

Reparation in the Aftermath of Ecocide

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Introduction

Calls for a new international crime of ecocide have gained significant momentum over the last few years. In 2021, the Stop Ecocide Foundation's Independent Expert Panel's release of a new proposed definition galvanised international statements of support for ecocide to be introduced as the fifth 'crime against peace' at the International Criminal Court (ICC). Proponents of such a move have called attention to the deterrent effects and other benefits of individual criminal accountability for environmental harm, including the symbolic value of framing ecocide as one of the 'most serious crimes of concern' to the international community. However, relatively little attention has been given to another potential benefit of including the crime in the ICC's mandate: the possibility of environmentally reparative measures. It is notable in this regard that the ICC has the ability to award reparations to victims of a convicted person's crimes, while the Court's Trust Fund for Victims (TFV) has the further ability to provide victims with assistance prior to any judgment being rendered.

This paper explores what these reparative possibilities offer in the context of ecocide. It begins by outlining the ICC's reparation and assistance mandates. In doing so, it highlights the current limits of the Court's reparation framework as a means of redressing ecocide, specifically how the definition of 'victimhood' serves to prevent reparations that prioritise the harm perpetrated against the environment itself. Nonetheless, the paper argues that reparations and assistance delivered to natural and legal persons can provide environmentally reparative benefits. Drawing on the Court's prior practice and the practice of other institutions that have awarded reparations for environmental destruction, this paper identifies three principles that might inform future reparation awards: interconnected harm and repair; do no harm and eco-sensitivity; and dignity, non-discrimination, and non-stigmatisation. It also considers the types of reparative modalities that might be appropriate in the aftermath of ecocide, focusing on restitution; compensation; rehabilitation; symbolic measures; and transformative reparations.

The paper acknowledges the practical challenges the ICC has faced, and their likely impacts on the Court's ability to deliver environmental reparative justice. As such, it is clear that the ICC cannot offer any kind of silver bullet solution to the harms of ecocide. Nevertheless, the Court's ability to award measures of repair offers opportunities to look beyond retribution and deterrence, to consider the needs of communities and ecosystems after ecocide has occurred.

Reparations at the International Criminal Court – The Current Regime

Reparations fulfil two main purposes that are enshrined in the International Criminal Court's Statute. First, they oblige convicted persons to repair the harm they have caused. Second, reparations aim, to the extent possible, to relieve victims' suffering by addressing the consequences of criminal acts committed by the convicted person, deterring future violations, and delivering a sense of justice through accountability.² As such, they are reparative rather than punitive, separated from the sentencing phase and considered 'distinct from a penalty.'³ Reparations are awarded by the ICC's Trial Chambers following the conviction of an accused.⁴ They can be made either against the convicted person or through the Trust Fund for Victims (TFV),⁵ an independent, non-judicial institution which can use funds made available by voluntary contributions to complement any money or property collected from the convicted person.⁶ Reparative measures can be individual, collective or both, depending on the scope and extent of any damage, loss or injury, and may include, for example, restitution, compensation and rehabilitation.⁷ In addition to implementing reparations awarded by the Court, the TFV may provide general assistance to victims and the families of victims who have suffered harm as a result of a crime which is within the Court's jurisdiction and linked to a situation under investigation.⁸ This can be done prior to any judgment being issued,⁹ and can include physical and/or psychological rehabilitation and material support.¹⁰ Previous assistance programmes have been delivered in the Democratic Republic of Congo and Uganda, and have included

² Rome Statute, art 75. For a comprehensive practice-oriented overview of the ICC's reparations mandate, see Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Cambridge University Press, 2022).

³ *Prosecutor v Thomas Lubanga Dyilo* (Observations of the Trust Fund for Victims on the appeals against Trial Chamber i's 'Decision establishing the principles and procedures to be applied to reparations') ICC-01/04-01/06-3009 (8 April 2013), para 105.

⁴ Rome Statute, art 75(1).

⁵ Rome Statute, art 75(2).

⁶ See International Criminal Court, 'Regulations of the Trust Fund for Victims' (3 December 2005) UN Doc ICC-ASP/4/Res.3. For a discussion around whether the ICC's framework might allow for legal and natural persons other than the accused to be held liable for reparations, see Nema Milaninia and Jelena Aparac, 'Climate Change Litigation before the International Criminal Court: Prospects in Theory and Practice' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci, *Climate Change Litigation: Global Perspectives* (Brill, 2021) 481-506.

⁷ International Criminal Court, 'Rules of Procedure and Evidence', adopted 9 September 2002, ICC-ASP/1/3, rr 97-98.

⁸ Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3 (2005), Regs 42, 50. For a critique of the assistance mandate, see Regina E. Rauxloh, 'Good Intentions and Bad Consequences: The General Assistance Mandate of the Trust Fund for Victims of the ICC' (2021) 34 *Leiden Journal of International Law* 203-222.

⁹ Anne Dutton and Fionnuala Ní Aoláin, 'Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate' (2019) 19 *Chicago Journal of International Law* 490, 506.

¹⁰ Trust Fund for Victims, 'Assistance Programmes' <www.trustfundforvictims.org/en/what-we-do/assistance-programmes> last accessed 13 April 2020.

measures such as medical referrals, individual and group counselling, and socio-economic activities.¹¹

The ICC's rules of procedure and evidence and jurisprudence establish the conditions necessary for a victim to claim reparations. The harm experienced by the victim must be personal and can be material, physical and psychological. Reparations can be awarded if the harm suffered was a result of the commission of any crime within the jurisdiction of the Court, with the causal link between the crime and harm being determined in light of the specificities of a case.¹² Notably, pursuant to rule 85 of the Court's Rules of Procedure and Evidence, only natural and legal persons who have suffered or sustained physical, material, psychological and/or moral harm with a causal nexus to a crime for which the defendant was convicted may qualify as victims. Natural persons may be direct victims of the crimes, or indirect victims who have suffered harm as a result of the commission of a crime against another person, such as their family member. Legal persons may include '*inter alia*, nongovernmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals, private education institutes [...], companies, telecommunications firms, institutions that benefit members of the community [...] and other partnerships.'¹³ Then rule 85 definition also applies to all aspects of the Trust Fund's mandate.¹⁴ To date, the Court has focused exclusively on harms experienced by natural persons.

The requirement that harm be 'personal' to a natural or legal person is reflective of the anthropocentric nature of the four current core crimes (war crimes, genocide, crimes against humanity and the crime of aggression) which are premised on human rights violations. The Rules' framing of victimhood notably excludes all the other-than-human natural entities, such as animal species, forests, or waterways,¹⁵ as well as future generations.¹⁶ Environmental

¹¹ For a recent assessment of this mandate see Dutton and Ní Aoláin (2019).

¹² ICC, *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129-AnxA, 3 March 2015. On the difficulties in understanding causality at the ICC, see Nema Milaninia, 'Conceptualising Victimization at the International Criminal Court: Understanding the Causal Relationship Between Crime and Harm' 50(2) (2019) *Colombia Human Rights Law Review* 116-158.

¹³ Lubanga Principles (2012), para 8.

¹⁴ Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3 (2005), Reg. 20

¹⁵ On the exclusion of animals, see Marina Lostal, 'De-Objectifying Animals: Could They Qualify as Victims before the International Criminal Court?' (2021) 19 *Journal of International Criminal Justice* 583-610.

¹⁶ On the possibilities of crimes against future generations, see Sébastien Jodoin, 'Crimes against Future Generations: A New Approach to Ending Impunity for Serious Violations of Economic, Social and Cultural Rights and International Environmental Law' *WFC & CISDL Legal Working Paper Final Version*, 15 August 2010.

destruction can be a feature of any of the core crimes.¹⁷ However, this exclusion naturally has particularly pronounced implications in cases concerning ecocide, a crime premised on the destruction of the natural world. Nevertheless, even in the absence of changes to the ICC's definition of victimhood, there are arguably avenues available to the ICC that would enable reparations to have environmentally positive impacts while addressing the human suffering that results from this type of crime. In the following sections I outline how the Court might firstly, design environmentally conscious principles to guide future reparation awards in the aftermath of ecocide, and secondly, mandate particular reparation modalities which address environmental destruction.

Principles to Guide Reparations for Ecocide

The International Criminal Court's principles on reparations are general concepts which are to be distinguished from its Chambers' orders for reparations. Principles can be formulated considering the circumstances of a specific case, but can also be applied, adapted, or expanded upon by future Trial Chambers.¹⁸ To date, the Court has never adopted institution-wide principles on the delivery of reparations.¹⁹ While this has been critiqued by some for producing a lack of clarity and inconsistency,²⁰ it also enables the flexible development of practice through the progressive practices of different Chambers.²¹ It also leaves open the possibility of amended or new principles in future as the ICC adapts to new ways of thinking, including the possible future adoption of a crime of ecocide.

I argue that there are (at least) three eco-centric principles that the ICC could adopt when dealing with future trials concerning ecocide. First, a principle recognising the interconnected nature of human and other-than-human harm and repair; second, a principle that expands the Court's 'do no harm' approach to encompass 'eco-sensitive' approaches to reparation, and

¹⁷ Matthew Gillett, 'Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict' in Carsten Stahn, Jens Iverson, and Jennifer S Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (OUP, 2017).

¹⁸ For the methodology applied to identify new principles, see, inter alia, International Law Commission, *First report on general principles of law*, 5 April 2019, A/CN.4/732.

¹⁹ See Lubanga (2012), para 34: 'These principles...are not intended to affect the rights of victims to reparations in other cases, whether before the Court or national, regional or other international bodies'

²⁰ Alina Balta, Manon Bax and Riane Letschert, 'Trial and (Potential) Error: Conflicting Visions within the ICC System' (2019) 29 *International Criminal Justice Review* 221.

²¹ Carla Ferstman, 'Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill 2020).

third, an expansive and eco-centric understanding of the principles of dignity, non-discrimination, and non-stigmatisation. These are each considered in turn.

Interconnected Harm and Repair

The wellbeing of humans cannot be achieved in isolation from the wellbeing of nature; indeed, human rights and the protection of the environment are increasingly recognised as interdependent and indivisible.²² Although natural entities are precluded from being beneficiaries of reparation measures in their own right, in cases of ecocide it is their destruction that has caused any physical, material, psychological and/or moral harm experienced by natural and legal persons recognised as victims. As such, there are ways in which reparations awarded to natural and legal persons might also legitimately acknowledge and encompass environmental harm. To encourage such an approach, the Court might draft principles designed to recognise the interconnected nature of human and other-than-human harm and repair,²³ and the potentially beneficial role of environmental restoration and repair for victimised individuals and communities. For example, the rehabilitation of waterways or contaminated land might address health-related harms or loss of farming-related income associated with pollution. Adopting such an approach would facilitate reparations which can better address the root causes of the suffering experienced by human and legal beneficiaries, while also responding directly to the environmental damage. Greater awareness of these interconnections in measures of reparation and victim assistance is therefore a necessary, if modest, first step if the impacts of ecocide are to be meaningfully and sustainably addressed.

Do No Harm and Eco-sensitivity

The Court could also expand its 'do no harm' principle to encompass a new principle of 'eco-sensitivity'.²⁴ Adapted from the practice of conflict-sensitivity²⁵ (which is already implemented by the TFV), I define an eco-sensitive approach as one which (i) attempts to understand how reparations may interact with environmental damage using environmental impact assessments; (ii) monitors, evaluates and mitigates against any unintended environmental effects, and (iii)

²² *Environment and Human Rights* (Advisory Opinion), Inter-American Court of Human Rights Reports (Series A) 23, 15 November 2017.

²³ Petra Tschakert More-than-human solidarity and multispecies justice in the climate crisis, (2022) 31(2) *Environmental Politics* 277-296.

²⁴ For recent jurisprudence on the 'do no harm' principle see *Prosecutor v Bosco Ntaganda*, 'Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order"' No. ICC-01/04-02/06 A4-A5, 12 September 2022.

²⁵ Adapted from 'Conflict-Sensitive Approaches to Development, Humanitarian Assistance and Peace Building: Resource Pack' < [Conflict-sensitive approaches to development, humanitarian assistance and peacebuilding: A resource pack - International Alert \(international-alert.org\)](https://www.international-alert.org/)> last accessed 30 December 2022.

positively influences environmental sustainability wherever possible. An eco-sensitive approach requires the Chamber to centre biological diversity and ecological integrity and incorporate an awareness of the possible long-term and inter-generational impacts of reparative projects. While this approach could be applied to all future reparation orders, regardless of the crime perpetrated, it is arguably crucial in cases concerning ecocide.

Dignity, Non-discrimination, and Non-stigmatisation

The ICC has long held that reparations should address underlying injustices and avoid replicating discriminatory practices or structures that predated the commission of the crimes.²⁶ As stated in the amended reparation decision in the Lubanga case, the principles of dignity, non-discrimination and non-stigmatisation mean that reparations should address underlying injustices and avoid replicating discriminatory practices or structures that predated the commission of the crimes.²⁷ The TFV has similarly spoken of the importance of ensuring awards that 'do not exacerbate the root causes of the conflict.'²⁸

In cases of ecocide, the application of this principle will require consideration of those structural inequalities which may shape who is able to access and use natural resources, and recognition that for victims from marginalised groups, ecocide may have been accompanied by and facilitated by a long-term lack of input into how the natural world is used and protected.²⁹ Indeed, the environmental justice movement has worked since the 1960s to expose these inequalities,³⁰ highlighting how disadvantaged groups suffer disproportionately from environmental degradation and unequal distribution of natural resources.³¹ For marginalised groups, the 'end' of ecocidal conduct may not signal the end of subjugation or denied access to natural resources. Reparations should therefore contribute to 'overcoming structures of inequality and discrimination' to the extent possible.³² In the context of indigenous peoples and

²⁶ Lubanga Amended Principles (2015) para 17.

²⁷ Lubanga Amended Principles (2015) para 4.

²⁸ ICC, *Prosecutor v Thomas Lubanga Dyilo*, 'Observations on Reparations in Response to the Scheduling Order of 14 March 2012', ICC-01/04-01/06-2872, 25 April 2012.

²⁹ Merryl Lawry-White, 'Victims of Environmental Harm During Conflict: The Potential for Justice' in Carsten Stahn, Jens Iverson and Jennifer S Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (OUP 2017), 367.

³⁰ See e.g. Robert Bullard, *Dumping in Dixie: Race, Class and Environmental Quality* (Westview Press, 1990).

³¹ Britta Sjostedt, 'Searching for Environmental Justice in Peacebuilding — Tools Offered by International Environmental Law' *Nature of Peace* (8 January 2018) < [Searching for environmental justice in peacebuilding — Tools offered by international environmental law – Nature of Peace \(lu.se\)](#) > last accessed 30 December 2022.

³² UN Office of the High Commissioner for Human Rights and UN Women, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence* (2014).

other marginalised groups, advocates and experts have underscored that land restitution and related reparations, while valued and even crucial, are insufficient without the simultaneous addressing of underlying discrimination and oppression.³³

At a minimum, the Court could avoid reinforcing harmful practices of exclusion, while aiming to further equitable access to and protection of the natural environment. Steps could be taken to identify the intersections of ethnicity/race/clan, class, sexuality, nationality, dis/ability and employment status which influence access to natural resources, to ensure that discriminatory practices of exclusions are not reproduced via the provision of reparations. A gendered lens would be important here, as women and girls often face gender-specific risks, challenges, and discrimination in gaining access to, using, and protecting their natural environment.³⁴

In furtherance of this principle, ensuring that those with an understanding of the specific environmental context are heard prior to reparation orders being made and during the design and implementation of reparative projects. While it may not be possible to meet all demands, the experiences, harms, priorities and needs of victims should be understood and incorporated into reparation awards to the greatest extent possible.³⁵ Prior to making an order, the Court may invite representations from victims, which may help in this regard.³⁶

Modalities of Reparation for Ecocide

It is possible to 'transpose some of the current provisions on reparations to accommodate justice for non-human life.'³⁷ As observed by the Special Rapporteur for environmental protection Marja Lehto, 'the effects of environmental damage are often felt both individually and collectively',³⁸ thus requiring reparations which are individual or collective in nature, or both. Existing modalities of reparation offering pathways to repair after ecocide include

³³ Thomas M Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2014) 25 *Duke Journal of Comparative and International Law* 1.

³⁴ Adapted from ICC, *Prosecutor v Al Mahdi*, 'Reparations Order', ICC-01/12/01-/15, Trial Chamber, 17 August 2017, para 34.

³⁵ John Braithwaite, *Restorative Justice and Responsive Regulation* (OUP 2002) 46.

³⁶ Rome Statute, art 75(3); Rules of Procedure and Evidence, r 97(3).

³⁷ Rosemary Mwanza, 'Enhancing Accountability for Environmental Damage under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity' (2018) 19 *Melbourne Journal of International Law* 606.

³⁸ Special Rapporteur Marja Lehto, 'Second Report on Protection of the Environment in Relation to Armed Conflicts', International Law Commission, UN Doc A/CN.4/728, 27 March 2019, 32.

restitution, compensation, rehabilitation, symbolic measures, and guarantees of non-repetition. These are each considered in turn.

Restitution

Complete restitution may be challenging in cases of ecocide, particularly given the emphasis on 'severe and either widespread or long-term damage to the environment' in the most recently proposed definition. However, potential avenues of restitution could include: (i) orders for restoration of any harm to the environment caused by the commission of the offence, if feasible, and if not, payment of the costs and expenses incurred in restoring the environment; (ii) costs for carrying out a specified project for the restoration or enhancement of the environment for the victims' benefit; or/and (iii) payment to an environmental trust or environmental organization for the purpose of a specified restoration project. For example, in a case concerning an oil spill, modalities might include land and water clean-up projects, as well as developing local nurseries so that healthy, indigenous plants will be available to regenerate heavily impacted ecosystems. Relevant examples can be found in the practice of the Inter-American Court of Human Rights (IACtHR), and the New South Wales Land and Environment Court in Australia,³⁹ both of which have previously awarded specified projects for the restoration of the environment. In relation to the practicalities of pursuing restoration, other domestic and regional frameworks may also provide guidance, for example, the US Comprehensive Environmental Response, Compensation, and Liability Act,⁴⁰ and the European Union Environmental Liability Directive,⁴¹ both of which contain frameworks for the restoration of injured natural resources.

Compensation

The Court may also consider awarding compensation and ordering fines or forfeitures of property. In the context of international law, the International Law Commission's commentary to the articles on State responsibility,⁴² the International Law Institute,⁴³ the UN Compensation

³⁹ See, e.g., *Chief Executive, Office of Environment and Heritage v Coffs Harbour Hardwood Sales Pty Ltd* [2012] NSWLEC 52; *Chief Executive, Office of Environment and Heritage v Lani* [2012] NSWLEC 115, as discussed in White (n 8).

⁴⁰ 42 USC §9601 et seq (1980).

⁴¹ 'Directive 2004/35/CE' (n 1).

⁴² International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' [2001] Yearbook of the International Law Commission vol 2, pt 2, 101, para 15 of the commentary to Article 36.

⁴³ Institute of International Law, 'Responsibility and Liability under International Law for Environmental Damage' (Session of Strasbourg, 1997) art 23.

Commission,⁴⁴ the International Court of Justice,⁴⁵ and the International Center for Settlement of Investment Disputes⁴⁶ have each made clear that environmental destruction is compensable. Evaluating environmental destruction for the purpose of compensation may pose challenges; valuations are likely to require expert testimony, site visits and appropriate evidence collection; and a lack of information, scientific certainty, and/or sufficient resources may inhibit the fact-finding and analysis necessary to calculate the nature of the harm. Nevertheless, where the practicalities of the situation allow for it, methods of assessment and valuation are possible.

Guidance on this process can be found in recent international law and international human rights law practice, including the Environmental Panel of the UN Compensation Commission,⁴⁷ International Court of Justice⁴⁸ and most notably the IACtHR,⁴⁹ where indigenous communities have sought compensation for the loss of culturally significant land and natural resources. In this context, the IACtHR has previously ordered compensation for material damage caused by 'despoiled subsistence resources' and 'destruction' of forests, as well as the immaterial damage caused to a people's spiritual connection with their territory. While the IACtHR is distinct from the ICC in terms of its legal framework, being centred on state responsibility, it demonstrates that the compensability of environmental destruction is well recognised in international law, and that valuation approaches exist to enable compensation to be awarded.

Rehabilitation

⁴⁴ Governing Council, UN Compensation Commission, 'Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of "F4" Claims', UN Doc S/AC.26/2005/10, 4 April 2005, para 58.

⁴⁵ *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation) [2018] ICJ Rep 15. Although note some dissent on the exclusive use of compensation in Judge Cançado Trindade's Separate Opinion, [36]–[37].

⁴⁶ ICSID, 'Decision on Counterclaims', *Burlington Resources Inc v Ecuador*, Case No ARB/08/5, 7 February 2017.

⁴⁷ United Nations Compensation Commission, Governing Council, Report and Recommendations made by the Panel of Commissioners concerning the fifth instalment of 'F4' claims (S/AC.26/2005/10), 4 April 2005, para 80.

⁴⁸ Diane Desierto, 'Environmental Damages, Environmental Reparations, and the Right to a Healthy Environment: The ICJ Compensation Judgment in *Costa Rica v Nicaragua* and the IACtHR *Advisory Opinion on Marine Protection for the Greater Caribbean*', *EJIL: Talk!* (14 February 2018) <[Environmental Damages, Environmental Reparations, and the Right to a Healthy Environment: The ICJ Compensation Judgment in Costa Rica v. Nicaragua and the IACtHR Advisory Opinion on Marine Protection for the Greater Caribbean – EJIL: Talk! \(ejiltalk.org\)](#)> last accessed 30 December 2022.

⁴⁹ Thomas M Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2014) 25 *Duke Journal of Comparative and International Law* 1.

The nature of ecocide may be such that the harm has been experienced collectively, requiring an appropriately collective response. Measures of rehabilitation may be appropriate in this context, particularly those that create long-term opportunities for victimised communities to flourish. In recognition of the principles of interconnected harm and eco-sensitivity, priority could be given to eco-sensitive and environmentally sustainable skills programmes and income-generating opportunities. In keeping with the principle of non-discrimination, such measures should avoid replicating any patterns of marginalisation that might risk excluding groups or individual victims from benefiting from income-generating opportunities.

It may be that modalities of reparation can be designed that train and empower victims to engage in environmentally regenerative and protective projects, such as restoring ecosystems, regenerating protected natural areas, and developing eco-tourist initiatives. In addition to those highlighted in the context of eco-sensitivity, examples of additional forms of reparation can be found in the practice of the IACtHR.⁵⁰ For example, it has previously awarded the creation of community development funds designed to enable eco-tourism developments, access to clean water and food security. A focus on reparative measures which have the potential to bring about long-term positive impacts on the environment could have lasting benefits for marginalised communities that may have historically lacked access to natural resources.

Furthermore, access to psychosocial rehabilitation may be required in recognition of the harms caused by ecocide's disruption of victims' life plans, their cultural, community and family life, and social interactions. This might involve access to psychiatric care for those suffering mental health issues, as well as psychological support for those experiencing behavioural disorders. Trauma-based counselling may play an important role for those suffering psychological harm, while help with addiction may be required for those who have turned to substance use as a coping strategy. Measures of psychosocial rehabilitation may also encompass social services and community and family-oriented assistance and services, designed to promote social wellbeing within the community.

Symbolic measures

⁵⁰ *Kichwa Indigenous People of Sarayaku v. Ecuador* (Merits, Reparations, Costs) IACtHR Series C No 245 (27 June 2012); *Case of the Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, Costs, Series C, No. 172 (Inter-American Court of Human Rights, 28 November 2007).

Additional symbolic measures, such as apologies, acceptances of responsibility and acknowledgments of suffering could be appropriate in the aftermath of ecocide. Awarding a combination of individual reparations in the form of compensation and wider ranging collective measures would be in keeping with the ICC's developing practice and would increase the possibilities of adequately responding to the harm.⁵¹ Symbolic reparations may include initiatives and events designed to commemorate, celebrate, and re-invigorate communities' natural and cultural heritage. They might also include measures such as the establishment of a memorial designed to publicly recognise the psychological and moral harms of ecocide. Furthering the principles of eco-sensitivity and interconnected harm, and in recognition of ecocide's potential to cause harms through the loss of space for people to play and be in community, a memorial might be in the form of restored and protected park land to be enjoyed as both a commemorative and recreational space.⁵²

4.e. Transformative Reparations

Guarantees of non-repetition have the potential to become a useful tool in pursuing transformation in the aftermath of ecocide.⁵³ Guarantees of non-repetition are designed to prevent the reoccurrence of crimes by addressing the structural causes of violations and are more commonly found in the context of human rights violations and state-led reparations. However, the ICC's reparations decision in the case of *Al-Mahdi* demonstrated the Court's willingness to award such reparations in the context of individual accountability. Just as 'effective measures to guarantee non-repetition of the attacks'⁵⁴ were considered appropriate in the context of attacks against specific cultural sites in *Al-Mahdi*'s case, so might future Chambers consider the possibility of awarding guarantees against future harmful behaviour directed at the environment.

In terms of implementation, the Basic Principles and Guidelines on the Right to a Remedy and Reparation identify eight examples of possible modalities, including training for law enforcement; promoting mechanisms for conflict resolution; and reforming laws that enabled

⁵¹ Pablo De Greiff, 'Justice and Reparations' in *The Handbook of Reparations* (Oxford: Oxford University Press, 2006).

⁵² Saleem Hassan Ali, *Peace Parks: Conservation and Conflict Resolution* (Cambridge: MIT, 2007).

⁵³ Clara Sandoval, 'Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition' in Roger Duthie and Paul Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017).

⁵⁴ *Al-Mahdi Reparations Order*, para 67.

the violations to take place.⁵⁵ Such measures offer the potential to entrench greater respect for the environment through appropriate adaptation. As noted by the Trial Chamber in *Al-Mahdi*, such reparations may require consultation with governmental authorities, and would need to be tailored to the individual concerns regarding the natural resources.⁵⁶ Again, guidance might be found in the practice of the IACtHR, where guarantees of non-repetition have been awarded in cases involving victim groups' land.⁵⁷

Conclusion

The ICC faces significant challenges in carrying out its existing mandate and to its legitimacy in the eyes of the international community. These range from waning state support, to its limited budget, to allegations of racism and selectiveness. In future cases involving ecocide, these challenges would likely be compounded by additional practical challenges such as the difficulty in assessing environmental harm, and legal challenges associated with implementing a new and distinct type of criminal offence. Indeed, one might question whether a system designed to focus on grave human rights violations such as international criminal law is equipped to protect the environment on its own terms.⁵⁸ Certainly, there are both practical and conceptual challenges associated with encompassing ecocide into the ICC's remit. My intention is not to minimise these very real barriers to accountability. Yet, this paper has demonstrated that when it comes to offering modes of repair, the Court's existing framework and practice offers space to think creatively about how to respond to legacies of ecocide. While it can be daunting to conceptualise repair in the aftermath of environmental destruction, it is crucial that we consider both the ways in which we can protect the natural world that remains, and what we might do to aid the recovery of that which is already damaged.

⁵⁵ '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', UNGA Res 60/147 (21 March 2006) UN Doc A/RES/60/147.

⁵⁶ *Al-Mahdi Reparations Order*, para 67.

⁵⁷ For an analysis of the ICC's awarding of guarantees of non-repetition and the applicability of IACtHR practice, see Francesca Capone, 'An Appraisal of the Al-Mahdi Order on Reparations and its Innovative Elements' (2018) 16 *Journal of International Criminal Justice* 645.

⁵⁸ Susanna Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5 *Transnational Environmental Law* 128.