Prosecuting environmental harm before the International Criminal Court

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IV. ENVIRONMENTAL HARM AND VICTIM PARTICIPATION AND REPARATIONS BEFORE THE INTERNATIONAL CRIMINAL COURT

A. Introduction

The prominent role given to victims before the ICC is a significant feature of the court's design, and marks a major development in international criminal law.[1146] Victim participation has become a well-established factor in the work of the ICC. Whereas the *ad hoc* tribunals for the former Yugoslavia and Rwanda did not allow for victims' participation *per se*, the ICC Statute includes explicit provision for this to occur.[1147] Subsequent to the inclusion of provisions for victims' participation in the Rome Statute of the ICC in 1998, other international (or internationalized courts) allowed for this possibility. Since 2004,[1148] the Extraordinary Chambers in the Courts of Cambodia has allowed victims to participate as witnesses, complainants, or as *parties civiles* and to have access to the evidence of the case.[1149] Under the 2007 Statute of the Special Tribunal for Lebanon, victims are able to participate in proceedings in much the same manner as the ICC, and have indeed been participating in proceedings.[1150]

Whereas there were criticisms of the absence of provision for victims' participation qua victims at the *ad hoc* tribunals,[1151] the presence of victims' participation at the ICC has also

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[1146] Schabas (2011), p.346. See also War Crimes Research Office, *Obtaining Victim Status for Purposes of Participating in Proceedings at the International Criminal Court*, International Criminal Court Legal Analysis and Education Project, December 2013 (**"**WCRO 2013"), p.1.

[1147] Claude Jorda and Jerome de Hemptinne, 'The Status and Role of the Victim' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP: 2002) ("Jorda and Hemptinne (2002)"), 1387–88.

[1148] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

[1149] Because of the unwieldy number of representatives of victims, the ECCC has now directed that victims' submissions be channelled through a common representative, or lead lawyer, of the various victims involved in the proceedings. See Fédération Internationale des Droits de l'Homme, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, Chapter IV: Participation (April 2007) <http://www.fidh.org/IMG/pdf/7-CH-IV_Participation.pdf>, at 18.

[1150] *Statute of the Special Tribunal for Lebanon*, annexed to *Resolution 1757*, UN SCOR, 62nd sess, 5685th mtg, 4, UN Doc S/Res/1757 (30 May 2007), article 17, which is essentially a verbatim reproduction of art 68(3) of the *Rome Statute*.

[1151] War Crimes Research Office, Am. Univ. Washington Coll. Of Law, *Victim Participation Before The International Criminal Court* (2007), pp.11-12; Jorda and Hemptinne (2002), 1387, 1387–1388.

been criticized.[1152] A review of all the literature concerning the merits of victims' participation is beyond the scope of this assessment. Nonetheless, a few relevant points clearly emerge from the general practice of victims' participation. Foremost among concerns is the high quantity of victims seeking to participate and the potential to compromise the efficient conduct of proceedings. Victim applicants often number in the hundreds or even thousands in a single case; 5,229 were authorised to participate in the Bemba case.[1153] The sheer weight of numbers jeopardises the feasibility of allowing victims to participate. Other practical concerns are the significant use of time and resources, and fears of imbalanced proceedings, with an accused facing not only the Prosecution but also the victims, also frequently arise.[1154] The following analysis takes cognizance of these concerns, particularly when assessing the adjudicative coherence of applying the provisions on victims' participation to the environment.

Nonetheless, with States Parties having recognized victims' rights as "the cornerstone of the Statute",[1155] it is clear that victims will have their voices heard during proceedings before the Court. The Prosecution's 2016 guidelines on case selection, expanding on the 2013 guidelines on preliminary examination,[1156] signal an increased focus on "the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and *environmental damage inflicted on the affected communities*", and the intent to focus on crimes perpetrated through "the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land".[1157] While this indicates a shift towards redressing environmental harm, it is unclear how the rules and practices governing victims would apply in the case of damage to the environment. Accordingly, the following analysis explores this issue, focusing primarily on the applicability of the regime for victims' participation and reparations to cases of environmental harm.

First, the rules defining victims' participation in Court proceedings and the rules on victims' reparations are set out. Then, this framework is assessed in relation to environmental harm. To

[1152] Christine Van den Wyngaert, "Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge", 44 *Case W. Res. J. Int'l L. 475* (2011) ("Wyngaert (2011)").
[1153] *Bemba* article 74 Decision, paragraph 18.
[1154] *Prosecutor v Thomas Lubanga Dyilo*, Judgment on Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) (Appeals Chamber, Case No ICC-01/04-01/06-1432, 11 July 2008) ("*Lubanga* Appeals Chamber decision"), Judge Pikis Dissent, para.14 ("a defendant cannot have more than one accuser"). See generally, Wyngaert (2011).
[1155] Vasiliev in Stahn (2015), p.1134 citing *inter alia* Victims and Affected Communities, Reparations and Trust Fund for Victims, Preamble, Resolution ICC-ASP/12/Res.5, 27 November 2013 (Twelfth Session of the ASP).
[1156] OTP 2013 Preliminary Examination Policy Paper.
[1157] OTP 2016 Case Selection Paper, para.41

instantiate this analysis, the three types of environmental harm that have been discussed in previous chapters are specifically addressed: military attacks resulting in excessive environmental harm; unlawful transboundary movement and storage of hazardous substances (toxic dumping); and wildlife exploitation. Finally, the possibility of an advocate for the environment, analogous to current victim's representation is explored.

B. Victim participation

1. Rules and principles governing victims' participation

The following analysis examines whether the rules on victim participation at the ICC would allow for the environment to qualify as a victim in its own right. It then assesses whether individual human beings, or organizations, that suffer harm as a result of practices harming the environment could qualify as victims.

(a) The Preamble

Before addressing the provisions of the Rome Statute, it is important to examine the terms of the preamble to determine the tenor of the Statute's contents, and to assist the interpretation of specific provisions.[1158] The preamble of the Rome Statute recalls that "millions of children, women and men have been victims of unimaginable atrocities" during the twentieth century.[1159] In this manner, it signals that addressing victimisation is a central motivation behind the Court's establishment. That core motivation, as set out in the preamble, is reflected in the provisions of the Statute, which explicitly allow for victim participation and reparations as a feature of the Court's proceedings.

In line with the predominantly anthropocentric framing of the Rome Statute, the Preamble primarily refers to victims in anthropocentric terms—"children, women and men".[1160] However, concerning harm to the environment, the preambular references to victims are

[1158] Though the Rome Statute Preamble is not *per se* an applicable part of the Statute under article 21, it may be used as context to interpret the Statute's provisions; Vienna Convention on the Law of Treaties, 1969, article 31(2) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes"). The Appeals Chamber has stated that the Rome Statute may be interpreted in lights of its purposes as "gathered from its preamble and general tenor of the treaty"; *Situation in Democratic Republic of the Congo,* Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 33; *Katanga* article 74 Decision, paras.55, 1122. See also Max Hulme, "Preambles in Treaty Interpretation", *University of Pennsylvania Law Review*, 164 (2016), 1281-1343, p.1282.
[1159] Rome Statute, Preamble, para.2.
[1160] Rome Statute, Preamble, para.2.

unclear and raise more questions than they answer. While it has been shown that humans can inflict devastating harm to the natural environment, including during the commission of war crimes, crimes against humanity and genocide, the Preamble makes no direct reference to the environment or environmental harm. Nonetheless, the Preamble's notation of "present and future generations",[1161] provides an indirect basis for the Court to address serious environmental victimization.[1162] Nonetheless, basing the Court's interest in assisting the victims of environmental harm on the interests of human generations serves to reinforce the anthropocentric orientation of the Rome Statute.

(b) The definition of victims: key provisions

The foundational provision for victims' participation in proceedings before the ICC is article 68(3) of the Rome Statute. This provision suggests a conceptual predisposition towards victims being natural human beings. For example, it refers to "the personal interests" and "views and concerns" of victims:

> "Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

Consistent with the implicit suggestion of human victims in article 68(3), Rule 85(a) provides that victims are 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'. The harm can be either a direct or indirect result of the crime but must be suffered "personally" by the victim.[1163]

Along with natural humans, organizations may also potentially qualify as victims under the Rome Statute system. Rule 85(b) expands the parameters of potential victims, adding that victims may also include organizations or institutions that have sustained direct harm to their property, and which are dedicated to, *inter alia*, religious, educational, cultural, charitable, or historic purposes. Applying rule 85(b), the Court has required that the organization provide clear information as to (i) the quality of the organisation; (ii) the capacity of the individual

[1161] Rome Statute, Preamble.
[1162] See ICJ Nuclear Weapons Advisory Opinion (1996), p. 226.
[1163] *Lubanga* Appeals Chamber decision, paras.32-35.

acting on its behalf; and (iii) his/her identity are clearly established.[1164] The Court looks to the mandate of the organization in question to determine whether it had suffered direct harm as a result of the crimes for which the accused is charged.[1165] This is not an insurmountable standard. For example, in France, the Court de Cassation has upheld findings that environmental associations have suffered *direct and personal* harm due to environmental harm.[1166]

Whereas the legal tests differentiate between natural persons, who may qualify as victims so long as they suffer *personal* harm (whether direct or indirect) from the charged crimes, and organizations, which must show that they have suffered *direct* harm from the charged crimes in order to qualify for victim status, both humans and organizations are nonetheless explicitly included as potential victims of ICC crimes. Conversely, entities other than human beings or organizations are not explicitly encompassed within the Court's victim parameters.

(c) Rules on modalities of victims' participation

While qualifying under the definition of victim is the threshold test for participation in ICC proceedings, the manner in which this participation is conducted is subject to several rules and principles. The manner in which such participation could be exercised will largely influence its impact and the extent to which the interests of the environment will be upheld during proceedings. In terms of the modalities of victims' participation, article 68(3) imports two significant requirements: first, victims are allowed to present their views in a manner that is not prejudicial to the rights of the accused, and a fair and impartial trial, and second, the participation of victims, where permitted by the Court, must be carried out in accordance with the ICC Rules. Rule 86 adds little in this respect, simply directing the Chambers and other organs of the Court to consider the interests of victims and witnesses in carrying out their functions.[1167]

In terms of when victims may present their views and the manner in which they may do so, article 68(3) is vague. It states that if the personal interests of victims are affected, the Court shall allow them to express their views at a stage of the proceedings that it considers

[1164] See, e.g., *In the Case of the Prosecutor V. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Public redacted version of 'Second Decision on Victim Participation at Trial', 12 August 2016, para.9.
[1165] See, e.g., *In the Case of the Prosecutor V. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Public redacted version of 'Second Decision on Victim Participation at Trial', 12 August 2016, para.10.
[1166] Papadopoulou (2009), p.101 citing Cass. Crim., 12 September 2006.
[1167] See Gillett (2010), p.30-31.

appropriate.[1168] The Appeals Chamber held that under article 68(3), read in light of rules 85 and 89(1), a victim must show a link between the harm suffered and the crimes charged for his or her views and concerns to be presented.[1169]

Nor do the ICC Rules exhaustively determine the modalities of victim participation. The rules are representative, rather than exhaustive, of victims' participatory rights. Rules 89 and 91 set out the manner in which victims can participate in proceedings. Rule 89 provides that victims wanting to participate in proceedings are directed to apply to the Registry, which then passes on the applications to the relevant chamber. This rule explicitly mentions the possibility of victims making opening and closing statements.[1170] Concerning the procedure for obtaining victim status, rule 89 provides that "In order to present their views and concerns, victims shall make [a] written application to the Registrar, who shall transmit the application to the relevant Chamber". Regulation 86 requires that persons applying for victim status include the following information to the extent possible: the identity of the victim, the harm allegedly suffered at the hands of the accused, the location and date of the crime, evidence showing that the victim's personal interest is affected, and designation of the stage of proceedings in which the victim wants to participate.

The Appeals Chamber has clarified that victims' may only participate where judicial proceedings are concerned. Accordingly, victims could not invoke article 68(3), for example, to request the Prosecutor to investigate a certain issue or incident in the absence of some judicial proceeding already contemplated under the Rome Statute framework.[1171]

In its seminal decision in the *Lubanga* case, the Appeals Chamber held that, so long as a fair and impartial trial was ensured, victims could tender evidence going to the guilt or innocence of the Accused.[1172] To date, this has primarily consisted of questioning witnesses called by the Parties (the Prosecution and Defence). However, it would also potentially include having a witness called or a document introduced to the record.[1173] At the same time, the Appeals Chamber emphasized that leading evidence going to the proof of the charges is primarily a

[1168] Rome Statute, article 68(3).
[1169] *Lubanga* Appeals Chamber decision, para. 62-65.
[1170] Rule 89.
[1171] Situation in the Democratic Republic of the Congo, ICC-01/04-556, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, para.56 (19 December 2008), http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf; Wyngaert (2011), p.484.
[1172] *Lubanga* Appeals Chamber decision, para. 96.
[1173] *Lubanga* Appeals Chamber decision, para. 99.

role played by the parties and that victims are not parties as such in proceedings before the ICC (victims are referred to as participants).[1174]

However, the right to intervene in proceedings *qua* victims, including by leading evidence going to the guilt or innocence of the accused, has limitations. The Court has held that victims, when applying for participation in legal proceedings against an accused, have to show that the interests that they assert were not those of a nature belonging to the role assigned to the Prosecutor.[1175] Similar restrictions are increasingly placed on victim participation in domestic proceedings.[1176] These limitations reflect the judicial concern at victims being given such latitude to intervene and potentially duplicate the activities of the Prosecution. Accordingly, the victims' interventions would generally be most appropriately directed towards the manner in which they were personally affected by the environmental harm.

C. Victim reparations

The following section sets out the core provisions on reparations for victims and the relevant interpretations of those provisions set out in the Court's jurisprudence to date. In assessing the applicability of the provisions and the jurisprudence on reparations to instances of environmental harm, the analysis looks to the reparations phase in the *Al-Mahdi* case, which exclusively concerned the destruction of cultural heritage, to provide guidance as to the likely approach of the ICC judiciary when seeking to determine the appropriate quantum, form, and heads of reparations for environmental harm.

1. The law on victim reparations at the ICC

The Rome Statute provides in article 75 that the Court may order reparations for victims. In accordance with the definition of victims under Rule 85, reparations may be granted to "direct and indirect individual victims, provided that the harm they suffered is personal" and to "legal

[1174] *Lubanga* Appeals Chamber decision, para. 93.
[1175] *Prosecutor v. Thomas Lubanga Dyilo,* Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007, Appeals Chamber, Case No ICC-01/04-01/06-925, 13 June 2007, paras.28–29.
[1176] The War Crimes Research Office notes that "in *Berger v. France*, the European Court of Human Rights upheld France's law limiting the instances in which a civil party may appeal the dismissal of a criminal action where the Prosecutor chooses not to lodge such an appeal. Notably, the court in Berger based its decision in part on the "complementary interests" of civil parties and the prosecution in criminal cases." (report on participation during case), WCRO (2009), p.53.

entities that are direct victims of the crime committed".[1177] The ICC's reparations regime serves two purposes: it obliges those responsible for serious crimes to repair the harm they caused to the victims and it enables the Court to ensure that offenders are held to account for their acts.[1178] The reparations scheme may be accessed by individuals, thus providing potential additional and complementary forum to seek redress to these other mechanisms. Transposing this compensatory obligation onto individuals, as is done under the ICC reparations scheme, is a relatively under-developed area of international law, although it is changing rapidly.

The provision for reparations to victims set out in the Rome Statute marks the first time that an international criminal body has been authorized to award reparations, including restitution, compensation, and rehabilitation, against individual perpetrators of mass atrocities for the benefit of their victims.[1179] The ICC regime for victim participation has been described as part of a shift towards restorative justice in order to compensate victims for their injuries.[1180] In this respect, the WCRO notes in its report on victims' participation at the case stage of proceedings that "the drafters of the ICC's victim participation scheme were heavily influenced by the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" ("1985 Victims' Declaration of Basic Principles"),[1181] pursuant to which "[i]n cases where *a person*, a legal person, or other entity is found liable for reparations to a victim, such party should provide reparations to the victim."[1182]

In terms of reparations, the provisions of the Rome Statute constitute a development from the previous international courts, as they internalize the entire process of ordering reparations. The earlier statutes of the ICTY and ICTR allowed the judgements of those tribunals to be

[1177] *Prosecutor v. Al-Mahdi*, ICC-01/12-01/15, Reparations Order, 17 August 2017 ("*Al-Mahdi* Reparations Order"), paras.40-41.
[1178] *Al-Mahdi* Reparations Order, para.27.
[1179] The Case-Based Reparations Scheme at the International Criminal Court, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, June 2010 ("WCRO, Reparations)", p.1 (noting that the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda possess an authority to order restitution of property unlawfully taken by a perpetrator, the efforts to adopt a the power to award financial compensation to victims have been rejected by the judges of the Tribunals, and no formal consideration was given to empowering the Tribunals to award other forms of reparations, such as rehabilitation).
[1180] WCRO, victims' participation at the case stage of proceedings, (2013), p.6.
[1181] WCRO, victims' participation at the case stage of proceedings, (2013), p.7.
[1182] See *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, ICC-01/04-01/06-3129, 3 March 2015 ("*Lubanga* Appeals Decision on Reparations"), para.100 ("The Appeals Chamber notes that the imposition of liability for reparations on the convicted person is also consistent with the UN Basic Principles on Reparations for Victims, pursuant to which "[i]n cases where *a person*, a legal person, or other entity is found liable for reparations to a victim, such party should provide reparations to the victim […]" (emphasis added)").

used to support domestic claims for compensation.[1183] Moreover, the rules allowed the judges of the *ad hoc* tribunals to order restitution of property acquired by criminal conduct,[1184] but have not used this power to order restitution to victims.[1185] Similarly, the Statute of the Special Tribunal for Lebanon allows its judgements of individual criminal responsibility to be used in domestic proceedings for claims of compensation.[1186] Other international or hybrid courts have also provided for reparations to be granted to individual victims. The ECCC allows for "collective" and "moral" reparations to be ordered for victims.[1187]

In accordance with article 21 of the Rome Statute, potential guidance for the interpretation of the terms of the ICC framework documents concerning victims' reparations can be gleaned from several instruments of international law which require States to redress violations of human rights and empower their implementing institutions to award reparations to individual victims.[1188] For example, the European Convention on Human Rights,[1189] the American Convention on Human Rights,[1190] and the Optional Protocol to the African Charter on Human Rights[1191] allow the corresponding human rights institutions to award reparations. Reparations have been ordered for victims of killings, torture, enforced disappearances, and the destruction and appropriation of property.[1192] However, human rights instruments are anthropocentric in foundation and design, and can be described as bearing "a basic ecological blindness."[1193]

The Trust Fund for Victims has claimed that "[r]eparations are essential to any transitional justice process because reparations focus most directly and explicitly on the victims' situation by providing redress for rights that have been violated, for harms suffered, and for indignities endured."[1194] Accordingly, Article 75(1) of the Rome Statute provides that the Court "shall

[1183] Rule 106 of the ICTY and ICTR Rules.
[1184] ICTY Statute, article 24(3); ICTR Statute article 23(3).
[1185] Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, 2012, p.35; S. Malmström, 'Restitution of Property and Compensation to Victims', in R. May (eds), *Essays on ICTY Procedure and Evidence* (Kluwer Law International, 2001) pp. 373–384.
[1186] STL Statute: Article 25 Compensation to victims.
[1187] ECCC Internal Rules 23 and 100. Individual reparations awards are not allowed. See McCarthy (2012), p.46.
[1188] McCarthy (2012), pp.13-14.
[1189] ECHR, article 41.
[1190] ACHR, article 63.
[1191] Protocol to ACHR, article 27.
[1192] McCarthy (2012), p.16 citing *Khatsiyeva and Others v Russia*, Merits, 17 January 2008, Application no.5108/02, para139; *Akdivar and Others v Turkey*, Just Satisfaction, Grand Chamber 1 April 1998, Application no. 2189/93; *Varnava and Others v Turkey*, Merits, Grand Chamber, 18 September 2009, Application 16064/90, para.185.
[1193] Tarcisio Hardman Reis, *Compensation for Environmental Damages Under International Law: The Role of the International Judge*, (Kluwer Law International, 2011), p.40.
[1194] Trust Fund for Victims, Submission in *Lubanga* proceedings , para.6.

establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." Beyond this vague formulation, it was left to the Court to establish the details through its jurisprudence.[1195]

The Appeals Chamber in *Lubanga* set out the purpose behind reparations orders, stating "reparations, and more specifically orders for reparations, must reflect the context from which they arise, which, at the Court, is a legal system of establishing *individual* criminal liability for crimes under the Statute. In the view of the Appeals Chamber, this context strongly suggests that reparations orders are intrinsically linked to the *individual* whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence."[1196]

In *Lubanga*, the Trial Chamber clarified that restitution "should, as far as possible, restore the victim to his or her circumstances before the crime was committed, but this will often be unachievable for victims of the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities."[1197] The Appeals Chamber of the ICC has held that an order for reparations should usually adhere to the following requirements:

> "1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted."[1198]

With respect to the third of the listed requirements, the order for "reparations must specify the type of reparations, either individual, collective or both."[1199] However, the fact that a victim

[1195] Wyngaert (2011), p.486-487.
[1196] *Lubanga* Appeals Decision on Reparations, para.65.
[1197] *Lubanga* Appeals Decision on Reparations, para.223.
[1198] *Lubanga* Appeals Decision on Reparations, para.32; *Al-Mahdi* Reparations Order, paa.38.
[1199] *Lubanga* Appeals Decision on Reparations, para.130.

has not actively participated in proceedings is immaterial as long as they have received victim status in the proceedings.[1200] The Appeals Chamber has held that "a convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case."[1201]

Procedurally, the burden falls on the applicant to provide "sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case."[1202] Among the myriad standards of causation that have been applied in international and domestic law, most require that the harm be the "proximate cause" of the loss.[1203] For reparations, the Court has appeared to require a confusing mix of a but/for test with a proximate cause test.[1204] Whilst the exact test is unclear, it is relatively well-established that the requisite level of causation does not need to be the exclusive cause, mere coincidence in time will not be sufficient.[1205] Given that environmental degradation of other harm may be multi-factorial or opaque in its causes, it will likely be difficult to establish causation.[1206]

The specific mechanics of how the quantum, form, and heads of reparations are calculated is a relatively undeveloped and opaque area at the vanishing point of law and accessible practice. But guidance can be taken from the *Al-Mahdi* case at the ICC. The Judges in the *Al-Mahdi* case contracted experts to provide written reports addressing the nature and impact of the destruction that *Al-Mahdi* was convicted for. The Judges requested the experts to comment on "(i) the importance of international cultural heritage generally and the harm to the international community caused by its destruction; (ii) the scope of the damage caused, including monetary value, to the ten mausoleums and mosques at issue in the case; and (iii) the scope of the economic and moral harm suffered, including monetary value, to persons or organizations as a result of the crimes committed."[1207]

[1200] *Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Partly Dissenting Opinion of Judge G.M. Pikis, para.18.
[1201] *Lubanga* Appeals Decision on Reparations, para.118.
[1202] *Lubanga* Appeals Decision on Reparations, para.81.
[1203] WRCO, reparations, pp.5, 39.
[1204] See *Al-Mahdi* Reparations Order, para.44 citing Lubanga Appeals Decision on Reparations, paras.11 and 59.
[1205] In the case of *Affaire Tătar c. Roumanie*, *(Requête No* 67021/01*), 27 Janvier 2009 Judgment,* The ECHR held that the applicants had not provided a sufficient basis to show that the levels of sodium cyanide produced by a nearby factory led to increased aggravation of asthma, and so did not order damages. (paras.105-106).
[1206] See infra Chapter III(C)(2)(d)(ii).
[1207] *Prosecutor v. Al-Mahdi*, ICC-01/12-01/15, Public Redacted Version of "Decision Appointing Reparations Experts and Partly Amending Reparations Calendar", 19 January 2017, para.1.

By analogy, reparations proceedings for convictions focusing on environmental harm would see the judges taking into account the importance of the environment and the harm to the international community arising from its destruction, as well as the scope of the damage in the specific case and the scope of the harm to the victimized persons and organizations, including the monetary value of these forms of harm. In order to arrive at a quantum, the Court relied on the approach suggested by one of the experts of taking a broadly analogous award from the Ethiopian-Eritrean arbitration commission concerning cultural destruction and adjusting the level of compensation to match the circumstances in *Al-Mahdi*.[1208]

Whilst the ICC framework allows for a broad range of victims' reparations to be awarded, which goes beyond the other international courts, its regime is still subject to major restrictions. Proving the criminal nature of the acts in question is a pre-requisite for a compensation order,[1209] which in turn necessitates proving elements of the crime or crimes in question—a difficult task in relation to environmental harm, as set out above.[1210] Proving the mental element, typically that the act carried out with intent and knowledge,[1211] is typically an exacting task,[1212] and the framing of the one substantive provision in the Rome Statute referring to environmental harm (article 8(2)(b)(iv)) includes a demanding combination of three mental sub-elements, as discussed previously.[1213]

2. Individual vs collective reparations

At the ICC, pursuant to rule 97(1), "the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both". With regards the type of reparations, Article 75 of the Rome Statute lists restitution, compensation and rehabilitation as forms of reparations. This list is not exclusive and it has been held that other types of

[1208] *Al-Mahdi* Reparations Order, paras.131-132.
[1209] See Rome Statute, article 75; *Lubanga* Appeals Decision on Reparations, para.65. Additionally, the Trust Fund for Victims may use "other resources" to "benefit victims of crimes"; Regulations 48, 50(a)(i), Regulations of the Trust Fund for Victims; McCarthy (2012), p.35. That will still require showing that the harmful acts were crimes, which requires a demonstration of criminal intent, irrespective of whether the specific accused is responsible for the crime.
[1210] See infra Chapter II.
[1211] Rome Statute, article 30.
[1212] By contrast, general international law does not have a baseline mental element required to be shown for any finding of a wrongful act: Max Sorensen (ed.), *Manual of Public International Law* (London, 1968), p.535 ("The decisive consideration is that unless the rule of international law which has been violated specifically envisages malice or culpable negligence, the rules of international law do not contain a general floating requirement of malice or culpable negligence as a condition of responsibility").
[1213] See infra Chapter II on the *mens rea* required for article 8(2)(b)(iv).

reparations may include, for example, those with a "symbolic, preventative or transformative value".[1214]

In relation to environmental harm, the likely orientation of any reparations awards would be both towards restoring the environment to its state prior to the harmful act, and, to the extent there were human victims, individual compensation to natural persons. This is consonant with the approach taken in the 1985 Victims' Declaration, which recognizes restitution of the environment to its pre-damaged state in the event of criminal conduct resulting in serious environmental harm.[1215] However, whereas collective reparations can be readily directed to efforts to restore the environment to its state prior to the crime in question, it is unlikely that individual reparations would or could be used to conduct such rehabilitation of the environment. This augurs in favour of collective reparations awards when redressing environmental harm.

3. Implementation: The Trust Fund for Victims

The body that will be responsible for implementing any court decisions on reparations is the Trust Fund for Victims ("TFV").[1216] According to the Appeals Chamber in *Lubanga*, "the Trust Fund has a dual mandate: 1) to provide assistance to victims within the Court's jurisdiction and 2) to implement Court-ordered reparations".[1217]

The framework governing the Trust Fund for Victim's operations has two tracks.[1218] First, there is the regime for implementing and supporting court-ordered reparations, as discussed above.[1219] Second, there is the broader framework whereby the Trust Fund may use "other resources…to benefit victims of crimes as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, who have suffered physical, psychological and/or material harm as a result of these crimes."[1220]

[1214] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2904, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012.
[1215] *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 4034, UN GAOR, 40th sess, 96th plen mtg, Annex, UN Doc A/Res/40/34, (29 November 1985).
[1216] Rome Statute, article 79.
[1217] *Lubanga* Appeals Decision on Reparations, para.105.
[1218] Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2015 to 30 June 2016, 16 August 2016, para.2.
[1219] See Regulation 50(b) of the Regulations of the Trust Fund for Victims.
[1220] See Regulations 48, 50(a)(i) of the Regulations of the Trust Fund for Victims. See also Rule 98(5) "Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79".

For the first track of Court-ordered reparations, the Court may order that the awards be deposited with the Trust Fund for Victims under rule 98, if it is impossible to make individual awards directly to each victim. It may also order that an award for reparations against a convicted person be made on a collective basis through the Trust Fund for Victims where the "number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate" as provided for under rule 98(3). In all instances, the award must be made against the accused person.[1221] Additionally, the Trust Fund for Victims may itself determine whether to allocate "other resources" to complement those ordered by the trial chamber.[1222]

The parameters controlling the measures that may be undertaken under the second track are not yet comprehensively elucidated, but the Regulations clarify that the Trust Fund must first notify the Court of any such measures and give the Court the opportunity to inform the Trust Fund that the measures "would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[1223]

This second track of victim support can be ordered irrespective of whether an individual has been convicted for any crime.[1224] For environmental harm, the ability to provide support even in the absence of a conviction is significant. Environmental harm may form part of the backdrop against which other crimes are committed, and may form part of the initial charges against an accused, but still not be reflected in convictions entered at the end of a trial.[1225] At the same time, the Prosecution's 2016 guidelines on case selection signal an increased focus on environmental harm as a factor supporting ICC pursuit of a case.[1226]

The types of measures that have been ordered for victim support include (a) physical rehabilitation; (b) psychological rehabilitation; (c) material support; and (d) implementing

[1221] *Lubanga* Appeals Decision on Reparations, para.76.
[1222] *Lubanga* Appeals Decision on Reparations, paras.109-111.
[1223] See Regulation 50(a)(ii) of the Regulations of the Trust Fund for Victims.
[1224] Regulation 50(a)(i) of the Regulations of the Trust Fund for Victims
[1225] To date, no convictions have been entered under international criminal law for environmental harm, indicating the difficulty of securing convictions for this form of conduct: Weinstein (2005), p.698; UNEP Study (2009), p.24.
[1226] OTP 2016 Case Selection Paper.

special initiatives for victims of sexual violence and their children.[1227] Of relevance to environmental harm, the Trust Fund indicates that the material support it provides to victims includes "environmentally friendly livelihood activities",[1228] but otherwise does not indicate any particular focus on environmental issues.

In relation to individual natural persons who may be victims of environmental harm, the potential for victim support from the Trust Fund is established and sufficiently broad to cover this type of crime and provide a measure of relief designed to avoid further harm to the environment. At the same time, the Trust Fund's activities indicate a strong anthropocentric underpinning. Measures such as physical and psychological rehabilitation and vocational training strongly point to a view of victims as natural human beings, in line with the primary formulations of the Rules, as set out above. Treating the environment as a victim *per se* would therefore fit awkwardly with this practice and would fit awkwardly with the terms of the Regulations of the Trust Fund, particularly its focus on "physical or psychological rehabilitation or material support for the benefit of victims and their families".[1229] Furthermore, although this framework for victim support has the potential space to redress environmental harm, the language of its instruments, such as psychological rehabilitation, indicates that environmental harm is not the primary type of harm that was intended to be covered.

D. Applying the ICC's regulatory scheme for victim participation and reparations to environmental harm

The applicability of the victim participation and reparations system to victims of crimes concerning harm to the environment raises several questions. These are, first, whether the environment can qualify as a victim, or whether the victims' regime would only be relevant insofar as human beings and human organizations were impacted by environmental harm. Second, the need to show causation between the environmental harm and the injury to individuals. Third, the means and mechanisms available to quantify environmental harm for the purpose of reparations through compensation. Applying the Court's rules and provisions to the paradigmatic forms of environmental harm of military attacks causing excessive harm,

[1227] Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2015 to 30 June 2016, 16 August 2016, para.36.
[1228] Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2015 to 30 June 2016, 16 August 2016, para.36(c).
[1229] Regulation 50(a)(i) of the Regulations of the Trust Fund for Victims.

toxic dumping, and wildlife exploitation, assists to instantiate each of these discussions. Accordingly, the following analysis presents the major questions and then tests them against these forms of environmental harm.

1. Harm to the environment *per se* vs. harm to individual humans or organizations as a result of environmental destruction

At the outset, it is important to distinguish between harm to the environment *per se* and harm to human beings arising as a consequence of harm to the environment. Although the assessment below looks at the possibility to compensate both forms of harm, they are distinct in terms of the entity being harmed and, potentially, the directness of the harm.

(a) The environment as a victim *per se*

Addressing the question of the environment's status as a victim before the ICC necessarily involves applying the provisions of the Rome Statute and associated instruments to the environment.[1230] In this section, the possibility of the environment constituting a victim *per se* is addressed in relation to all crimes that could potentially involve environmental harm. This is because the rules on qualifying as a victim and victim participation do not vary, as a matter of law, in light of the crime in question.

As with the other Rome Statute crimes,[1231] crimes against the environment may impact human beings or man-made entities, but are premised on the occurrence of harm to the environment in and of itself. For example, the primary and direct victims of wildlife exploitation such as the illegal trade of animal species are the animals themselves.[1232] This distinction has important flow-on effects in terms of procedure and also in terms of victim participation in trials for environmental harm.

[1230] However, see below for an assessment of the environment being considered as a victim irrespective of it meeting the definition of victim under the Rules.

[1231] Crimes against the environment differ from the other crimes under the Court's jurisdiction in terms of the nature of the entity that is harmed. Crimes against humanity, war crimes, and genocide typically concern the victimization of human beings, and destruction of buildings, and harm to man-made entities such as organisations (either through the physical or mental harm to themselves or through the misappropriation or destruction of their property). However, it is questionable whether crimes against cultural heritage inherently require anthropocentric harm; see Marina Lostal, "Prosecutor v. Al Mahdi: a Positive New Direction for the ICC?", *Opinio Juris*, http://opiniojuris.org/2016/10/26/prosecutor-v-al-mahdi-a-positive-new-direction-for-the-icc/.

[1232] Note approximately 90 to 95 percent of trafficked parrots and reptiles from South America will not survive the experience, and many that do survive will suffer broken limbs; European Union Action to Fight Environmental Crime (2015), p.20. Note that at one level this trade may be lawful due to the loophole in the CITES convention allowing trade in animals born in captivity.

With respect to whether the environment could be classified as a victim in its own right, the definition of victims in rule 85 (as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court" and "organizations or institutions that have sustained direct harm to any of their property") appears to exclude the environment from qualifying *per se* for this status. The environment cannot be sensibly defined as a "person" let alone a "natural person", as required for rule 85(a). Similarly, the environment is not an organization or institution, and so would not naturally qualify under Rule 85(b).

Innovative approaches to the legal recognition of environmental features are present in certain domestic jurisdictions. For example, in New Zealand, the Whanganui River, which is the third largest river in the country, was granted the status of a legal person in 2017, after negotiations between the Whanganui Iwi and the Crown.[1233] An entity called Te Pou Tupua, with representation by the Iwi and by the Crown, was created to represent the interests of the river.[1234] Previously, New Zealand's Te Urewera National Park had been ascribed legal status in 2014, with a board formed to represent its interests.[1235] Similarly, in India in 2017, the High Court of Uttarakhand declared that the Ganges and Yamuna rivers are living entities with legal status.[1236] However, these domestic precedents are exceptional even within their own systems and, even if they were more well-established at the domestic level, are not automatically applicable at the ICC.[1237] Moreover, it would require a significant departure from the natural meaning of the ICC Rules to consider the environment to be a "natural person" under rule 85(a), or an organization or institution under rule 85(b).

[1233] See Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, section 14. See also Guardian, "New Zealand river granted same legal rights as human being", 16 March 2017 https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being.
[1234] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Section 19(1)(a).
[1235] Te Urewera Act 2014, Sections 4, 11. See also Stuff New Zealand, "Whanganui River gets the rights of a legal person", 16 March 2017, http://www.stuff.co.nz/national/politics/90488008/Whanganui-River-gets-the-rights-of-a-legal-person.
[1236] *M. Salim v. State of Uttarakhand & others*, Writ Petition (PIL) No.126 of 2014, 20 March 2017, para.19 ("Accordingly, while exercising the parens patrie jurisdiction, the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna. The Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand are hereby declared persons in loco parentis as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries. These Officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and well-being of these rivers.").
[1237] See Rome Statute, article 21. See infra Chapter I(C)(1) (discussion of sources of law).

Other provisions of the governing instruments of the ICC also sit uneasily with the notion of an entity such as the environment qualifying as a victim (as opposed to natural humans and human organisations harmed by environmental destruction qualifying as victims). For example, article 68(1) provides that "[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." These protected values do not immediately appear designed for application to the natural environment, and, given the use of the mandatory term "shall", which requires the Court to apply these measures, again suggest an anthropocentric focus.

Provisions outlining the procedure for obtaining victim status further indicate a presumed anthropocentric requirement for the grant of victim status. As noted above, article 68(3), the governing provision on victim participation at the ICC, and rule 89, which sets out the application process for victims, both refer to the "views and concerns" of victims. This is difficult to reconcile with the notion of the environment qualifying as a victim in and of itself. Similarly, the types of information sought under regulation 86 such as the identity of the victim, the harm allegedly suffered at the hands of the accused, the location and date of the crime, evidence showing that the victim's personal interest is affected, and designation of the stage of proceedings in which the victim wants to participate, do not naturally fit with the environment qualifying *per se* as a victim.

On this reading, it is hard to find space for the environment to qualify as a victim in its own right under the current ICC procedural framework, particularly article 68(3) and rule 85. This conclusion holds irrespective of whether the specific environmental harm in question consists of military attacks causing excessive environmental harm, toxic dumping, and wildlife crime.

Three major implications emerge from this analysis of the possibility of the environmental qualifying as a victim *per se*.

- First, the fact that there is no realistic means of the environment qualifying as a victim in its own right under the existing Rome Statute framework indicates that the rules on victim participation are conceived of anthropocentrically. This accords with the general framing of the provisions of the Rome Statute instruments, as discussed above.

- Second, as discussed below, the exclusion of the environment qualifying for victim status *per se* is contradictory in light of the Rome Statute's inclusion of a partially eco-centrically framed crime under article 8(2)(b)(iv). This means that the crime could be

proven but, if there were no natural humans or organizations sufficiently harmed, there would be no qualifying victim despite a grave international crime having been committed. This indicates adjudicative incoherence inherent in the Court's founding instruments.

- Third, in relation to toxic dumping and wildlife exploitation, the fact that the environment could not qualify as a victim does not indicate adjudicative incoherence, as these types of environmental harm are not explicitly included as crimes in the Court's jurisdiction. Whilst these crimes could potentially be prosecuted incidentally under other crimes within the Rome Statute,[1238] they are not specifically provided for and it is thus unsurprising that the environment could not qualify as a victim *per se* in this respect.

Allowing the environment to qualify as a victim would require an amendment of the Rules, particularly rule 85. Such an amendment would be in line with the undertaking given by States concerning the "greening" of their internal laws on victims' compensation, such as in article 13 of the Rio Declaration on Environment and Development, 1992, which provides that "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction."

(b) Individual persons who suffer due to environmental harm as victims

Even if the environment may not qualify as a victim in and of itself, the question arises whether individual persons who suffer as a result of environmental harm could qualify as victims under the ICC provisions. As set out above, a natural person may suffer either direct or indirect harm as a result of the crime to qualify as a victim as long as that harm is suffered "personally" by the victim.[1239]

In relation to the possibility of reparations for individual humans or organizations who have suffered personal harm as a result of environmental degradation, there are multiple forms of consequent damage to human beings and their health that may arise as a consequence of

[1238] See infra Chapter II(D).
[1239] *Lubanga* Appeals Chamber decision, paras.32-35.

environmental harm. Three major categories of such harm are: material harm, physical harm, and mental harm.[1240]

In relation to environmental damage caused in connection with a crime under the statute, all three types of harm could be caused to victims. Death or physical injury or illness may arise from severe environmental harm that deprives a people of their access to sustenance, material harm may arise from damage to property, such as agricultural land and crops, and mental harm and suffering may arise from the destruction or damage of environmental features of special significance to a population. For example, victims of ISIS' alleged scorched earth tactics in Iraq in 2015-2016 reported wells laced with diesel, rendering the water toxic to plants, and improvised explosive devices in fields, which undermined agriculture, as well as secondary effects such as large price increases for food, all of which has led to malnutrition among the surviving inhabitants of these lands.[1241] The specific harm to humans arising from environmental damage is not always immediately clear, and may require monitoring and assessment. For example, the United Nations Claims Commission addressed claims for reasonable monitoring of public health, and performing medical screening for the purposes of investigating and combating increased health risks.[1242]

An alternative approach to the issue of the victimization of the environment is to focus on the collective harm caused to people when the environment is seriously damaged. While such damage may not necessarily directly cause any individual serious personal harm, it can result in significant aggregated collective harm to present and future generations.[1243] This would be partially analogous with the manner in which aspiring victims have been encouraged to join with others in order to make a single collective application to obtain victim status, rather than flooding the Court with thousands of applications.[1244] While such an argument may potentially have merit, it has effectively been excluded by the Appeals Chamber in its leading decision in the *Lubanga* case. There, the Appeals Chamber stated that the collective nature of

[1240] *Lubanga* Appeals Chamber decision, paras.32-38.
[1241] Schwartzstein (2016).
[1242] UNCC Recommendations First Instalment (2001), paras.29-31.
[1243] In this respect, see the Preamble to the Rome Statute, which notes that the Court ICC is established for the sake of present and future generations.
[1244] *The Prosecutor v. Laurent Gbagbo,* Decision on Issues Related to the Victims' Application Process, ICC-02/11-01/11, para.8 (Pre-Trial Chamber III, 6 February 2012).

the harm is immaterial to the question of victim participation; the decisive factors are the personal suffering of harm by the victim, and the type of harm suffered.[1245]

2. Causation required for reparations for environmental harm

In addition to detailing the harm, it must be shown that there is a connection between the crime(s) and the environmental harm. In establishing this connection for the purposes of reparations, the applicant would not need to show a "direct and immediate link" between the crime and the harm suffered.[1246] Instead, the applicant would need to show that the crime was a "proximate cause" of the environmental harm, or consequent harm to human being(s), and that "but/for" the crime, the harm would not have been suffered by the victims.[1247] The but/for test is difficult to apply and would be particularly difficult in the circumstances of environmental harm, which typically has myriad interrelated causes.

For individual human victims of environmental harm, any injuries, trauma, or disruption to life may potentially qualify for reparations. The standard of proof that has been applied to establish personal harm for victim status is the prima facie standard.[1248] Previous cases where harm has been considered sufficiently proximate to the crimes for which an accused was convicted include *Lubanga*, in which the Appeals Chamber found the following forms of harm to be sufficiently proximate with respect to direct victims: physical injury and trauma; psychological trauma and the development of psychological disorders, such as, *inter alia*, suicidal tendencies, depression, and dissociative behaviour; interruption and loss of schooling; separation from families; exposure to an environment of violence and fear; difficulties socialising within their families and communities; difficulties in controlling aggressive impulses; and the non-development of 'civilian life skills' resulting in the victim being at a disadvantage, particularly as regards employment.

With respect to indirect victims, it found the following was compensable: psychological suffering experienced as a result of the sudden loss of a family member; material deprivation that accompanies the loss of the family members' contribution; loss, injury or damage suffered by the intervening person from attempting to prevent the child from being further harmed as a result of a relevant crime; and psychological and/or material sufferings as a result

[1245] *Lubanga* Appeals Chamber Decision, para. 35.
[1246] *Lubanga* Appeals Decision on Reparations, para.126, 129.
[1247] *Lubanga* Appeals Decision on Reparations, paras.129, 247-250; *Al-Mahdi* Reparations Order, para.44.
[1248] *Bemba* article 74 Decision, paragraph 20.

of aggressiveness on the part of former child soldiers relocated to their families and communities.[1249] It appears that loss of livelihood would be qualified as an indirect form of harm under these latter provisions.

The types of compensable harm identified in *Lubanga* are overwhelmingly anthropocentric, as they exhibit a clear orientation towards individual human victims. That orientation reflects the structure and contents of the Rules governing victims' participation and reparations at the ICC. It reinforces that reparations for environmental harm would be likely be directed towards any specific natural human victims who could show harm from the environmental degradation.

On the other hand, examples of harm that was not considered sufficiently proximate in the *Katanga* proceedings include that of lost opportunity claimed by inhabitants of Bogoro born after the date of the attack for which Katanga was convicted (24 February 2003). The Court reasoned that this was too attenuated to be compensable.[1250]

Superimposing the analysis from the decided ICC cases of *Lubanga* and *Katanga*, it can be seen that a broad approach is generally taken to the application of the proximate cause and but for tests. Accordingly, all three major forms of harm (material, physical, and mental) against human victims resulting from environmental destruction would potentially be included.

3. Quantifying reparations for environmental harm

In terms of reparations, there is considerable overlap with the tests set out above to establish victim status, particularly in terms of the types of harm that can result in victim status. Under international law, reparations and compensation are generally divided into two major categories. First, there is pecuniary loss, consisting of the loss of directly and specifically quantifiable assets, such as real estate, movable property, or loss of income. Second, there is non-pecuniary loss, which may consist of physical harm and moral harm arising from the wrongful conduct.[1251]

While courts have considerable experience at placing monetary values on these forms of loss arising from anthropocentric claims, it is more difficult to quantify environmental losses.[1252]

[1249] *Lubanga* Appeals Decision on Reparations, para.191.
[1250] *Katanga* Reparations Decision, 24 March 2017, para.134.
[1251] See McCarthy (2012), p.98-99, 100, 110.
[1252] Papadopoulou (2009), 97.

For any harm occasioning reparations, the nature of the harm must be established and documented. The analogous reparations in the *Al-Mahdi* case, which concerned harm to cultural heritage, indicate that the Court would consider harm at two levels: the general harm to the international community caused by environmental destruction, and the specific harm caused by the convicted person's crimes.[1253] The Court would look to establish the monetary value of the destruction itself and of the economic and moral harm caused to the individual and organizational victims.[1254] The Court would look to analogous cases from other international proceedings in which reparations were ordered, including human rights proceedings, to provide a starting point for the calculation of monetary compensation, and would provide damages for the destruction itself, as well as the economic and moral harm caused. Whereas in *Al-Mahdi*, the Court followed one of the appointed expert's methodology of using the Eritrea-Ethiopia Claims Commission award concerning a damaged cultural site as a starting point,[1255] in a case of environmental harm, the Court could look to the awards of the United Nations Claims Commission F2 panel concerning environmental harm committed by Iraq in connection with its invasion of Kuwait in 1990-1991.

The United Nations Claims Commission addressing the harm done during Iraq's invasion of Kuwait included the following types of environmental harm: direct environmental damage and the depletion of natural resources; losses or expenses resulting from abatement and prevention of environmental damage; reasonable measures already taken to clean and restore the environment; and reasonable monitoring and assessment of environmental damage for the purpose of evaluating and abating the harm and restoring the environment.[1256]

Other international courts support the notion that reparations in the form of damages are not limited to pecuniary damages; in *Gutierrez-Soler v. Colombia* the Inter-American Court of Human Rights held that 'nonpecuniary damage may include distress, suffering, tampering with the victim's core values, and changes of a non-pecuniary nature in the person's everyday life.'[1257] An additional form of harm that has been recognised in some court proceedings, is that of communal harm. Communal harm is that caused to important community interests,

[1253] *Prosecutor v. Al-Mahdi,* ICC-01/12-01/15, Public Redacted Version of "Decision Appointing Reparations Experts and Partly Amending Reparations Calendar", 19 January 2017, para.1.
[1254] *Prosecutor v. Al-Mahdi*, ICC-01/12-01/15, Public Redacted Version of "Decision Appointing Reparations Experts and Partly Amending Reparations Calendar", 19 January 2017, para.1.
[1255] *Al-Mahdi* Reparations Order, paras.131-132.
[1256] See, e.g., UNCC Recommendations First Instalment (2001), paras.29-31.
[1257] *Case of Gutiérrez-Soler v. Colombia*, Inter-American Court of Human Rights, Judgment of September 12, 2005 (Merits, Reparations and Costs), para.82.

which may disrupt or destroy the social structures and cohesion of a community. For example, Canada was found to have violated the ICCPR through the expropriation of land from an indigenous community, the Lubicon Lake Band.[1258] Communal harm would be naturally suited to compensation through collective reparations to the affected victims.

Some guidance can also be taken from domestic jurisprudence addressing forms of harm suffering by various entities due to environmental harm.[1259] In France, it has been held in the criminal context that legal persons may suffer moral harm,[1260] raising the prospect of environmental associations with legal standing seeking compensation for non-pecuniary losses arising from environmental harm. French courts have also referred to loss suffered by "the aquatic environment",[1261] and loss suffered by the "natural heritage of the [regional] park".[1262]

4. Applying the victims' participation and reparations framework to three types of environmental harm

This analysis first addresses victims of the key eco-centric crime under the Rome Statute, that being military attacks resulting in excessive harm to the environment under article 8(2)(b)(iv). The analysis then examines the feasibility of individual victims of toxic dumping and wildlife exploitation qualifying under the Rome Statute and associated instruments.

(a) Military attacks that result in disproportionate environmental harm

(i) Victim status and participation

Looking first to article 8(2)(b)(iv), although there have not been any charges laid for violations of this provision, it is evident that actions resulting in long-term, widespread and severe harm to the environment could also result in harm to natural human beings. The personal harm to those humans would potentially qualify those people as victims under rule 85(a), as has been interpreted in the jurisprudence.[1263]

If organizations or institutions were directly harmed, those organizations could potentially qualify as victims under rule 85(b), subject to the elements of article 8(2)(b)(iv) being met. An

[1258] *Ominayak v. Canada*, 26 March 1990, HRC Communication 167/1984, para.33.
[1259] See infra Chapter I(C)(1) (discussion of sources of law).
[1260] Papadopoulou (2009), p.98 citing *Cass. Crim.*, 9 January 2002, n8 01-82471 (unreported).
[1261] Papadopoulou (2009), 99 citing *CA Bordeaux*, 13 January 2006, n8 05/00567 (unreported).
[1262] Papadopoulou (2009) citing *TGI Narbonne*, 4 October 2007, S.A.R.L. SOFT (unreported)
[1263] *Lubanga* Appeals Chamber decision, paras.32-35.

example would be the shelters of an association of wildlife protection rangers were destroyed in an arson attack that also gravely impacted the environment.[1264]

Given the requisite elements under article 8(2)(b)(iv), which include showing widespread and serious environmental damage, it is likely that there would be multiple victims of any such attack. The key to obtaining victim status is the demonstration of "personal harm" suffered by the applicant(s).[1265] This could be established by injuries suffered by the applicant, and else by showing that the victims personally suffered indirect personal harm, for example due to the destruction of their places of living, means of subsistence, or death or major injury of family members. For example, ISIS reportedly lit oil wells in Iraq in 2016, leading in one instance to 1,500 people seeking medical attention for suffocation symptoms brought on by the plume of sulphur dioxide.[1266]

Establishing the causative connection between the military attack, the environmental damage, and the personal harm suffered would be the key test. As set out above, the causal test requires a proximate link, and the but-for standard must be satisfied.[1267] In the case of a conviction under article 8(2)(b)(iv), any victims suffering death or injury, pecuniary harm or moral harm for which the military attack was a proximate cause and which would not have occurred but for the attack would have a sound basis to claim victim status and reparations.

However, it would be more difficult to make out these claims if the harm arose indirectly from the environmental damage caused by the attack, rather than the harm being directly caused by the attack itself. At the United Nations Claims Commission, for example, Kuwait claimed various forms of damage resulting from Saddam Hussein's lighting of the oil fires, which could potentially be seen as the type of military attack that article 8(2)(b)(iv) addresses.[1268] In relation to Kuwait's claim that the pollution caused by the oil well fires had resulted in higher mortality rates, the UNCC was unconvinced, holding that Kuwait had not provided sufficient information to show that any particular deaths could be wholly or partially

[1264] See, e.g., African Conservation, https://www.africanconservation.org/wildlife-news/lords-resistance-army-attack-threatens-headquarters-at-garamba-national-park-north-eastern-drc-2 ("in January 2009…a 200-strong LRA force attacked Nagero, killing 15 African Parks' staff-members and kidnapping two children whist destroying $2 million worth of buildings and equipment").
[1265] *Lubanga* Appeals Chamber decision, paras.32-35.
[1266] Cusato (2017).
[1267] *Lubanga* Appeals Decision on Reparations, paras.129, 247-250; *Al-Mahdi* Reparations Order, para.44.
[1268] See Chapter II(D)(1).

attributed to the effects of Iraq's actions in relation to the invasion.[1269] In many instances the personal harm necessary under the ICC's victims' framework would arise as a result of multiple factors, and determining the relative contribution of the environmental harm caused by the accused would be a difficult, and more speculative, exercise.

Moreover, in the confusing wartime circumstances in which the attacks would be launched, it may be difficult to show a connection between the military attack and the harm underlying the application for victim status. For example, in the context of the NATO attacks on the former Yugoslavia, the report prepared by the ICTY referred to the attacks on various chemical industrial sites but did not specify how many victims, if any, resulted from the chemicals unleashed by the NATO attacks.[1270]

In terms of the subjects open to the intervention of victims through the participation, victims of the crime of military attacks causing excessive environmental harm under article 8(2)(b)(iv) would be able to point to the nature and extent of the environmental harm. Because environmental harm is a central focus of the crime, the victims would have a clear basis to address environmental matters. Victims of attacks causing excessive harm to the environment during armed conflict could also potentially participate in proceedings on the issue of the accused's guilt or innocence, to the extent the matter was not held to have been covered by the Prosecution, as discussed above.[1271]

Given the difficulty of proving environmental harm with any precision, there will be considerable scope for victim participation in proceedings for environmental harm. With increased participation comes increased risk of excess filings impeding the expeditious

[1269] UNCC (2005), para.519, 524 ("Kuwait seeks compensation in the amount of USD 192,500,000 for increased mortality in Kuwait due to increased pollution resulting from the oil well fires in Kuwait. In particular, Kuwait seeks compensation for loss of economic value resulting from 35 premature deaths that it estimates occurred due to the exposure of its population to airborne particulate matter from the oil well fires. Kuwait calculates the compensation requested on the basis of USD 5,500,000 per life lost… The Panel notes that there is sufficient evidence to show that the oil well fires in Kuwait resulted in increased ground-level concentrations of airborne particulate matter in populated areas of Kuwait between February 1991 and October 1991, and that these concentrations could have been sufficient to cause increased mortality in Kuwait. However, the evidence submitted by Kuwait is not sufficient to demonstrate either that 35 premature deaths actually occurred or that any such premature deaths were the direct result of the invasion and occupation. In particular, Kuwait provides no information on the specific circumstances of actual deaths that would enable the Panel to determine whether such premature deaths could reasonably be attributed, wholly or partially, to factors resulting from Iraq's invasion and occupation. Consequently, Kuwait has failed to meet the evidentiary requirements for compensation as specified in article 35(3) of the Rules").

[1270] Press Release on Final Report on NATO (2000); Final Report on NATO (2000), para.14-16, available at <http://www.icty.org/sid/10052> (last accessed 16 October 2015), para.9.

[1271] *Lubanga* Appeals Chamber decision, para.96 (holding that, so long as a fair and impartial trial was ensured, victims could contribute evidence going to the guilt or innocence of the Accused). In this respect, see *Lubanga* Appeals Chamber decision, Dissenting Opinion of Judge Pikis, para.14.

progress of the trial. Overseeing such proceedings and ensuring their effectiveness will require a presiding judge experienced in the management of large-scale proceedings involving varying actors with diverging interests.

(ii) Reparations for victims of attacks causing excessive harm to the environment during armed conflict

As set out above, the relevant chamber must establish that the accused is guilty of one or more of the crimes with which he or she was charged before it can issue a reparations order.[1272] Where the crime is one listed under the Rome Statute, this element is directly fulfilled, as would be the case with a conviction under article 8(2)(b)(iv). The reparations would accordingly have to be formulated with reference to the nature and severity of the environmental harm.

Guidance on principles governing awards of compensation relevant to military attacks causing environmental harm can be taken from the Iraq Claims Commission. The UNCC established that the costs of monitoring and assessing environmental damage and monitoring of public health and performing medical screenings caused by Iraq's invasion and occupation of Kuwait could be included as part of the damages attributable to Iraq.[1273] Claimants sought damages for: damage from air pollution; depletion of water resources; damage to groundwater; damage to cultural heritage resources; oil pollution in the Persian Gulf; damage to coastlines; damage to fisheries; damage to wetlands and rangelands; damage to forestry, agriculture and livestock; and damage or risk of damage to public health.[1274]

[1272] *Lubanga* Appeals Decision on Reparations, para.99.

[1273] UNCC Recommendations First Instalment (2001), paras.29-31. See also Paragraph 35 of Governing Council decision 7 provides that "direct environmental damage and the depletion of natural resources" includes losses or expenses resulting from: (a) "Abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters; (b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment; (c) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment; (d) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage; and (e) Depletion of or damage to natural resources." And noting that ""F4" claims were claims for damage to the environment. The Commission received approximately 170 such claims seeking a total of approximately US$85 billion in compensation. "F4" claims fell into two broad groups. The first group comprised claims for environmental damage and the depletion of natural resources in the Persian Gulf region including those resulting from oil-well fires and the discharge of oil into the sea. The second group consisted of claims for costs incurred by Governments outside of the region in providing assistance to countries that were directly affected by the environmental damage. This assistance included the alleviation of the damage caused by the oil-well fires, the prevention and clean up of pollution and the provision of manpower and supplies."

[1274] UNCC Recommendations First Instalment (2001), para.13.

Faced with the contingent nature of claims being sought for monitoring expenses in order to undertake studies to determine whether or not compensable environmental harm had occurred, the F4 Panel opted for an open approach. It permitted such claims to proceed, and thereby avoided undermining the claimants' ability to prove their substantive claims of environmental harm. At the same time, it held that claims for monitoring would not be granted for monitoring and assessment of purely theoretical or speculative environmental harm, or harm with only a tenuous link to Iraq's invasion and occupation of Kuwait.[1275] Notably, the F4 Panel insisted on establishing a sufficient nexus between Iraq's conduct and the potential environmental harm – for example by showing the "possible pathways and media by which pollutants resulting from Iraq's invasion and occupation of Kuwait could have reached the areas or resources concerned".[1276]

Other institutions assessing the damage or harm to a community's environment have struggled to provide precise parameters for the reparations. In the case of *Ominayak v Canada*, the Human Rights Commission found a violation of article 27 ("ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language") due to Canada's expropriation of land from indigenous communities in the Lubicon Lake Band for commercial and industrial development.[1277] The Human Rights Commission did not indicate any special form of reparations but accepted Canada's offer to rectify the harm in accordance with article 2's requirement to provide an effective remedy.[1278]

The Court would have to determine whether to provide compensation on an individualized basis or collective basis or both.[1279] This is a different issue for the collective nature of victim harm for the purposes of obtaining victim status to participate in proceedings, which is discussed above. A significant question in this respect is the degree to which the interests of individual victims would differ from those of the environment as a collective entity. In the case of military attacks resulting excessive harm to the environment, it is likely that there would be multiple victims suffering in connection with the serious harm to the environment. Because of the multiplicity and the collective nature of the value harmed, it would be coherent

[1275] UNCC Recommendations First Instalment (2001), paras.29-31.
[1276] UNCC Recommendations First Instalment (2001), para.31.
[1277] *Ominayak v Canada*, 26 March 1990, Human Rights Commission Communication no.167/1984.
[1278] McCarthy (2012), p.124-125.
[1279] Rome Statute, rule 98(3).

to order reparations on a collective basis. Compensation could also be awarded on an individualized basis for any harm suffered personally by any victims, so long as that did not doubly compensate particular victims.[1280] This may occur for example if collective moral (non-pecuniary) compensation were awarded for causing pollution and environmental harm to an area through unlawful military attacks, while individual pecuniary compensation were awarded for the specific harm caused to land held by individuals.

For environmental harm caused by military attacks, restitution of the harmed facet of the environment to its pre-attack state would be the preferred course of action in most instances. In the context of the environment, restitution is a particularly desirable form of reparations as it seeks to return the natural environment to its pre-damage state in keeping with the motivating environmental consideration of conservation, and it is provided for under the 1985 Basic Principles on Victims' Rights specifically in the aftermath of serious damage to it pursuant to criminal conduct.[1281]

However, if this were not possible, compensation would be appropriate. Rehabilitation generally refers to harm to natural persons, and would only be relevant in this context if the environmental harm in turn harmed natural persons. Additionally, reparations ordered on a preventative, symbolic, or transformative basis would be relevant to harm to the natural environment.

In terms of calculating the exact amount of pecuniary compensation due, determining a proportionate quantum and form of compensation appropriate for victims of military attacks resulting in excessive environmental harm would be a case-by-case assessment. Nonetheless, some guidance can be gleaned from the awards of the United Nations Claims Commission addressing the harm caused by Iraq's invasion of Kuwait in 1990-1991.[1282] The F4 Panel received a myriad of claims ranging from monitoring the environmental impact of Iraq's invasion and occupation of Kuwait, to the actual damage itself, which was argued to have affected coastlines, air quality, soil water, and to have caused respiratory problems and to

[1280] UNCC (2002), para.46 (noting that the secretariat of the Claims Commission carried out cross-claim checks in order to avoid "multiple recovery of compensation").
[1281] Principle 10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.
[1282] Note that the Chamber in *Al-Mahdi* took note of the Ethiopia-Eritrea Arbitration to determine an analogous starting point to establish quantum, but did not explain the basis under the sources of law set out in article 21 of the Rome Statute for addressing this precedent; *Al-Mahdi* Reparations Order, para.131.

potentially have increased cancer rates.[1283] The F4 Panel also faced requests for compensation for environmental damage to facets of the environment that have no commercial value (an example provided was the existence of oil along a beach). It held that there is no rule in its guiding statutes or under general international law preventing compensation for such damage.[1284]

One of the main heads of damage was "The release and transport, into the Claimants' territories, of airborne pollutants caused by oil fires resulting from the ignition of hundreds of oil wells in Kuwait by Iraqi forces during Iraq's invasion and occupation of Kuwait".[1285] Putting aside the question of whether the lighting of oil wells in this specific instance would constitute an "attack" for the purposes of article 8(2)(b)(iv), the igniting of industrial facilities provides a guide as to costs that were calculated to have been incurred or caused by the environmental damage. At the same time, it should be borne in mind that compensation awarded against a state, in this case Iraq, are likely to be significantly higher than the compensation awarded against an individual in the context of a criminal trial. The basis to attribute harm to a state is different from the basis for attributing harm to an individual, and in the case of military attacks in an international armed conflict would generally be broader than the conduct that could be attributed to one specific individual.[1286]

To set out some examples, the Commission awarded 672,960 USD to Iran to collect samples and engage in computer modelling analysis to test the spread of pollution from the oil fires.[1287] It awarded between zero and 4,873,620 USD to Kuwait for costs to monitor and assess harm to groundwater and surface water caused by the oil fires.[1288] The Commission awarded 681,055,719 USD to Kuwait for ordnance disposal, finding that this was a reasonable measure to clean and restore the environment.[1289] For costs associated with remediation of wellhead pits used to store water to fight oil fires, the Commission awarded Kuwait 8,252,657 USD.[1290]

[1283] UNCC Recommendations First Instalment (2001), (addressing Iran's claims).
[1284] UNCC (2005), paras.52-58.
[1285] UNCC Recommendations First Instalment (2001), para.14.
[1286] This is because the articles on state responsibility make a state responsible for *inter alia* all actions undertaken by its authorised agents; whereas criminal liability attaching to an individual is dependent on the applicable modes of liability under article 25 of the Rome Statute.
[1287] UNCC Recommendations First Instalment (2001), para.78.
[1288] UNCC Recommendations First Instalment (2001), table 7.
[1289] UNCC (2002), para.46.
[1290] UNCC (2003), para.119.

Although the nature of the environmental harm in a specific case would determine the relevance of these potential precedents, the Court's approach in *Al-Mahdi* suggests that the findings of the UNCC could be taken into account as a reference point for environmental harm. As an internationally founded institution, addressing the specific question of compensation for environmental harm, the UNCC's analysis can be taken into account under article 21 of the Rome Statute as relevant to the determination of international law. The quantum awarded to Kuwait suggests that environmental harm serious enough to meet the Court's gravity requirement would lead to reparations potentially amounting to several million dollars.

(b) Unlawful transboundary movement and storage of hazardous substances (toxic dumping)

(i) Victim status and participation

Looking to unlawful transboundary movement and storage of hazardous substances, individuals personally harmed by the toxic dumping in question could include those suffering respiratory problems from the noxious fumes emitted by the chemicals or relatives of those killed by the chemicals.[1291] Organizations with property directly damaged by such dumping could also qualify as victims under the ICC framework. For example, if an organization held coastal land for environmental purposes, and that were harmed by unlawful toxic dumping or mis-storage, the organization could apply for victim status and reparations.

But questions would arise for those who did not suffer acute health effects from the dumping but nonetheless suffered other forms of harm, such as their crops being damaged, or the wildlife in their locality being killed. These include whether this form of harm constitutes "personal harm" so as to justify victim status, and what would be the impact of the dumping having ruined the enjoyment of the environment, for example by removing the possibility of outdoor activities or even the view of the environment. Mental pain and anguish have been recognised as a basis for claims for damages under international law, including in the form of distress, anxiety, a sense of injustice and shock.[1292] However, the gravity of the requisite mental harm has been relatively elevated. At the United Nations Claims Commission, qualifying victims of mental harm were those who lost an immediate family member, those who suffering disfigurement, those who were victims of a sexual assault or torture, those who

[1291] See Amnesty Report on Cote d'Ivoire (2012); Reports of Special Rapporteur on Toxic Dumping (2009), para.6; White (2008), p.119.
[1292] McCarthy (2012), p.116.

witnessed one of the above events, those taken hostage, or those who lost all economic means.[1293] At the same time, ICC decisions concerning victims suffering personal harm have found that a broader range of mental harm and anguish may qualify, including where socialising with other members of society was disrupted by the crimes and exposure to an environment of violence and fear.[1294]

On their face, these types of effects would not seem to be comparable with the harm suffered by victims of other anthropocentric crimes under the Rome Statute, such as sexual violence or mutilation for example. However, because the rules are broadly worded and the interpretation is largely left to the judges, there is considerable scope for development and refinement in this area of the ICC's operations and procedure. At the ECHR it has been held that severe environmental harm can affect the well-being of individuals and adversely affect their private and family life (particularly by impeding their enjoyment of the home) even without seriously damaging the victims' health.[1295]

In terms of the modalities of participation for victims of toxic dumping, it is not clear that the victims would be able to present evidence going to the extent of the environmental harm. The existing crimes under which toxic dumping could be prosecuted are all anthropocentric (or genus-centric) in nature.[1296] For example, the crime against humanity of other inhumane acts, which is a possible charge that could arise from toxic dumping, is explicitly anthropocentric in nature. Qualifying victims would be permitted to present the views, and potentially evidence, concerning the extent of the harm to themselves.

However, it is necessary for a victim to show the link between the harm suffered and the crimes charged for his or her views and concerns to be presented.[1297] Because the crimes charged to cover toxic dumping, such as other inhumane acts, do not include an element of environmental harm, the victim may be restricted to discussing the toxic dumping only to the extent that it led to the victims' suffering and not to the extent that it caused serious harm to the environment *per se*. Ultimately, the environmental harm could potentially be de-prioritized or even essentially excluded from consideration in the reparations phase of the

[1293] UNCC, Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damage up to US$100,000 (Category C claims), 21 December 1994, S.AC/1994/3, p.87 cited in McCarthy (2012), p.118.
[1294] *Lubanga* Appeals Decision on Reparations, para.191.
[1295] ECHR, *Lopez Ostra, v Spain*, (1994) 20 EHRR 277.
[1296] See infra Chapter II(D)(2).
[1297] *Lubanga* Appeals Chamber decision, para. 62-65.

proceedings. In this respect, the lack of a provision protecting the environment from toxic dumping in the substantive offences of the Rome Statute could be exacerbated by the restrictions on victim participation before the ICC.

(ii) Reparations for victims of toxic dumping

In the case of toxic dumping, there is no provision of the Rome Statute directly criminalizing this type of crime. Accordingly, it would instead be at most prosecuted indirectly through other provisions such as crimes against humanity, genocide, and war crimes.[1298] The possibility of addressing environmental harm through this indirect means has been foreshadowed by the Prosecution's 2016 guidelines on case selection, which refer to environmental harm *per se* and the use of environmental harm to effectuate other crimes.[1299] Although a conviction pursuant to this approach would not explicitly be for a crime against the environment, such harm could be reflected in the reparations order. This could occur if the environmental damage were found to be an inherent part of the harm caused by the crime.

In the case of toxic dumping constituting the crime against humanity of other inhumane acts due to the severe effects on civilians, or possibly other crimes under the Statute, victims could be affected on an individual basis. Nonetheless, the harm would almost certainly involve a collective aspect in relation to the deterioration of the location(s) where the substances were dumped, which would render appropriate a collective form of reparations, compensation or restitution.[1300]

Determining a proportionate quantum and form of reparations appropriate for victims of toxic dumping would be a case-by-case assessment. There is little precedent for reparations for victims of crimes involving toxic dumping at the international level. However, improper storage or treatment of hazardous wastes have generated human rights cases, that have been treated by regional human rights courts, providing some broad parameters for levels of pecuniary compensation. At the same time, it should be borne in mind that compensation awarded to an individual for a violation of their human rights, will be calculated differently to the compensation awarded against an individual in the context of a criminal trial.

[1298] See, e.g., Weinstein (2005), p.708.
[1299] OTP 2016 Case Selection Paper.
[1300] See ICC Rules of Procedure and Evidence, Rule 97.

Guidance can also be taken from the 2006 ILC principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[1301] These rules underline that there must be 'prompt, adequate and effective remedies' in the event of transboundary damage caused by hazardous activities (Principles 4 and 6), which may have occurred despite compliance by the relevant State with its obligations concerning prevention of such damage. However, the guidance can only be of limited impact in the context of international crimes as the commentary explains that

> liability is excepted if, despite taking all appropriate measures, the damage was the result of (a) an act of armed conflict, hostilities, civil war or insurrection; or (b) the result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or (c) wholly the result of compliance with a compulsory measure of a public authority in the State of injury; or (d) wholly result of a wrongful intentional conduct of a third party.[1302]

Given that the possibility of reparations discussed above is premised on the commission of wrongful conduct, it would automatically fall under the exception in (d). Nonetheless, if remedies must be 'prompt, adequate and effective' in the case of non-criminal conduct, then these standards should also apply in the case of criminal offending.

Some broad guidance as to quantum of reparations can be taken from awards in international human rights courts. In a case involving harm caused to persons living near a rubbish tip in Turkey, the ECHR awarded compensation for a violation of the right to protection of life enshrined in Article 2 of the Convention and of the right to peaceful enjoyment of possessions as protected by Article 1 of Protocol No. 1, and a violation of the right to a domestic remedy, as set forth in Article 13 of the Convention.[1303] The applicant lost nine members of his family due to the accident, and also claimed that his house and movable property was damaged. Prior to the accident, the experts had warned that site gases such as methane, carbon dioxide and hydrogen sulphide were likely to have formed in the site and there was a risk of an explosion as the site was not equipped with a system to dispose of such gases, which could be extremely harmful given the proximity of residential houses.[1304] The Court's finding that there was a

[1301] Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries (UN-Doc A/61/10), *Yearbook of the International Law Commission,* 2006, vol. II, Part Two, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf ("Draft Principles on Allocation of Harm").

[1302] Draft Principles on Allocation of Harm, p.161 and fn.434.
[1303] Öneryıldız v. Turkey [GC], p.59 (disposition).
[1304] Öneryıldız v. Turkey [GC]; Öneryıldız v. Turkey (48939/99) [2002] ECHR 491; The experts stated: ("... In any waste-collection site gases such as methane, carbon dioxide and hydrogen sulphide form. These substances must be collected and ... burnt under supervision. However, the tip in question is not equipped with such a system. If methane is mixed with air in a particular proportion, it can explode. This installation contains no

breach of the right to life was based on the fact that the municipal waste site was opened and operated despite not operating according to the relevant technical standards, and the authorities were aware of these shortcomings (or had reason to know of them) but did not address the problems, thereby leading to the extensive damage and deaths when the accident occurred.[1305]

The court awarded funeral expenses of 2,000 euros "on an equitable basis" (the equitable basis was used as it found that the applicant's pecuniary losses had not been duly documented).[1306] In relation to the applicant's claims for the loss of financial support due to the death of his household members, and for the loss of future support from his children, the Court awarded 10,000 euros.[1307] For the damage to the applicant's flat, the Court awarded no financial compensation as it could discern no major financial loss arising from the accident. However, it awarded 1,500 euros for the damage to his movable property.[1308] Addressing the applicant's non-pecuniary damage, the Court awarded 33,750 euros to each of the applicant and his three adult children.

Additional guidance as to quantum ranges from the ECHR concerns amounts of approximately 12,000 euros and 24,000 euros awarded for violations of article 8 of the ECHR (right to respect for home and family life) due to a plant for the storage and treatment of "special waste" classified as either hazardous or non-hazardous being located near a residential house,[1309] and nuisance due to smells, noise and fumes caused by a waste-treatment plant close to housing, respectively.[1310]

Notably, in a study of UK domestic sentencing practices, it was found that fines for illegal dumping of toxic materials and similar polluting offences, the fines were approximately 10

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means of preventing an explosion of the methane produced as a result of the decomposition [of the waste]. May God preserve us, as the damage could be very substantial given the neighbouring dwellings. ..."). The court noted that "on 28 April 1993 at about 11 a.m. a methane explosion occurred at the site. Following a landslide caused by mounting pressure, the refuse erupted from the mountain of waste and engulfed some ten slum dwellings situated below it, including the one belonging to the applicant. Thirty-nine people died in the accident.").

[1305] Öneryıldız v. Turkey [GC], para.109.

[1306] Öneryıldız v. Turkey [GC], paras.166-167.

[1307] Öneryıldız v. Turkey [GC], para.168 ("the Grand Chamber agrees with the Chamber's view that in the instant case each member of the household must, in one way or another, have provided a contribution, if only an accessory one, to the sustenance of all, although the prospect of future financial support by the seven minor children who died in the accident appears too distant.").

[1308] Öneryıldız v. Turkey [GC], para.170.

[1309] ECHR, Case of Giacomelli v. Italy *(Application no.* 59909/00*)* 2 November 2006, Judgment.

[1310] ECHR, Case of Lopez Ostra v. Spain, *(Application no.* 16798/90*)*, Judgment - 9 December 1994 (the award was for 4,000,000 Spanish pesetas).

times higher on average than fines for wildlife exploitation.[1311] Other domestic cases have seen damages for substance spills calculated based on the surface area of affected waters, although this is considered inappropriate for sea-water due to the rapidly changing area of pollution at the surface.[1312]

(c) Wildlife exploitation

(i) Victim status and participation

For wildlife exploitation, the perpetrators could be prosecuted under several substantive provisions, including for the crime against humanity of other inhumane acts under article 7(1)(k),[1313] or as an indirect result of the crime of pillage under article 8(2)(b)(xvi) or possibly the destruction or appropriation of protected property under article 8(2)(a)(iv), among other crimes. These are all anthropocentric in focus.[1314]

To qualify as victims, individuals would have to show that they were personally affected by the misuse of the species in question, whether directly or indirectly.[1315] The direct victims of wildlife exploitation are usually the species themselves. Such circumstances could arise where for example the species were a sacred religious symbol for the people in question and their mental health would be affected by its disappearance.

For organizations, it would have to be shown that the species was the property of the organization and therefore the organization suffered harm as a result of the acts in question.[1316] This is conceivable, for example if the organization were a collective of tribes that relied on the medicinal property of a certain species for physical and or mental well-being.

Arguments have been made that the illicit trade of endangered species can harm humans due to the possibility of the promised medicinal effects of rare animals not being effective in curing human diseases, or because of humans eating bad meat from unlawfully traded

[1311] Fines in Magistrates' Court for wildlife offences were on average £5,000; whereas for environmental offences it was £50,000; WWF Report, *Sentencing Wildlife Trade Offences in England and Wales Consistency, Appropriateness and the Role of Sentencing Guidelines*, September 2016 ("WWF (2016)"), p.75.
[1312] Papadopoulou (2009), p.108.
[1313] Rome Statute, article 7(1)(k). See also Statute of the ICTY Article 5(i); Statute of the ICTR Article 3(i) (for the analogous provisions).
[1314] See infra Chapter II(D)(3).
[1315] Rule 85(a).
[1316] Rule 85(b).

species.[1317] The former type of harm would not qualify the natural person as a victim, as they would themselves have contributed to the underlying criminal harm (the trading and killing of the protected species) by purchasing the supposedly medicinal goods.[1318] The latter type of harm could potentially qualify a natural person as a victim, although it would have to be shown that they were not complicit in the provision of illegally traded species in order to merit victim status.

More broadly, it has been claimed that the loss of biodiversity indirectly impacts on all citizens of an affected locality.[1319] However, such a broad category of persons would be unlikely to be accepted by the Court as having suffered "personal" harm, absent some additional specific link to the species in question. Arguments that wildlife crime is associated with other organized crime are generally correct, but is more of a general observation than a basis to qualify any specific individual as a victim.[1320] Again, questions concerning the level of harm that must be suffered and the directness of that harm to the application are likely to arise in cases where a non-human species has been injured. The judges will enjoy considerable discretion in framing an appropriate response to these issues.

Looking to the modalities of participation for victims of wildlife exploitation, it is not clear that the victims would be able to present evidence going to the extent of the harm to the species involved, or more generally to the environment. The existing crimes under which wildlife crime could be prosecuted are all anthropocentric in nature, and the most likely crime (other inhumane acts) is explicitly anthropocentric in nature. Qualifying victims would be permitted to present the views, and potentially evidence, concerning harm to themselves or other persons with whom they had a close relationship. However, as set out above, a victim must show the link between the harm suffered and the crimes charged for his or her views to be presented.[1321] Because the crimes charged to cover wildlife exploitation under the Rome Statute, such as other inhumane acts, do not include an element of environmental harm, the victim would likely be restricted to discussing the wildlife exploitation only to the extent that it led to the victims' suffering and not to the extent that it caused serious harm to the environment *per se*. Again, the environmental harm, in this case to wildlife, could be de-prioritized or even essentially excluded from consideration in the reparations phase of the

[1317] European Union Action to Fight Environmental Crime (2015), p.22.
[1318] Preventing malefactors from benefiting from their wrongdoing accords with the general legal principle *ex injuria jus non oritur*.
[1319] European Union Action to Fight Environmental Crime (2015), p.22.
[1320] European Union Action to Fight Environmental Crime (2015), p.22.
[1321] *Lubanga* Appeals Chamber Decision, paras.62-65.

proceedings. In this respect, the lack of a provision protecting wildlife in the substantive offences of the Rome Statute would be exacerbated by the restrictions on victim participation before the ICC.

(ii) Reparations for victims of wildlife crime

In relation to wildlife crime, it is hard to envisage natural human victims suffering harm on an individual basis at the requisite level. The trafficked species cannot themselves qualify as victims and the natural human beings who could qualify would be hard to characterize as suffering on an individual basis from the trafficking or poaching of animals. Accordingly, group reparations would appear appropriate for this form of harm.

As set out above, wildlife crime would raise the issue of whether the relevant harm caused can include the environmental harm, or whether it would be restricted to the harm constituting a necessary feature of other inhumane acts, that being severe harm to individual persons. While the Prosecution has signaled in its 2016 guidelines on case selection that the impact on the environment will be a factor taken into account in the initiation of cases,[1322] it is unclear whether the Court would also take into account environmental harm at the conclusion of a case when ordering reparations.

In cases of crimes against animal species, such as trafficking and illegal export/import, restitution may include costs of housing the animals when they are rescued as well as the costs of re-patriating the animals.[1323] Similarly, in the case of the Erika spill off the coast of France in 1999, which may provide a broadly analogous measure of guidance as civil and criminal liability was imposed, the damages included expenses for the bird rescue and care centres to aid animals affected by the spill.[1324] In terms of the recipient of the compensation, where the harm is caused to the environment *per se*, rather than to any specific natural person, restitution should be paid to the relevant state or states and should include restitution for the costs of the clean-up and/or treatment of affected wildlife or natural features.[1325]

Compensation for wildlife crime at the international level can be informed by court awards at the domestic level,[1326] which have included compensation to environmental associations for

[1322] OTP 2016 Case Selection Paper.
[1323] UNODC Toolkit (2012), p.138.
[1324] Papadopoulou (2009), p.101.
[1325] UNODC Toolkit (2012), p.138.
[1326] See infra Chapter I(C)(1) (discussion of sources of law).

extra expenses incurred in responding to illegal poaching.[1327] In the Erika case, an environmental association focused on bird protection sought damages for each bird harmed, but this was rejected and instead damages were calculated based on the "extent of the pollution, or the role of the association in organising the bird care, and its general efforts in the field".[1328]

In terms of quantum, guidance can be gleaned from awards in domestic cases. In the 2010 case of *United States v. Slattery*, the accused pleaded guilty to conspiracy to violate the Lacey Act in connection with obtaining black rhinoceros horns. He was sentenced to serve 14 months' incarceration, a 10,000 United States dollar fine, and forfeited 50,000 United States dollars of proceeds from his illegal trade in rhinoceros horns.

In the 2014 case of *United States v. Andrew Zarauskas*, the accused was convicted in connection with his purchase of approximately 33 narwhal tusks, which are covered by the international Convention on International Trade in Endangered Species (CITES) and also listed as threatened under the US Endangered Species Act. The accused was sentenced to 33 months imprisonment and ordered to forfeit 85,089 United States dollars, six narwhal tusks and one narwhal skull. He was also ordered to pay a fine of 7,500 United States dollars.[1329]

Studies of UK sentencing for wildlife crime showed that sentences and fines were low. A study of 174 cases of illegal wildlife trade from 1986 and 2013 found that most cases (74 percent) resulted in non-custodial sentences and fines were typically low with 88 percent amounting to 2,500 pounds or less.[1330] For example, in 2000 an Indian company called the Renaissance Corporation was fined 1,500 pounds by Horseferry Road Magistrates Court (London) for trading in shatoosh shawls (also forfeited) worth 353,000 pounds made from endangered Tibetan antelope.[1331]

E. Adjudicative incoherence arising from the application of the ICC rules on victim participation and reparations to environmental harm

The preceding analysis of the relevant rules and jurisprudence show that the environment may not qualify as a victim in and of itself but that it may incidentally be linked to the victim status

[1327] Papadopoulou (2009), p.100 citing Cass. Crim., 4 July 1978, Bull. Crim. n8 219.
[1328] Papadopoulou (2009), 108.
[1329] WWF (2016), p.26.
[1330] WWF (2016), p.4.
[1331] WWF (2016), p.25 citing Lowther, Cook and Roberts, The International Wildlife Trade and Organised Crime: A Review of the Evidence and the Role of the UK (Wolverhampton, UK: WWF–UK, 2002).

of specific persons if environmental harm is an integral part of those persons suffering when subjected to a crime under the jurisdiction of the Court. The exclusion of the environment from victim status *per se* is contradictory in light of the Rome Statute's inclusion of a partially eco-centrically framed crime in article 8(2)(b)(iv).[1332] Despite the inclusion of this substantive prohibition against harming the environment, the environment itself cannot be qualified as a victim under rule 85 or any other rule. The discrepancy further indicates the anthropocentric orientation of the Court's governing framework.

The imbalance is all the more concerning in light of the ICC OTP's recent shift in policy to increase its focus on criminal conduct impacting the environment.[1333] An increase in the prosecution of environmental harm will result in an increased focus on the victimization of the environment. This will highlight the lack of provision in the rules on victim participation capable of applying to the environment in and of itself.

An explicit recognition of the environment's potential victimization by acts prohibited under the Rome Statute would have been consistent with the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[1334] These principles have been recognized as a valid reference material when assessing the law applicable to victims' participation at the ICC.[1335] Significantly, the 1985 Victims' Declaration of Basic Principles refer to restitution of the environment in the aftermath of serious damage to it pursuant to criminal conduct.[1336] However, such recognition would require amendment of the rules concerning the qualification of victims, which is unlikely to occur in light of the existent concerns that victim participation and reparations are lengthening proceedings unduly and complicating proceedings.

Failing amendment of the definition of victims, environmental harm could potentially engage the provisions related to victims if the environment were considered to be property.[1337] This would render any harm to the environment harmful in turn to people's property interests.

[1332] The crime set out in article 8(2)(b)(iv) is specifically formulated as follows: "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or *widespread, long-term and severe damage to the natural environment* which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated." [emphasis added].
[1333] OTP 2016 Case Selection Paper, para.41.
[1334] 1985 Victims' Declaration of Basic Principles.
[1335] *Lubanga* Appeals Chamber Decision, para.33.
[1336] Principle 10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.
[1337] Already some aspects of the natural environment constitute property in some circumstances, such as certain wildlife sanctuaries, forests, and beaches.

However, the notion of the natural environment in toto constituting property is problematic and would clash with the idea of global commons, such as Antarctica, the high seas, or outer space, which may be subject to grave environmental harm even where no specific person's property interests are affected.[1338]

Alternatively, instead of the environment qualifying as a victim *per se*, the protection of environmental interests could be achieved by Chambers appointing an advocate for the environment. Under the Rome Statute, Chambers possess a broad discretion to manage proceedings, as for example is provided in article 64(8)(b). The judges could appoint an expert or advocate to represent the interest of the environment during proceedings, much the same way as a counsel is typically appointed to represent any child in domestic family proceedings or similar cases. Such an advocate for the environment would provide eco-centric counter-weight to the overwhelmingly anthropocentrically oriented framing of the Rome Statute and associated instruments.

The representatives of victims have enjoyed an increasingly prominent role in proceedings before the ICC. To date almost all participation of victims in proceedings has been conducted through a common legal representative.[1339] In *Lubanga*, Trial Chamber I allowed the various legal representatives for the victims access to many documents and the ability to file submissions with the Court, including on substantive topics relating to the guilt or innocence of the accused.[1340] In *Bemba*, the Trial Chamber also allowed victims to file submissions on a range of topics and allowed victim applicants to make an opening statement.[1341] In *Katanga & Ngudjolo*, there were 366 victims who participated in the trial and these victims were divided among two groups, with each group being represented by a common legal representative.[1342]

Corresponding with the judiciary's potential power to hear from an advocate for the environment, the Trust Fund also has scope to be addressed in this manner. Under regulation 49 of the Regulations of the Trust Fund for Victims, the Board of Directors "may consult victims as defined in rule 85 of the Rules of Procedure and Evidence and, where natural

[1338] See infra Chapter III(B)(2).
[1339] WCRO (2013), pp.14-15.
[1340] *Prosecutor v Thomas Lubanga Dyilo,* Decision on Victims' Participation, (Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008). See also *Lubanga* Appeals Chamber decision, [96]. (holding that, so long as a fair and impartial trial was ensured, victims could contribute evidence going to the guilt or innocence of the Accused). In this respect, see *Lubanga* Appeals Chamber decision, Dissenting Opinion of Judge Pikis, para.14.
[1341] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Legal Representation of Victim Applicants at Trial, ICC-01/05-01/08-1020 (Trial Chamber III, 19 November 2010), paras.25-27.
[1342] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the Organisation of Common Legal Representation of Victims, ICC-01/04-01/07-1328, pp.2-4.

persons are concerned, their families as well as their legal representatives". It continues that the Board may also "consult any competent expert or any expert organisation in conducting its activities and projects". An advocate for the environmental could accordingly have to be classified as an expert in order to qualify for consultative status vis-à-vis the Trust Fund.

Legal recognition of the interests of the environment has occurred in several instances in domestic proceedings, which may provide a model for the advocate for the environment.[1343] For example, the Supreme Court of New Zealand was presented with arguments in July 2017 that the swapping of one parcel of land administered by the Department of Conversation (which was sought for flooding to serve a dam project) for another parcel of land served environmental interests by enhancing the overall "conservation value" of the land managed by the Department.[1344] The Court noted that "[i]t is necessary to consider what is appropriate to protect the "intrinsic values" of the land concerned (a focus required by the definition of "conservation")".[1345] The Court overturned the political decision to permit the land swap on the basis that the assessment had mistakenly focused on the benefits of the overall benefits of swapping the parcels of land instead of focusing on the conversation values of protecting the initial parcel of land in its own right.[1346] Taking account of the intrinsic value of the environment is required under the applicable legislation.[1347]

Similarly, the intrinsic value of environmental features such as a river and a national park have been legally recognised under New Zealand legislation, and boards have been established to represent those interests.[1348] The 2014 legislation protecting the national park noted that its legal status was intended to "preserve, as far as possible, the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and

[1343] Papadopoulou (2009), p88; *T. Corr. Paris*, 16 January 2008, n8 99-34-895010, N/ H 10-82.938 Fp-P+B+R+I N/ 3439 CI 25 *Septembre* 2012 Cassation Partielle Sans Renvoi (available at https://www.courdecassation.fr/IMG///Crim_arret3439_20120925.pdf).
[1344] Hawke's Bay Decision, para.22 ("The summary taken into account by the Director-General was that "from an ecological and biological point of view", exchanging the 147 hectare Smedley land for the 22 hectare Ruahine Forest Park revocation land would enhance the conservation values of land managed by the Department.").
[1345] Hawke's Bay Decision, para.111.
[1346] Hawke's Bay Decision, para.127.
[1347] See New Zealand Conservation Act 1987, Section 2(1), ("Conservation" is defined to mean the "preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations". Additionally, "preservation" is defined in relation to a resource as "the maintenance, so far as is practicable, of its intrinsic values", while "protection" in relation to a resource is defined as "its maintenance, so far as is practicable, in its current state; but includes … its restoration, … augmentation, enhancement, or expansion").
[1348] See Chapter IV(D)(1) referring to Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Sections 14 and 19, and Te Urewera Act 2014, Sections 11 and 16.

its historical and cultural heritage" and to "provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all".[1349] More recently in 2017, the High Court of Uttarakhand in India declared that the Ganges and Yamuna rivers are living entities with legal status.[1350]

In the case of a military attack resulting in excessive harm to the environment, for example, the advocate for the environment may wish to highlight the harm caused by the conflict in question as a whole to the environment, and not necessarily just that arising from the particular attack. The Prosecution may be resistant towards such an approach due to concerns about losing focus on the primary charges.

In relation to reparations, the advocate for the environment could again play a constructive role in the Court's operations. Rule 97(2) of the ICC Rules authorizes trial chambers to "appoint appropriate experts to assist it in determining the scope." Using experts to assess the form and quantum of reparations obviates the need for victims to attempt to itemize or document their losses, and thereby avoids a source of possible re-traumatization for the victim.[1351] Recently the ICC has issued a call for experts on victims' reparations in relation to the *Al-Mahdi* case, signalling an openness to receiving external expert assistance in this complicated area.[1352]

The advocate for the environment would have to assist the court by advising about the impact on endangered species and biological diversity of certain practices, including practices that we may consider relatively mundane in present circumstances. In order to carry out these functions, the advocate for the environment would require the following powers:

- Represent the views of victims of environmental harm, including by making written and/or oral submissions on points of law and fact;

- Challenge narrowness of indictment: the advocate for the environment should be able to submit a legal challenge to the framing of the indictment. In *Lubanga* this was

[1349] Te Urewera Act 2014, Section 4.
[1350] *M. Salim v. State of Uttarakhand & others*, Writ Petition (PIL) No.126 of 2014, 20 March 2017, para.19.
[1351] WCRO, 3rd report, p.56.
[1352] There is precedent for the use of an expert to address the technical details of victim compensation. In a class action suit brought under the Alien Tort Claims Act by victims of torture and other human rights abuses committed by the authorities during the regime of Ferdinand Marcos in the Philippines, a Special Master was appointed to supervise the compensatory damage phase of the case, which involved around 10,000 victim claimants. The jury ultimately ordered compensatory-damages of over $766 million along with compensatory-damage awards in favor of the direct plaintiffs; *Hilao v. Marcos*, 103 F. 3d 767, 771, 774 (9th Cir. 1996).

carried out by the victims when they attempted to have the indictment re-characterized to include charges of sexual violence. Ultimately the Appeals Chamber agreed with Judge Fulford's dissenting opinion that the re-characterization was not lawful and went beyond the legitimate power of the lower court during the ongoing proceedings.

- Undertake scientific research missions *in situ* to assess the level of the damage.

Some guidance for the advocate for the environment is the role of environmental associations in French civil and criminal proceedings. These associations have received formal recognition as ''guardians'' of the collective interest to environmental protection, and are entitled, subject to certain conditions to bring civil party petitions concerning 'environmental harm' being addressed by criminal courts.[1353] Environmental associations that are able to bring claims for environmental damage are specifically listed in legislation.[1354]

As an alternative, or else in conjunction with the creation of the post of advocate for the environment, a panel of scientists could be convened to advise the ICC on matters of environmental harm.[1355] The panel would effectively operate as *amicus curiae*, with the task of providing the court with independent expert advice on various scientific matters that may arise during the proceedings. The UNCC established a similar pool of experts in order to address the questions of environmental harm that it was tasked to address. There is also provision for expert opinions to be obtained by the Tribunal for the Convention of the Law on the Sea.[1356] It would be important to vet these experts to ensure that none had an improper connection with any of the parties to the proceedings that could compromise their neutrality. Any materials generated by the panel of experts for the Judges should be shared with the Parties to proceedings in order to provide them with an opportunity to comment thereon.[1357]

[1353] Papadopoulou (2009), 87-112.
[1354] Article L142-2 of the French Environmental Code reads "[t]he approved associations mentioned in Article L141-1 may exercise the rights recognised as those of the civil party with regard to acts which directly or indirectly damage the collective interests that they defend and which constitute an infringement of the legislative provisions relating to the protection of nature and the environment, to the improvement of the living environment, to the protection of water, air, soils, sites and landscapes, to town planning, or those whose purpose is the control of pollution and nuisances, nuclear safety and radiation hygiene, and of the enactments for their application"; Papadopoulou (2009), 92.
[1355] McLaughlin (2000), p.406.
[1356] Rules of the Tribunal (UNTCLOS), article 82(1).
[1357] See, e.g., Rules of the Tribunal (UNTCLOS), article 82(2).

F. Conclusion

The above survey shows that the natural environment does not *per se* match the definitions of victims established under the Rules of the ICC, and so could not itself be considered a direct victim of crimes before the ICC under the current framework. Nonetheless, there are circumstances in which human victims of crimes involving environmental harm could qualify as victims in order to potentially participate in proceedings and receive reparations arising from their injuries.

The subject-matter crimes of the ICC – war crimes, crimes against humanity and genocide, are typically viewed as victimizing human beings and their property. There is essentially only one provision directly addressing harm to the environment - article 8(2)(b)(iv) of the Rome Statute, which prohibits attacks resulting in excessive harm to the environment. In keeping with the anthropocentric focus behind the crimes falling into the jurisdiction of the ICC, the relevant provisions of the Rome Statute and associated instruments do not easily lend themselves to an interpretation whereby the environment could qualify as a victim.

At the theoretical level, the exclusion of the environment from itself qualifying as a direct victim is potentially contradictory in light of the Rome Statute's inclusion of an eco-centrically framed crime, namely the prohibition on attacks on the environment resulting in excessive harm under article 8(2)(b)(iv). The discrepancy results in anomalies, including the potential for a situation where there is no person or entity capable of qualifying as a victim despite a grave international crime having been committed. The lack of provision for the environment to qualify as a victim is particularly concerning in light of the guidance in the United Nations principles on the basic rights of victims that there should be compensation for environmental damage, particularly its restoration to the pre-damaged state.[1358] However, the rules also provide the basis for the Judges to order the appointment of an advocate for the environment to ensure that these eco-centric interests are represented during proceedings. That possibility presents a moderating counter-balance to the lack of provision made for the environment as a victim under the Statute and Rules.

The major implications emerging from the survey of the relevant provision on reparations for victims as it applies to environmental harm are: first, there is a natural tension between reparations provided to individuals and reparations provided on a collective basis to restore

[1358] 1985 Victims' Declaration of Basic Principles.

the environment to its pre-damaged state. Specific victims' interests may well differ as to which is preferable in a particular circumstance. Second, there is considerable flexibility in how the awards are structured, subject to the basic requirements of a connection to the charged crime(s) being satisfied, leaving room to cover environmental restoration efforts. Third, the potential for the Trust Fund for Victims to intervene to assist victims and victim projects irrespective of any link to the charged crime is important in its own right as it extends the potential scope of recipients, including potentially to projects centered on the restoration of the environment to its pre-damaged state, partly in line with the Basic Principles of Justice for Victims of Crime and Abuse of Power.