protected area-level, the magnitude of harm justifies an extraordinary justice response.[59] Conservation violence in any given protected area may cause the forced removal of thousands, if not tens of thousands of Indigenous community members, with many subsequent generations likely to suffer from resulting intergenerational structural and cultural violence. In the Ngorongoro conservation area in Tanzania, for example, an estimated 82,000 Maasai people are currently under threat of eviction from their lands to accommodate an UNESCO-sanctioned expansion of the conservation area.[60]

The large-scale abuses subject to transitional justice scrutiny are also not conceptually confined to bodily integrity harms. Violations of economic, social and cultural (ESC) rights, many of which are inherent in conservation violence, can be equally severe, large-scale and devastating for victims The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (UNSR TJ) has reflected on the impacts of land dispossession on ESC rights:

> communities dispossessed of their ancestral lands and natural resources have seen their livelihoods, jobs, subsistence, basic services, cultural roots and social cohesion taken away and have been plunged for generations into poverty and exclusion.[61]

This is especially the case for Indigenous Peoples, whose economic, material, spiritual and cultural needs are often inseparable from their lands, territories and resources. Thus, the scale of harm associated with conservation violence is on par with violations addressed in conventional transitional justice cases.

Bona Fide Transition

The application of transitional justice also ordinarily requires the presence of a transition.[62] Some authors suggest that the field has outgrown the transitional terminology,[63] but some degree of transition has long been seen as a key element behind the transitional justice project.[64] Conventional theory confined transitions to those from dictatorship to liberal democracy, or alternatively, from armed conflict to peace.[65] However, it has never been clearly articulated what exactly amounts to a transition or what societies are purportedly transitioning to or from.[66] From a purely semantical perspective, a transition does not dictate a specific origin, change or endpoint. This is supported by the UN's definition of transitional justice, which notably does not link it to an identifiable transition.[67]

[59] See, e.g., Environmental Justice Atlas and Kalpavriksh, 'Losing ground: how are India's conservation efforts putting the local communities in peril?,' https://ejatlas.org/featured/conflictprotectedareaindia (accessed 3 June 2022).

[60] Letter from UN special mandate holders to Government of Tanzania dated 9 February 2022, Ref. No. AL OTH 263/2021, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26941 (accessed 28 October 2022).

[61] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, *Transitional justice measures and addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts*, UN Doc. No. A/76/180 (19 July 2021), para 63.

[62] See, e.g., Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly* 31(2) (2009): 321.

[63] Lars Waldorf, 'Cuddled, Loved and Mutilated: Transitional Justice as Transitional Object,' *Responsibility to Protect Student Journal* 3(2) (2019): 6; *see also* Marcos Zunino, *Justice Framed: a Genealogy of Transitional Justice* (Cambridge, UK: Cambridge University Press, 2019), 4.

[64] Joanna Quinn, 'Whither the Transition of Transitional Justice,' *Interdisciplinary Journal of Human Rights* 8(1) (2014): 64.

[65] Stephen Winter, 'Towards a Unified Theory of Transitional Justice,' *International Journal of Transitional Justice* 7(2) (2013): 227.

[66] Christine Bell and Catherine O'Rourke, 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay,' *The International Journal of Transitional Justice* 1(1) (2007): 35.

[67] UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616 (23 August 2004), para 8.

Conservation violence is unlikely to be accompanied by a transition from authoritarianism to democracy or from armed conflict to peace, upon which the field traditionally relies upon.[68] Yet, transitional justice is also no longer wedded to the paradigmatic transitions associated with dominant theory. We can reconceptualize a transition to, as Sharp argues, 'capture[] the complex realities of an expanding field.'[69] This does not risk conceptual coherence unless we remain dogmatically moored to the narrow transitions of the paradigmatic cases. Hobbs has argued that a 'less explosive' but viable transition can be found in 'the gradual development of an Indigenous rights consciousness among non-Indigenous Australian society.'[70] Similarly, here, the conservation industry's gradual, yet incomplete shift towards recognizing, respecting, and protecting Indigenous rights is arguably transitional, even if gradual and incomplete.

There is now considerable momentum behind the idea that conservation projects must respect Indigenous Peoples' rights, including those enshrined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The IUCN has endorsed UNDRIP and has committed to implementing the Declaration in its work.[71] Indigenous Peoples' organizations are also now recognized as IUCN members, giving them incrementally more agency in determining global conservation agendas.[72] Moreover, conservation stakeholders have adopted policies undertaking to respect Indigenous Peoples' rights vis-à-vis their conservation initiatives. These protections are commonly integrated into conservation projects, even if rarely implemented on the ground.

This suggests that the conservation industry has made a clear, rhetorical shift away from the wholesale exclusion of Indigenous Peoples.[73] While rights-based conservation is in its initial stages, Indigenous Peoples are increasingly governing more and more protected areas established on their territories. Indeed, some Indigenous groups use protected area designations to their benefit, by affirmatively safeguarding their lands from development and extractive threats.[74]

This largely rhetorical shift has yet to seriously disrupt prevailing fortress conservation projects or radically change the way conservation negatively impacts Indigenous Peoples. However, it is not fatal that such a transition is invariable uncertain, or perhaps even improbable. Winter maintains that a transition can be 'gradual, cumulative, contested and perhaps incomplete' while also noting that '[t]transitional scholarship is comfortable with "protracted transitions"'.[75] A partial or even an unlikely transition does not foreclose applying the theoretical lens of transitional justice to conservation violence. An increased Indigenous rights consciousness amongst the conservation industry signals the type of gradual, albeit uncertain transition that can conceptually support the application of transitional justice to conservation violence.

[68] Balint, Evans and McMillan, supra n 47 at 200.

[69] Dustin Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition,' *International Journal of Transitional Justice* 9(1) (2015): 157.

[70] Harry Hobbs, 'Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia', *The University of New South Wales Law Journal* 39(2) (2016): 521.

[71] See, e.g., IUCN, WCC Resolution 4.052, Implementing the United Nations Declaration on the Rights of Indigenous Peoples (2018), https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2020_RES_002_EN.pdf (accessed 3 June 2022); IUCN, WCC Resolution 097, Implementation of the United Nations Declaration on the Rights of Indigenous Peoples (2012), https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2012_RES_97_EN.pdf (accessed 3 June 2022); IUCN, WCC Resolution 002, Strengthened institutional inclusion concerning indigenous peoples (2020), https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2020_RES_002_EN.pdf (accessed 3 June 2022).

[72] IUCN, Becoming an Indigenous peoples' organisation Member: A convening platform for collective action and influence, https://www.iucn.org/sites/dev/files/content/documents/iucn-becoming-ipo-member-digital-version-2_002.pdf (accessed 3 June 2022).

[73] UN Special Rapporteur on the rights of indigenous peoples, supra n 33.

[74] Report of the Special Rapporteur on the rights of Indigenous Peoples, *Protected Areas and Indigenous Peoples' Rights: The Obligations of States and International Organizations*, UN Doc. A/77/238 (19 July 2022), para 23.

[75] Winter, supra n 65 at 231.

Practical Justifications and Dilemmas

There are also several pragmatic justifications and challenges associated with using transitional justice to engage with conservation violence. An analysis of these issues supports the idea that we must grapple with the legacies of protected areas in more meaningful ways, but it also illuminates significant barriers to doing this effectively. It warrants a modest, cautious approach, whereby transitional justice can serve as one tool, in tandem with other avenues of redress and reform.

Environmental Protection and Potential Conflicts

One of the most persuasive pragmatic reasons for using transitional justice to engage with conservation violence is the knock-on effect it may have on protecting nature. To the extent historical grievances surrounding land and resources remain unresolved, it is unlikely that protected areas will be able to adequately safeguard and foster biodiversity. Indeed, it is now commonly accepted, even amongst mainstream conservation actors, that global conservation goals cannot be achieved without the participation of Indigenous Peoples and securing their rights.

Conservation violence causes significant harm to the environment. Indigenous Peoples' custodianship and traditional knowledge have positively shaped their territories for millennia.[76] Evicting them disrupts an essential part of that ecosystem and removes a layer of protection that potentially safeguards against external threats, including those posed by unsustainable human settlement, extractive industries and development projects. Conservation violence also alienates Indigenous Peoples, making them less likely to support State conservation objectives. Protected areas that disrupt sustainable resource management regimes and criminalize subsistence activities can lead to unsustainable resource extraction by all affected communities and can jeopardize conservation goals.[77]

A robust body of research now shows that Indigenous Peoples are the best custodians of their natural environments, having overwhelmingly protected the ecological integrity of their territories.[78] This has been confirmed across dozens of studies demonstrating that territories owned, governed and occupied by Indigenous Peoples perform on par or outperform State-managed protected areas in fostering biodiversity, reducing deforestation and sequestering carbon.[79] Their responsible stewardship is further evidenced by the fact that Indigenous Peoples occupy, own and manage the most biologically intact ecosystems in the world, effectively safeguarding 80 percent of Earth's remaining biodiversity.[80] This reflects positive contributions made by Indigenous Peoples over millennia,[81] but it also demonstrates the significant risks posed to Indigenous territories as States are increasingly pressured to sequester and conserve biodiversity hot spots, including through the recently adopted target at the CBD to nearly double the current percentage of terrestrial area under protected area status by 2030.[82]

Despite their sustainable track record, Indigenous groups are still disproportionately blamed for environmental degradation – often through small-scale hunting, artisanal mining and subsistence agriculture. Contemporaneously, governments and politically powerful corporations enrich themselves on Indigenous lands through activities far more harmful to the environment.

[76] Erle C. Ellis, et al. 'People have Shaped Most of Terrestrial Nature for at Least 12000 Years,' *Proceedings of the National Academy of Sciences* 118(17) (2021).

[77] Jonas Geldmann, et al. 'A Global-Level Assessment of the Effectiveness of Protected Areas at Resisting Anthropogenic Pressures,' *Proceedings of the National Academy of Sciences* 116(46) (2019): 23, 209–23215.

[78] IPBES, supra n 14.

[79] Rights and Resources Initiative, supra n 57 (citing numerous studies).

[80] Special Rapporteur on the rights of indigenous peoples, supra n 33 at para 14.

[81] Stan Stevens, 'Indigenous Peoples, Biocultural Diversity', in *Indigenous Peoples, National Parks, and Protected Areas*, ed. Stan Stevens (Tuscon, USA: University of Arizona Press, 2014), 23–24.

[82] Kunming-Montreal Global biodiversity framework, Draft decision submitted by the President, CBD/COP/15/L.25, 18 December 2022, https://www.cbd.int/doc/c/e6d3/cd1d/daf663719a03902a9b116c34/cop-15-l-25-en.pdf (accessed 13 January 2023).

Indigenous traditional practices have even been banned as environmentally unfriendly largely because they conflict with Western ideals of conservation, with adverse consequences for nature.

This is not to suggest that Indigenous worldviews and environmental practices are unassailable. As with all segments of society, Indigenous groups do not live in harmony with their natural environments everywhere and at all times.[83] Transitional justice may be forced to grapple with difficult questions in this regard. How should it approach a case where an Indigenous group engages in fossil fuel production on their own territories? Are States justified in restricting access to land and curtailing usage rights if Indigenous occupation endangers biodiversity? How do we ensure that extraordinary processes seeking to redress Indigenous harm do not also ultimately further species loss, at the expense of everyone.

Concerns about conflicts between realizing Indigenous Peoples' rights and environmental protection are not specious, but the aforementioned research shows that safeguarding Indigenous rights – including rights to their lands, territories and resources – is overwhelmingly consistent with positive ecological outcomes. This has been reinforced by regional human rights courts in response to States defending their infringements on Indigenous Peoples' land and resource rights on public interest grounds. In the *Ogiek* case before the African Court on Human and Peoples' Rights, for example, the Court held that Kenya could not rely on its need to conserve the Mau Forest to justify the eviction of the Ogiek people from their lands, as the main causes of environmental degradation was caused by other groups and the government.[84] Moreover, in the *Kaliña and Lokono* case, the Inter-American Court on Human Rights ordered Suriname to grant collective title to the *Kaliña and Lokono* peoples who were evicted to establish three nature reserves in Suriname. In assessing the compatibility of the rights of the *Kaliña and Lokono* peoples with the environment, the Court concluded:

> the protection of natural areas and the right of the indigenous and tribal peoples to the protection of the natural resources in their territories is compatible … owing to their interrelationship with nature and their ways of life, the indigenous and tribal peoples can make an important contribution to such conservation.[85]

The complementary, compatible, and non-exclusionary character of Indigenous peoples' rights and environmental rights has been further emphasized at the level of the UN.[86] Indigenous peoples' rights and environmental objectives may not overlap in every instance, but they are overwhelming aligned.[87]

At the same time, transitional justice processes should not overly romanticize Indigenous stewardship of nature. Such an approach is reductive, essentialist and detrimental to advancing the rights of Indigenous Peoples, including their right to self-determination. Some authors challenge Indigenous Peoples' status as the top environmental stewards by pointing to individualized instances of environmental destruction and caution against returning 'all indigenous communities to their ancestral lands inside protected areas', especially for groups that have been displaced for long periods of time.[88] The suggestion is that the barriers of the fortress should remain in place for such groups.

Yet, such critiques do not adequately situate unsustainable environmental practices in the context of the colonial and oppressive structures that have disrupted traditional conservation

[83] Whyte, supra n 27.
[84] *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application No. 006/2012, African Court on Human and Peoples' Rights, Judgment of 26 May 2017, para 130.
[85] *Kaliña and Lokono Peoples v. Suriname*, Inter-American Court of Human Rights, Judgment of 25 November 2015, para 181.
[86] Special Rapporteur on the rights of indigenous peoples, supra n 33;
[87] Artelle, et al. supra n 6.
[88] Fergus Simpson and Sara Geenen, 'Batwa return to their Eden? Intricacies of Violence and Resistance in Eastern DR Congo's Kahuzi-Biega National Park,' *The Journal of Peasant Studies* (2021): 16.

management regimes, deprived Indigenous communities of basic subsistence activities, disconnected them from their land and water-based cultures and often forced them into life or death situations on the edges of their homelands. They also seem to imply that States are doing or will do a better job of protecting biodiversity, thus buying into what Alcorn calls the 'myth of the noble state'.[89] Transitional justice measures, such as a truth commission, could have an important role in this regard, as a process in which international human rights standards can been reinforced and Indigenous Peoples' environmental practices can be properly contextualized within their violent colonial histories.

There is also something unsettling about the idea that we should condition fundamental Indigenous rights on a group's positive and sustainable relationship with the environment, a litmus test that is not applied to other groups, including most societies based in the Global North whose overproduction and overconsumption is principally driving the environmental crises threatening our planet. By virtue of their collective right to self-determination, Indigenous Peoples are entitled to freely pursue their economic, social and cultural development and to own, use and develop their lands, territories and resources.[90] Refusing to return Indigenous Peoples to their territories for their failure to adhere to some vague standard of ecological harmony, freezes them in the past, treats their cultures as static and denies them the ability to cultivate and implement adaptive land and resource management techniques based on their extensive traditional knowledge.[91]

Practical Dilemmas and the Problem of Land Restitution

Practical difficulties will accompany any transitional justice process, including ones in response to conservation violence. To the extent one envisions a global mechanism (as called for at the IUCN), the breadth and scope of abuses are vast. Human rights abuses against Indigenous Peoples arising from conservation violence can be found across thousands of protected areas that have been established over the last 150 years. Such a broad initiative has never been attempted and any process designed to respond to conservation violence on a global level could not possibly address the sheer breadth of violations in any comprehensive manner.

It is feasible, however, for a mechanism to engage with the history of conservation violence more broadly. This is what was proposed by Indigenous advocates at the Vth WPC when they called for the establishment of a 'high level' truth commission for protected areas.[92] In the context of conservation violence, this could theoretically occur through the IUCN's work. As a large intergovernmental organization with hundreds of members, funding and expertise, it is well-placed to design and implement a transitional justice mechanism to reckon with conservation's unjust history and legacies. Ideally such a process would be Indigenous-led in the fullest sense possible, meaning that Indigenous organizations would have agency over the conception, design, decision-making, implementation, and management of the process, even if done in tandem with other members and stakeholders.

Another issue concerns the transnational nature of the harm at stake and the multiplicity of culpable actors. Conservation violence spans nearly every country and region in the world and implicates not just governments, but a host of conservation stakeholders who have funded, managed or otherwise supported protected areas. Transitional justice has been primarily conceived as a State's attempt to grapple with legacies of violence or injustice within

[89] Janis Alcorn, 'Noble Savage or Noble State? Northern Myths and Southern Realities in Biodiversity Conservation,' *Etnoecológica* 2(3) (1994): 7–19.

[90] UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly, UN Doc. A/RES/61/295 (13 September 2007), Arts. 3, 26.

[91] *See* Cherie Metcalf, 'Indigenous Rights and the Environment: Evolving International Law,' *Ottawa Law Review* 35(1) (2003): 101–140.

[92] IUCN WPC Recommendation 5.24, supra n 38.

its own (or former colony's) borders. While transitional justice typically responds to intra-state violence and repression, proposals for public reckoning associated with transnational abuses have been advanced.[93] In order for a global transitional justice process to address conservation violence, it would require a significant level of cooperation between governments and other stakeholders.

This, of course, does not obviate the possibility of national or local processes. Narrowly tailored mechanisms on the protected area-level may have more flexibility and less practical challenges than a global response. This has been attempted, including through the Whakatane mechanism developed by the IUCN. It is a conflict resolution process designed to 'address and redress the effects of historic and current injustices against indigenous peoples in the name of conservation'.[94] So far, however, the Whakatane mechanism has only been piloted in a handful of protected areas and it has proven largely ineffective at resolving long-standing conflicts between conservation authorities and Indigenous groups.[95]

The most fundamental challenge, however, concerns whether transitional justice can meet the demands of Indigenous Peoples negatively impacted by conservation violence. Transitional justice is still oft-critiqued for being top-down and unresponsive to local needs and desires. Consistent endorsements of local agency and ownership over transitional justice processes have been accompanied by the sentiment that the field needs to be more responsive to survivor priorities and understanding these priorities is key to implementing effective transitional justice policies.[96]

Indigenous Peoples displaced through conservation measures largely center their demands around the restitution of their lands. Indeed, it is regularly the case that displaced Indigenous communities remain on the outskirts of their lands, often living in deplorable conditions, awaiting the possibility to return to their home. Any transitional justice measure addressing conservation violence must seek to engage with this central demand of returning stolen Indigenous land and resources.

Restitution is a well-acknowledged form of reparation in the field of transitional justice. The Basic Principles and Guidelines provide that restitution includes the 'return to one's place of residence' and the 'return of property', among other elements.[97] This form of reparation is implicated in the context of conservation violence and other cases of serious crimes and human rights violations committed against Indigenous Peoples forced off their lands.[98] A right of restitution is further afforded specifically to Indigenous Peoples through Article 28 of UNDRIP, but the provision acknowledges the potential impossibility of effectuating restitution as a remedy.[99]

Despite this standard-setting at the international level, land issues have historically been weakly integrated into transitional justice processes.[100] Critical transitional justice scholars have routinely emphasized the failure of transitional justice to meaningfully address land issues. Moyo contends that 'land tenure and land redistribution issues are at the periphery of conventional

[93] See, e.g., Rhoda Howard-Hassmann, 'A Truth Commission for Africa?' *International Journal* 60(4) (2005): 999–1016; James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice,' *International Journal of Transitional Justice* 10(2) (2016): 332–349.

[94] Forest Peoples Programme, Whakatane Mechanism, www.forestpeoples.org/en/work-themes/environmental-governance/whakatane-mechanism (accessed 28 October 2022).

[95] *See* Luoma, supra n 37.

[96] Simon Robins, 'Whose Voices? Understanding Victims' Needs in Transition: Nepali Voices: Perceptions of Truth, Justice, Reconciliation, Reparations and the Transition in Nepal By the International Centre for Transitional Justice and the Advocacy Forum, March 2008,' *Journal of Human Rights Practice* (2009) 2(1): 320.

[97] UN General Assembly, Basic Principles and Guidelines, supra n 8 at paras 18–19.

[98] Rocío Del Pilar Peña-Huertas, et al. 'Collective Ownership and Land Restitution: A New Opportunity for Afro-Colombian Communities,' *International Journal of Transitional Justice* 15(1) (2021): 230–241.

[99] UNDRIP, supra n 90, Art. 28.

[100] Theodore Mbazumutima, 'Land Restitution in Postconflict Burundi,' *International Journal of Transitional Justice* 15(1) (2021): 66–85.

transitional justice discourses' and that the field, in its liberal form, is incapable of addressing land conflicts.[101] Evans echoes a similar sentiment, observing that '[it seems unlikely that transitional justice is good enough at addressing questions of housing, land and property.'[102]

While restitution for historical injustices features in transitional justice debates,[103] realizing mass land restitution has proved to be an elusive goal. Many periods of repression or conflict are linked to land injustices, but transitional justice measures consistently overlook such harms For instance, Timor-Leste's Commission for Reception, Truth, and Reconciliation (*Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste*) focused on the damage perpetrated after the invasion by Indonesia in 1975, although it was during the colonial period that land was taken, leading to subsequent structural injustices.[104] Even mechanisms centered specifically on Indigenous harm, such as Canada's Truth and Reconciliation Commission, failed to tackle broader issues of land dispossession in the scope of their work.[105]

This shortcoming is partially attributable to the difficulty in realizing land restitution when the act of dispossession occurred decades earlier. The UNSR TJ has commented on this challenge:

> restitution – one of the components of reparations – is difficult to achieve given the gravity, and therefore irrevocability, of the rights violations committed, and also the impossibility of fully restoring the status quo ante, namely the pre-occupation situation.[106]

Even if mass land restitution was feasible and politically viable, Indigenous Peoples' lands often suffer severe environmental degradation under State control, including when they are designated and managed as protected areas. Thus, Indigenous Peoples are unlikely to receive their lands back in the state they had it taken away from them.

There is the added complexity of determining who exactly should be the beneficiaries of such restitution. Who should stolen land be returned to? Conservation violence affects direct victims, but also their descendants, causing multi-layered, collective and intergenerational harm. In some instances, there may be competing claims, including from other marginalized communities who assert historical claims to the same lands, territories and resources. Adjudicating such claims risks some degree of alienation and could potentially even push communities towards violent conflict.

The larger risk arguably lies in the potential for transitional justice to weaken and distract from Indigenous Peoples' demands around land.[107] Critics of applying the framework of transitional justice to Indigenous harm routinely point to its seeming inability to facilitate land restitution. Some Indigenous scholars maintain that justice measures that do not include the return of land in this context are meaningless.[108] For example, Alfred (Kanien'kehaka) argues that:

[101] Khanyisela Moyo, 'Mimicry, Transitional Justice and the Land Question in Racially Divided Former Settler Colonies,' *International Journal of Transitional Justice* 9(1) (2015): 71–72.
[102] Matthew Evans, 'Land and the Limits of Liberal Legalism: Property, Transitional Justice and Non-Reformist Reforms in Post-Apartheid South Africa,' *Review of African Political Economy* 48(170) (2021): 649.
[103] *See* Jon D. Unruh and Musa Adam Abdul-Jalil, 'Housing, Land and Property Rights in Transitional Justice,' *International Journal of Transitional Justice* 15(1) (2021): 1–6.
[104] *Chega!: The Final Report of the Timor-Leste Commission for Reception, Truth and Reconciliation*, Vol. 1 (November 2013).
[105] Jeff Corntassel and Cindy Holder, 'Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-determination in Australia, Canada, Guatemala, and Peru,' *Human Rights Review* 9(4) (2008): 465.
[106] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, supra n 61 at para 57.
[107] See, e.g., Leanne Betasamosake Simpson, 'Land and reconciliation: Having the right conversations,' *Electric City Magazine* (7 January 2016), https://www.electriccitymagazine.ca/2016/01/land-reconciliation/ (accessed 3 June 2022).
[108] Corntassel argues that '[r]econciliation without meaningful restitution merely reinscribes the status quo without holding anyone accountable for ongoing injustices.' Jeff Corntassel, 'Re-envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-Determination,' *Decolonization: Indigeneity, Education & Society* 1(1) (2012): 93.

> Without massive restitution, including land, financial transfers and other forms of assistance to compensate for past harms and continuing injustices committed against our peoples, reconciliation would permanently enshrine colonial injustices and is itself a further injustice.[109]

Much of this criticism also revolves around attempts to integrate decolonization as a desired goal of transitional justice.[110] There is no universally accepted definition of decolonization, but Tuck (Unangax̂) and Yang argue that in the Indigenous context, it requires the repatriation of land – 'all of the land, and not just symbolically'.[111] Decolonization is about 'dismantling colonialist power in all its forms,'[112] a burden no transitional justice policy can possibly bear. In turn, authors contend that transitional justices' inability to return Indigenous land is an impediment to decolonization,[113] rendering the field largely incompatible with Indigenous claims for justice.[114]

Notwithstanding these limitations, transitional justice can make a modest contribution to decolonizing efforts in more consequential ways. For instance, while unable to directly facilitate land restitution, transitional justice processes could potentially help reform land tenure systems, including by setting forth a truthful record of land issues and claims in any given context.[115] In this way, transitional justice can support, in a complementary way, other processes aimed at more substantial and long-lasting reforms

In seeking to reckon with conservation violence, we should resist saddling transitional justice mechanisms with expectations that are unlikely to be achieved. Skeptics of overly expansive forms of transitional justice warn that an unbridled broadening of the field's remit risks turning it into a 'theory of everything'[116] and raises 'already inflated expectations of what transitional justice mechanisms can accomplish.'[117] De Grieff is cautious in this regard, warning:

> it is very serious to make promises that you cannot deliver. Furthermost, I think that because these are promises that are primarily made to victims. There is a peculiar form of cruelty in awakening expectations of people that have already suffered a lot, without any certainty whatsoever about whether we will be able to deliver on the promises that we make.[118]

The urge to extend transitional justice to victims of conservation violence must be balanced with a pragmatic analysis of what can expect to be achieved. This does not completely abrogate the value of transitional justice in this context; instead, it acknowledges that it is just one part

[109] Gerald Taiaiake Alfred, 'Restitution Is the Real Pathway to Justice for Indigenous Peoples,' in *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey,* eds. Gregory Younging, et al. (Ottawa, Canada: Aboriginal Healing Foundation, 2009) 181.

[110] Jennifer Matsunaga, 'Two Faces of Transitional Justice: Theorizing the Incommensurability of Transitional Justice and Decolonization in Canada,' *Decolonization: Indigeneity, Education & Society* 5(1) (2016): 24.

[111] Eve Tuck and K. Wayne Yang, 'Decolonization is not a Metaphor,' *Decolonization: Indigeneity, Education & Society* 1(1) (2012): 7.

[112] Bill Ashcroft, Gareth Griffiths and Helen Tiffin, *Post-Colonial Studies: The Key Concepts* (Oxfordshire, UK: Routledge, 2000) 63.

[113] Matsunaga, supra n 110 at 26. Park argues that while paradigmatic transitional justice cannot engage in decolonization, a radicalized form of transitional justice could. Park, supra n 47.

[114] See, e.g., Corntassel and Holder, supra n 105 at 465–466; Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, USA: University of Minnesota Press, 2018), 108–09.

[115] Chris Huggins, *Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform, and Development* (International Center for Transitional Justice, July 2009).

[116] Naomi Roht-Arriaza, 'Reparations and Economic, Social, and Cultural Rights,' in *Justice and Economic Violence in Transition,* ed. Dustin N. Sharp (New York City, USA: Springer, 2014) 111.

[117] Lars Waldorf, 'Anticipating the past: Transitional justice and socio-economic wrongs,' *Social & Legal Studies* 21(2) (2012): 171.

[118] Laurel Fletcher and Harvey Weinstein, '"North-South" Dialogue: Bridging the Gap in Transitional Justice-Workshop Transcript,' *Berkeley Journal of International Law* 36(2) (2018): 221.

of the larger project of addressing injustice and resolving conflict in societies. Any such transitional justice process must be cognizant of its limitations and incorporate appropriate outreach strategies to assess victim priorities and set clear expectations.

CONCLUSION: THE VALUE-ADD OF TRANSITIONAL JUSTICE

This article concludes by briefly assessing the value of applying transitional justice to conservation violence, in light of the justifications and dilemmas identified above. First, applying the lens of transitional justice to conservation violence treats Indigenous dispossession and resultant wrongs as grave violations worthy of an extraordinary response. Historical and contemporary wrongdoing against Indigenous Peoples is often attributed to the inevitable consequences of development and modernization. In the conservation space, they are often implicitly treated as collateral damage to the broader goal of protecting nature. Indigenous Peoples' displacement and dislocation from their lands and deprivation of their rights are deemed regrettable but are ultimately tolerated in furtherance of saving the planet. By treating conservation violence 'not as unchangeable facts of life but as consequences of conscious policy decisions that fail to protect fundamental rights'[119] transitional justice mechanisms can put pressure on conservation actors to implement Indigenous rights-respecting approaches.

By addressing conservation violence through transitional justice, it positions Indigenous lives, lands, traditional livelihoods and cultural practices as things of value, worthy of being protected, acknowledged and redressed. Mechanisms could evaluate such harm through a human rights framework, drawing on and relying on the international standards that have been developed to defend Indigenous Peoples' rights and hold States and non-State actors accountable. Transitional justice should be principally guided by these hard-fought protections, including those included in UNDRIP, to assess the conservation industry's conduct against prevailing international standards.

Second, transitional justice has the power to challenge the dominant narrative surrounding nature conservation. Protected areas are largely considered a 'universal good' as both a cornerstone of biodiversity protection and a key climate change mitigator. In some States, they are not only revered as awe-inspiring spaces of untamed, natural beauty, but also an invaluable part of a nation's collective heritage and history.[120] The park rangers who guard these protected areas are often lionized as heroes, while Indigenous communities who seek to access their territories are depicted as criminals. This prevailing narrative galvanizes donors to fund more protected areas and police them with increasingly violent and militarized methods.

Transitional justice is recognized as a powerful narrator of difficult and complex histories.[121] Here, it can provide space for a counternarrative, one in which protected areas are considered in the context of violent, Indigenous dispossession. Especially in the case of truth commissions, transitional justice measures have the power to makes these abuses visible to greater society and disrupt the myths that (re)produce harm on Indigenous Peoples. Creating a truth-telling body to expose the truth around conservation and shape a more truthful narrative about the links between protected areas and dispossession of Indigenous lands is both feasible and responsive to Indigenous demands. Such mechanisms have the flexibility to contextualize abuses in ways that ordinary justice processes often lack.[122]

[119] Lisa Laplante, 'Transitional justice and peace building: Diagnosing and addressing the socioeconomic roots of violence through a human rights framework,' *The International Journal of Transitional Justice* 2(3) (2008): 342.

[120] See, e.g., Advancing the National Park Idea Commission Report of the National Parks Second Century Commission (2009), https://www.npca.org/resources/1900-national-parks-second-century-commission-report (accessed 28 October 2022).

[121] Zinaida Miller, 'Effects of invisibility: In search of the "economic" in transitional justice,' *The International Journal of Transitional Justice* 2(3) (2008): 266–267.

[122] International Centre for Transitional Justice, *Indigenous Voices and Truth Commissions* (March 22–23, 2010).

Lastly, meaningfully addressing conservation violence through transitional justice, including through effective mechanisms of redress, may create space for a more just relationship between Indigenous Peoples and the global conservation industry. While they both ostensibly seek a common goal – healthy and biodiversity-rich ecosystems – their relationship is marked by animosity and hostility.[123] This conflict can be an obstacle to effective environmental protection, if not itself a driver of environmental harm.

The ongoing violence of protected areas has fractured relationships between Indigenous Peoples and the conservation industry. These conflicts are often intractable and volatile, mirroring many paradigmatic post-conflict settings. A common goal of transitional justice agendas is to contribute to some sort of social construction in divided societies. Various transitional justice measures, including artistic interventions and memory projects, have shown some promise in this regard.[124]

By accounting for underlying conservation violence, transitional justice can potentially act as a springboard for an improved relationship between Indigenous Peoples and the conservation industry. The way this is pursued is context-dependent, but it must principally grapple with the power differential between Indigenous Peoples and conservation stakeholders. Recognizing and promoting Indigenous Peoples as the rightful owners of their lands is one way to instil legitimacy in the idea that they should determine their own conservation agendas.

Accordingly, there is merit in a more serious engagement between transitional justice and conservation violence, with potential benefits flowing to both Indigenous Peoples and the environment. The fact that such an endeavour is unlikely to return lands to Indigenous Peoples does not diminish its ability to recognize them as victims of large-scale human rights abuses, to challenge dominant narratives around nature conservation and to contribute a more just relationship between Indigenous Peoples and the conservation industry.

[123] Dowie, supra n 9.

[124] Clara Ramírez-Barat, 'The Path to Social Reconstruction: Between Culture and Transitional Justice,' *International Journal of Transitional Justice* 14(1) (2020): 242–250.