

ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

On the punitive nature of ICC reparations orders

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Abstract

The article focuses on reparations, as ordered by the International Criminal Court (ICC) against a convicted individual. It has long been orthodoxy that such measures fulfil solely compensatory objectives, for they lack any punitive intent. This article offers a rival account. An analysis of the respective regulatory and contextual framework reveals that, by design, reparations are allowed to pursue compensatory and punitive goals equally. An analysis of the reparations orders themselves affirms that, in practice, the ICC utilizes reparations as a means to accomplish compensatory and punitive objectives both. It is maintained that reparations orders are both remedial and punitive in nature. Ignoring this reality has a negative impact on individual prerogatives, and contradicts fundamental sentencing ideals of international criminal justice. It follows that the current reparations order regime should be reformed. The ICC should either explicitly acknowledge reparations as punishment, or detach them from criminal proceedings altogether.

Keywords: International Criminal Court; punitiveness; remedy; reparations; victim

1. Introduction

I claim that ICC reparations orders are (also) punitive in nature.¹

Discussions on reparations matter, for victims are playing an increasingly prominent role in international criminal law.² In confirmation, the Rome Statute allows the ICC to make a reparations order directly against a convicted person.³ This mandate aligns with the Court's normative move towards 'victim-oriented justice',⁴ heralded as one of the ICC's greater innovations.⁵ The added value of the ICC reparations regime for international criminal law is

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¹A note on terminology: I use 'nature' to refer to the legal nature and conceptualization of reparations; 'objective', 'purpose', or 'goal' to refer to the intent of ICC drafters and judges; and 'function' to refer to the actual outcome and effect.

²M. Rauschenbach and D. Scalia, 'Victims and International Criminal Justice: A Vexed Question', (2008) 90 *International Review of the Red Cross* 441.

³1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, Art. 75(2).

⁴S. Vasiliev, 'Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), 635, at 677; Rome Statute of the International Criminal Court, *supra* note 3, Arts. 75, 79, 110(4)(b).

⁵*The Prosecutor v. Thomas Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ICC-ICC-01/04-01/06-8-Corr, Pre-Trial Chamber I, 24 February 2006, para. 136; T. van Boven, 'Victims' Rights and Interests in the International Criminal Court', in J. Doria, H-P. Gasser and M. C. Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko (1930–2000)* (2009), 893, at 902; W. Schabas, *An Introduction to the*

rightly lauded, and it is not my intention to challenge the utility of this regime,⁶ nor draw attention away from victim needs and interests.

Yet, the focus on the virtues of reparations orders has somewhat overshadowed the discussion in regards to their nature. Are reparations punitive or remedial measures?⁷

The Statute itself provides for a rather loose framework, which does not explicitly answer this query. Article 75 allows the Court to order reparations on its own motion,⁸ stipulating that it is to respect the rights of victims at all times.⁹ The Trust Fund for Victims (TFV) is also involved, as the ICC may order that the award for reparations be made through the TFV;¹⁰ the TFV may also complement a reparations award, using its own funds.¹¹ These issues are clearly addressed by the Statute. Further details are to be fleshed out by the Court itself, as empowered to establish principles relating to reparations. These are to include restitution, compensation, and rehabilitation. Indeed, the ICC has successfully issued five reparations orders issued to this day: *Ongwen*,¹² *Ntaganda*,¹³ *Al Madhi*,¹⁴ *Katanga*,¹⁵ and *Lubanga*.¹⁶ In these, the ICC has consistently maintained that reparations orders are entirely non-punitive in nature, a position that has found support in literature as well. This is justified by the alleged lack of punitive intent. Reparations are awarded solely to acknowledge and redress the harm suffered by the victims, providing restitution, compensation, and rehabilitation. This is contrasted to the ICC penalties, which set out to punish the perpetrator, seeking punitive objectives, in particular retribution. Unlike penalties, reparations are not implemented, designed, or understood to punish. Due to their distinct purpose, reparations are entirely non-punitive – so goes the argument.¹⁷ This understanding has underpinned the entire ICC apparatus and gone relatively unchallenged in the ICC literature,¹⁸ taking the form of a mantra.

It is precisely the task of this article to challenge the dominant position. It is maintained that the current discourse that treats ICC penalties and reparations as parallel lines is legally erroneous and problematic. While acknowledging the compensatory function of reparations orders, it is proven that reparations are *also punitive* in nature.

International Criminal Court (2017), 333; R. Falk, 'Reparations, International Law, and Global Justice: A New Frontier', in P. de Greiff (ed.), *The Handbook of Reparations* (2006), 478; Human Rights Center, *The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court. Uganda Democratic Republic of Congo Kenya Côte d'Ivoire* (2015), 13; G. Bitti and G. G. Rivas, *The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court in Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (2006), 299.

⁶Though the place of victims in the ICC is not without challenges; see L. Walleyn, 'Victims' Participation in ICC Proceedings: Challenges Ahead', (2016) 16 ICLR 995; K. J. Fisher, 'Messages from the Expressive Nature of ICC Reparations: Complex-Victims in Complex Contexts and the Trust Fund for Victims', (2020) 20 ICLR 318.

⁷A note on terminology: this article utilizes the terms punitive and remedial. It should be noted that the former term is generally used interchangeably with 'exemplary', 'vindictive', 'penal' (and, to a lesser extent, 'aggravated'), whereas the latter term is understood also as 'civil', 'compensatory', 'remedial', and 'rectificatory'. For a discussion see S. Wittich, 'Punitive Damages', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (2010), 667.

⁸See Rome Statute of the International Criminal Court, *supra* note 3, Art. 75(1); Rules of Procedure and Evidence of the International Criminal Court, Rules 94–99.

⁹*The 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, Appeals Chamber, 2 March 2015, para. 34.

¹⁰See Rome Statute of the International Criminal Court, *supra* note 3, Art. 75(2).

¹¹'Victims' Participation and Reparations, Background Note, ICC2005.028-EN (11 February 2005), at 2; see also www.trustfundforvictims.org/en/about/two-mandates-tfv.

¹²*The Prosecutor v. Dominic Ongwen*, Reparations Order, ICC-02/04-01/15-2074, Trial Chamber IX, 28 February 2024.

¹³*The Prosecutor v. Bosco Ntaganda*, Reparations Order, ICC-01/04-02/06-2659, Trial Chamber VI, 8 March 2021.

¹⁴*The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, ICC-01/12-01/15-236, Trial Chamber VIII, 17 August 2017.

¹⁵*The Prosecutor v. Germain Katanga*, Reparations Order, ICC-01/04-01/07-3728, Trial Chamber II, 24 March 2017.

¹⁶*The Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012; as amended in ICC-01/04-01/06-3129-AnxA.

¹⁷See Section 2, *infra*.

¹⁸Though the position has not gone entirely unchallenged; see Section 3, *infra*.

This observation is of paramount importance, as it calls for a normative reconceptualization of the entire regime. More practically, acknowledging reparations as punitive measures means that they should be complemented with due consideration to procedural rights and sentencing principles, if not reformed altogether.¹⁹ In this fashion, a comprehensive examination of the nature of reparations orders is doubly justified.

To this end, the article proceeds as follows. Section 2 outlines the prevalent view in the ICC and scholarship, which takes reparations to be altogether distinct to penalties, due to a lack of punitive intent on the part of ICC judges and drafters. Section 3 revisits the nexus between penalties and reparations. It is maintained that the arguments advanced by the orthodox view do not suffice to disprove the punitive nature of reparations. On the contrary, an analysis of the reparations orders themselves proves that the purposes and functions of reparations are in fact indistinguishable from those of ICC penalties. Section 4 underlines the problematic consequences of the current reparations regime, and offers some thoughts on how to move forward. Section 5 summarizes and concludes.

2. The orthodox position: Reparations as non-punitive measures

This section outlines the prevalent discourse and its justifications. It is maintained that the ICC, alongside a considerable number of literature contributions, regards reparations as exclusively remedial, non-punitive measures. This stance is justified, according to its proponents, as it aligns with judicial practice, regulation, and context.

Subsequent sections proceed to discuss my antithesis, criticisms, and alternative propositions.

2.1 The ICC case law

The prevailing position in current discourse recites that reparations orders do not carry punitive force.

It is important to recognize that the ICC itself subscribes to this discourse. This is made clear in the reparations orders themselves. In *Ntaganda*, the Trial Chamber declared that ‘the goal of reparations is not to punish the person but indeed to repair the harm caused to others, the objective of reparation proceedings being remedial and not punitive’.²⁰ This was recently confirmed in *Ongwen*.²¹ Similar affirmations are found in other reparations orders, with *Lubanga* noting that ‘[t]he Statute and the Rules of Procedure and Evidence introduce a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice’.²²

The ICC has maintained the non-punitive design of reparations orders in the second instance, in appeals made against reparations orders. Both *Katanga* and *Lubanga* declare that ‘[t]he goal of reparations is not to punish the person but indeed to repair the harm caused to others’.²³

¹⁹See Section 4, *infra*.

²⁰See *The Prosecutor v. Bosco Ntaganda*, *supra* note 13, para. 224.

²¹Being the most recent reparations order, *Ongwen* did not result in any significant change. The Chamber declared early that it would ponder only ‘the need . . . to consider additional principles on reparations, apart from those already established by the consistent jurisprudence of the Court’; see *The Prosecutor v. Dominic Ongwen*, Order for Submissions on Reparations, ICC-02/04-01/15-1820, Trial Chamber IX, 6 May 2021, para. 5(1)(a). Indeed, and as made evident in the reparations order itself, *Ongwen* confirms the *Ntaganda* Principles as being ‘of general application’; see *The Prosecutor v. Dominic Ongwen*, *supra* note 12, paras. 59, 71.

²²See *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 16, para. 1 (emphasis added). This was confirmed in *Al Madhi*; see *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 14, para. 26.

²³*The Prosecutor v. Germain Katanga*, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled ‘Order for Reparations pursuant to Article 75 of the Statute’, ICC-01/04-01/07-3778-Red, Appeals Chamber, 9 March 2018, paras. 184–185; see also *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’, ICC-01/04-01/06-3466-Red, Appeals Chamber, 18 July 2019, paras. 314–135.

In *Katanga*, the Appeals Chamber found that ‘as long as a convicted person is held liable for the costs that it takes to repair the harm caused, there is no punitive element’.²⁴ In *Lubanga*, the appellant argued for the reduction of his reparation liability. He stated that such a reduction would be justified in light of his good behaviour, and in light of the necessity of his actions. Yet, the Appeals Chamber dismissed such claims, finding them altogether unrelated to the purposes of reparations, which are not punitive.²⁵ Similarly, when the appellant in *Ntaganda* challenged the reparations order, claiming it failed to account for his degree of individual culpability, the Appeals Chamber responded that ‘other persons’ contribution to the harm resulting from the crimes for which the person has been convicted is irrelevant to that person’s liability’.²⁶ This detachment of reparations from individual culpability is evident also in the *Ntaganda* reparations order, where the ICC found that:

[i]n determining the amount of the convicted person’s liability, the primary consideration should be the extent of the harm and the costs to repair it. Other criteria, such as modes of liability, gravity of the crimes, or mitigating factors are not relevant to this determination.²⁷

The ICC clearly treats reparations as altogether independent to individual culpability, further subscribing to a non-punitive reading of reparations.²⁸

In sum, all reparation orders and appeal judgments consistently maintain that reparations are non-punitive measures. A plethora of scholars have aligned to the ICC stance, making this position well-established and with a wide array of arguments to justify it.

It is to these arguments the analysis turns.

2.2 Justification: ICC practice, statute, and context

Proponents of the orthodox view have utilized a series of arguments to justify the non-punitive nature of reparations. These may be broadly grouped in three categories: the ICC practice; the regulatory framework; and the interpretive context provided by the ordinary meaning of the term, alongside the delegates’ deliberations leading to the Statute.²⁹

First, the orthodox position stands on the simple fact that the ICC itself consistently finds reparations to be non-punitive measures. Of particular importance here is the *Ntaganda* line of detaching reparations from individual culpability, in clear juxtaposition to penalties, which are firmly anchored to individual culpability.³⁰ Rather than striving towards punitive objectives and

²⁴See *The Prosecutor v. Germain Katanga*, *ibid.*, para. 185.

²⁵See *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 23, paras. 314–315.

²⁶*The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’, ICC-01/04-02/06-2782, Appeals Chamber, 12 September 2022, para. 271.

²⁷See *The Prosecutor v. Bosco Ntaganda*, *supra* note 13, para. 98, with further references.

²⁸Note also *The Prosecutor v. Germain Katanga*, *supra* note 23, para. 180.

²⁹For a holistic view on literature containing arguments for the non-punitive nature of reparations, one may note E. Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (2010), 43, as cited also in *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 16, para. 179; C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (2012), at 77 – McCarthy served as an expert consultant for the ICC; G. Bitti, ‘La jurisprudence de la Cour pénale internationale en 2016’, (2018) 16 *Droits fondamentaux* 19; S. Kabalira, *Under the Rome Statute of the International Criminal Court (ICC), The Content of the Right and Its Implementation in the Light of the Early Case Law of the Court* (2016); J. P. Pérez-León-Acevedo, ‘Compensation in Cases of Mass Atrocities at the International Court of Justice and the International Criminal Court’, (2023) 22 *The Law & Practice of International Courts and Tribunals* 30, at 53; J. Barker, ‘The Different Forms of Reparation: Compensation’, in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (2010), 605; O. Amezcua-Noriega, *Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections* (2011), 1, at 3.

³⁰See Rome Statute of the International Criminal Court, *supra* note 3, Art. 78(1); Rules of Procedure and Evidence, *supra* note 8, Rule 145(1)(a).

seeking to repair the harm as caused by the defendant, reparations strive to repair the harm caused to victims.³¹ In light of their disregard for offender culpability, clear victim orientation, and remedial objectives, reparation orders are declared non-punitive.³²

Second, the regulatory framework itself, composed of the Rome Statute and the ICC Rules of Procedure and Evidence, betrays the non-punitive nature of reparations.

The penalties that the ICC may impose are expressly enumerated within Article 77 of the Rome Statute, constituting part and parcel of Part 7, entitled ‘Penalties’. In contradistinction, the provisions governing reparations are situated within Article 75 of Part 6 of the Statute, denoted as ‘The Trial’, and chiefly concerned with procedural aspects, rather than sentencing issues.³³ This strategic arrangement of reparations provisions inherently underscores the intention of the Rome Statute drafters to dissociate reparations from the concept of punishment.³⁴

In similar fashion, the Statute distinguishes forfeiture of property as penalty, as being altogether separate from forfeiture of property as a compensatory measure. This becomes evident in light of Articles 75(5) and 109 of the Statute, read in conjunction. Article 109 obliges ICC state parties to give effect to a forfeiture ordered as penalty. Article 75(5) obliges state parties to give effect to a reparations order ‘as if’ the provisions of Article 109 were applicable. The inclusion of the terms ‘as if’ clearly implies that there are two distinct types of forfeiture orders: reparative, and punitive. This is echoed in Rule 218 of the ICC Rules, which lists the minimum requirements to be included in the body of forfeiture orders. This Rule specifies one set of requirements in respect of forfeiture measures awarded as a penalty,³⁵ and an altogether distinct set regarding forfeitures that result from a reparations order.³⁶ Such provisions further demonstrate the disparity between reparations orders and punitive measures.³⁷

In addition, both Statute and Rules allocate discrete objectives to each measure. Reparations are to be made ‘to, or in respect of, victims’,³⁸ and their objectives are ‘restitution, compensation and rehabilitation’.³⁹ In this fashion, reparative forfeiture of property measures pivot towards a victim-centric perspective, seeking to acknowledge and address the needs of those who have suffered. This is opposed to the offender-centric punitive forfeiture measures, which primarily aim to punish the offender by divesting them of financial gains.⁴⁰

Another factor of relevance is to be found in the intrinsic connection between reparations and the Trust Fund for Victims (TFV). Article 75 of the Statute allows the ICC to order that the award for reparations be made through the TFV;⁴¹ further, the TFV may complement a reparations award, using its own funds.⁴² The TFV has a clear restorative and rehabilitative mandate. Consequently, the reparations–TFV nexus serves to further emphasize the non-punitive nature of reparations.⁴³

³¹M. Lostal, ‘The Ntaganda Reparations Order: A Marked Step towards a Victim-Centred Reparations Legal Framework at the ICC 2021’, *EJIL:Talk!*, 24 May 2021, available at www.ejiltalk.org/the-ntaganda-reparations-order-a-marked-step-towards-a-victim-centred-reparations-legal-framework-at-the-icc/.

³²See Amezcua-Noriega, *supra* note 29, at 3.

³³See McCarthy, *supra* note 29, at 77.

³⁴See Kabalira, *supra* note 29, at 91; see also McCarthy, *supra* note 29, at 78.

³⁵See Rules of Procedure and Evidence, *supra* note 8, Rule 218(1).

³⁶*Ibid.*, Rule 218(3).

³⁷See McCarthy, *supra* note 29, at 78.

³⁸See Rome Statute of the International Criminal Court, *supra* note 3, Art 75(1); Rules of Procedure and Evidence, *supra* note 8, Rule 97(2).

³⁹*Ibid.*, Art. 75(2).

⁴⁰See McCarthy, *supra* note 29, at 78.

⁴¹See Rome Statute of the International Criminal Court, *supra* note 3, Art. 75(2).

⁴²See www.trustfundforvictims.org/en/about/two-mandates-tfv.

⁴³See Dwertmann, *supra* note 29, at 42; *Prosecutor v. Lubanga*, ‘Observations on Reparations in Response to the Scheduling Order of 14 March 2012’, ICC-01/04-01/06-2872, Trial Chamber I, 25 April 2012, paras. 69–71.

Third, an interpretation of reparations in light of (i) the ordinary use of the term,⁴⁴ and (ii) the delegates deliberations leading to the Rome Statute,⁴⁵ serves to further underline their non-punitive nature.

The ordinary meaning of the term in everyday language signifies ‘reparation’ as ‘the action of making amends for a wrong done’, the ‘compensation for, remedying of, some loss’, or the ‘repair of an injury’.⁴⁶ Such definitions singularly encompass the act of redressing inflicted harm. There is no indication, within customary linguistic usage, that ‘reparations’ concurrently convey the notion of penalizing a perpetrator for inflicting said harm. The very meaning of the term conveys its non-punitive nature.

This understanding aligns with the judicial practice on reparations in international law.⁴⁷ This is exemplified in the *Chorzów* case, where the Permanent Court of International Justice held that ‘reparation must, so far as possible, wipe out all the consequences of the illegal act, and reestablish the situation which would, in all probability, have existed if that act had not been committed’.⁴⁸ This formulation does not imply any notion of reparations serving a punitive purpose whatsoever. Subsequent case law from the Permanent Court of Arbitration, the Inter-American Court of Human Rights, and the European Court of Human Rights, reveals that these international tribunals all subscribe to the same non-punitive reading of reparations.⁴⁹

The committee deliberations leading to the adoption of the Rome Statute also underline the drafters’ intent to demarcate reparations from punitive modalities. As revealed by the *travaux préparatoires*, national delegations originally set out to structure a reparations regime that would include ‘a punitive element, a compensatory element or both’.⁵⁰ Yet, the final proposal on reparations did not outline a punitive facet within the framework of reparations awards.⁵¹ This omission marks a shift in direction, revealing that the parties implicitly yet clearly desire to steer away from punitive reparations. This attitude was likewise mirrored in the proceedings of the Working Group on Penalties. Originally, the Group cited reparations as a penalty.⁵² Yet, no allusion to reparations was incorporated during the final revision of the relevant pertaining to enforceable penalties.⁵³ Consequently, the drafters of the Rome Statute considered, and ultimately discarded, the notion of punitive reparations.⁵⁴

⁴⁴In line with the 1969 Vienna Convention on the Law of Treaties, Art. 31(1).

⁴⁵In line with *ibid.*, Art. 32.

⁴⁶See McCarthy, *supra* note 29, at 79; further citing the Oxford English Dictionary (1933), Vol. VIII, at 457–458.

⁴⁷On this point see *The Prosecutor v. Germain Katanga*, *supra* note 23, para. 178; Barker, *supra* note 29, at 605; McCarthy, *supra* note 29, at 79.

⁴⁸*Factory at Chorzow (Germany v. Poland)*, PCIJ Series A No. 9.

⁴⁹For an analysis of such case law see McCarthy, *supra* note 29, at 79; also C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (2012), 44.

⁵⁰Proposal by the United Kingdom to the Preparatory Committee, A/AC.249/1997/WG.4/DP.13 (10 December 1997); Proposal by France to Preparatory Committee, A/AC.249/1997/WG.4/DP.3 (5 December 1997); Proposal by France and the United Kingdom to the Preparatory Committee, A/AC.249/1998/WG.4/DP.19 (10 February 1998). It should be noted that, initially, the draft Statute only contemplated the use of fines, including no mention to reparations whatsoever – though such fines would be funnelled towards the victims, similar to today’s regime.

⁵¹United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Article 73, Reparations to Victims: Proposal Submitted by the Delegations of France and the United Kingdom of Great Britain and Northern Ireland, in doc. A/Conf.183/c.1/WGPM/L-28 (26 June 1998), available at www.legal-tools.org/doc/eba97a/.

⁵²Chairman’s Working Paper on Article 75, Committee of the Whole Working Group on Penalties, A/CONF.183/C.1/WGP/L.3 (30 June 1998).

⁵³Report of the Working Group on Penalties, Committee of the Whole, Rome Conference, A/CONF.183/C.1/WGP/L.14 (4 July 1998).

⁵⁴See McCarthy, *supra* note 29, at 79.

2.3. Reparations as purely remedial measures

On the basis of these arguments, the orthodox position concludes that the purpose of reparations is compensatory. Their justifications are restitution, compensation, rehabilitation, and other modalities that seek to acknowledge and redress victim harm, and ‘where possible . . . restore the *status quo ante*’.⁵⁵ Most importantly, reparations are taken to pursue these objectives *in lieu of* punishment – compensation is the *sole* purpose of reparations. In this fashion, reparations and penalties are taken to be ‘as incompatible as oil and vinegar’,⁵⁶ an understanding that has been entrenched in ICC practice and literature.

3. Antithesis: Reparations as punitive measures

I take no issue with the claim that reparations have a compensatory objective – this, to me, appears apparent, and very much laudable. Yet, the shibboleth that reparations are *exclusively* compensatory finds me in opposition.

I am not alone in my claim. Others have considered the punitive character of ICC reparations before. Characteristically, O’Shea notes that ‘ordering the accused to pay compensation is a punitive measure’.⁵⁷ Fisher underlines the expressive condemnatory function of reparations, noting that ‘when compelled, reparations can be similar to punishment in that both punishment and reparations can help to communicate the community’s understanding of the respective standings of the victim and perpetrator’⁵⁸ – though Kirsten does not place the point in the specific context, does not examine the nature of reparations, does not argue that reparations are (also because of their condemnatory expressive capacity) punitive or (despite their condemnatory expressive power) civil. Drumbl, noting that ICC reparations escape the label ‘retributive justice’, does not further comment on their nature, yet suggests that:

the Rome Statute’s conceptual approach to reparations as restorative justice should not be universalized . . . there may also be occasion . . . to conceptualize reparations as *poena*, in particular when they take the form of fines and financial damages directly ordered against human rights abusers.⁵⁹

Drumbl concludes that impunity should be understood as ‘freedom from harmful consequences, recrimination, *reparations*, shame, or pain’,⁶⁰ advocating for a more elastic understanding of punishment that includes reparations – though his focus does not lie on the ICC specifically. Stahn observes that the ICC reparations regime ‘differs from classical civil claim models due to its nexus to the criminal case and specifically the focus on conviction’.⁶¹ Shelton admits that the exact determination of the nature of ICC reparations is a challenging matter and does not discount the

⁵⁵See *The Prosecutor v. Bosco Ntaganda*, *supra* note 13, para. 30, with further citations; *The Prosecutor v. Germain Katanga*, *supra* note 23, para. 178; Rome Statute of the International Criminal Court, *supra* note 3, Art. 75(1). For an analysis on these objectives see McCarthy, *supra* note 29, at 77, 159.

⁵⁶Such remarks were made by Lord Hailsham, in discussing the nature of damages in England and Wales; while altogether distinct in terms of *rationae loci*, Lord Hailsham’s words are relevant for our purposes here, *rationae materiae*. See *Rookes v. Barnard*, [1964] AC 1129, 1077.

⁵⁷A. O’Shea, ‘Reparations under International Criminal Law’, in M. du Plessis and S. Peté (eds.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (2007), 179, at 189.

⁵⁸K. J. Fisher, ‘Messages from the Expressive Nature of ICC Reparations: Complex-victims in Complex Contexts and the Trust Fund for Victims’, (2020) 20 ICLR 318.

⁵⁹M. A. Drumbl, ‘Impunities’, in K. Heller et al. (eds.), *The Oxford Handbook of International Criminal Law* (2020), 238, at 259.

⁶⁰*Ibid.*, at 260 (emphasis added).

⁶¹See C. Stahn, ‘Reparative Justice after the Lubanga Appeal Judgment: New Prospects for Expressivism and Participatory Justice or “Juridified Victimhood” by Other Means?’, (2015) 13 *Journal of International Criminal Justice* 801, at 806.

possibility of exemplary reparations (though neither expands nor endorses this).⁶² Dwertmann considers the notion, before ultimately dismissing it.⁶³ Birte argues that there are punitive elements in reparations orders, though concludes that the nature of the reparations is very unclear. He suggests that, in practice, it would be more convenient for ICC state parties to treat reparations as sanctions – nevertheless, such a suggestion is meant to address practical issues, rather than serving as the conclusion of a thorough examination on the nature of reparations.⁶⁴ In the current edition of *An Introduction to International Criminal Law and Procedure*, Cryer, Robinson and Vasiliev note that ‘reparations are grounded in individual criminal responsibility of the convicted person and hence are an extension of penal sanction rather than a form of civil damages’.⁶⁵ Yet, in previous editions of the same book it is noted that ‘[w]hile it could be argued that the reparations are a penal sanction - as it presupposes a conviction - they are rather of a civil nature’.⁶⁶ Interestingly, both statements note the nexus between reparations and individual liability confirmed by prior criminal conviction, yet proceed to reach antipodean conclusions.

These findings reveal that the orthodox position is not without dissent. Nevertheless, it is regrettable that such observations have been made mainly *en passant*. A comprehensive, detailed analysis identifying the exact reasons that made ICC reparations punitive, mounting a properly developed and sustained assault to the many arguments presented by the orthodox position, has been so far missing.

Against this backdrop, I proceed in three steps. First, I contend that the justification of the orthodox position rests principally on volition: the argument is that reparations are not punitive for they are not *meant* to pursue punitive objectives neither by design (as conceptualized by the Statute drafters) nor practically (as imposed by the ICC judges). Second, I dismantle the former string of arguments, showing that, by design, reparations are allowed to fulfil both remedial and punitive goals. Third, I prove the concurrency of objectives and functions between the ICC-imposed penalties and reparations orders.

Once successfully defended, my antithesis proves that the orthodox position is erroneous, and that reparations are simultaneously remedial and punitive.

3.1 Punitive intent as the disputed point

The narrative of the orthodox position focuses on intent⁶⁷ – or rather, lack thereof. Reparations orders are taken to not be punishment, for they are not meant to be punishment. It is not the will of the Statute’s drafters⁶⁸ nor the ICC judges⁶⁹ to equip ICC reparations with any punitive purpose. On the contrary, they wish to focus exclusively on the victim, and use reparations to achieve solely compensatory objectives. The singular trait that distinguishes reparations from penalties revolves around volition.

⁶²D. Shelton, *Remedies in International Human Rights Law* (2005), 237.

⁶³See Dwertmann, *supra* note 29, at 42.

⁶⁴B. Timm, ‘The Legal Position of Victims in the Rules of Procedure and Evidence’, in H. Fischer et al., *International and National Prosecution of Crimes under International Law: Current Developments* (2001), at 306.

⁶⁵R. Cryer, R. Robinson and S. Vasiliev, *An Introduction to International Criminal Law and Procedure* (2019), at 445, 460.

⁶⁶R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2007, and 2014), at 393, 400, 478, 495 respectively.

⁶⁷I use intent here as equivalent to desire, will, purpose, or volition. See Rome Statute of the International Criminal Court, *supra* note 3, Art. 30; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, 7 February 2007, para. 351; further citing A. Eser, ‘Mental Elements–Mistakes of Fact and Law’, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 889, at 899.

⁶⁸Made clear by the Rome Statute provisions, and in light of the ordinary meaning of the term and the Statute’s drafting history.

⁶⁹Made clear by the Trial and Appeals Chamber judgments.

No other aspect of reparations is disputed. It is unclear whether any other aspect of reparations *could* convincingly be disputed. In all other aspects, reparations and penalties ordered by the ICC converge. In both cases, the authoritative Court compels an individual offender to suffer an unpleasant consequence as response to a crime committed under the Rome Statute. Both are dependent on a previous determination of guilt. The outcome is also identical: the individual has to comply and suffer the unpleasant consequence.⁷⁰ In punishment, this involves loss of liberty, and (potentially) material loss; in reparations, it involves material loss. To an outside observer with no knowledge of the ICC judges' or drafters' intent, it would be impossible to separate reparations orders from penalties, particularly penalties of pecuniary nature, such as forfeiture measures.⁷¹

In light of such observations, the focus of the orthodox position on intent is hardly surprising – no other route seems viable.

The analysis now turns to disputing the orthodox position. First, I advance rejoinders to the contextual assertions presented above, contending that the nature of reparations is, by regulatory design, ambiguous. Then, I revisit ICC reparations orders, proving that the ICC judges utilize reparations to achieve both remedial and punitive objectives – I also note that reparations are often better equipped to achieve primarily the latter.

3.2 *The ambiguous nature of reparations orders by design*

A key pillar of the orthodox position, as already outlined, rests on the drafters' design of reparations. Based on the placement and textual interpretation of specific provisions, as interpreted in light of the ordinary meaning and *travaux*, orthodoxy concludes that delegates at Rome did not see reparations as part of the Court's punitive apparatus.

I take exception to this stance, and submit the following points in response.

The fact that the regulatory framework explicitly acknowledges the compensatory nature of reparations, does not *ipso facto* preclude their exemplary nature. Both the Statute and the Rules alike are silent on the matter. All that is stated clearly is that '[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'. That reparations have a restorative, compensatory, rehabilitative objective is definitive. Yet, nowhere does the regulatory framework explicitly denounce the potential of reparations to fulfil punitive functions.

Reparations do indeed fall under Part 6 of the Rome Statute, which concerns the conduct of trial proceedings. Yet, this does not mean that reparations are to be counted as part and parcel of some airtight compartment altogether distinct from sentencing and punishment. Article 75 of the Statute declares that individual reparations orders are to be made 'directly against a convicted person'. This is repeated in Rule 98 of the ICC Rules.⁷² Both the Statute and the Rules are explicit in this point: the addressee of reparations orders must actually be a convicted individual. Conviction is one of two outcomes (the other being acquittal) of the trial itself, signalling the curtain fall. A guilty verdict is established at the very end of the proceedings. The determination and enforcement of reparations follows. Consequently, reparations belong firmly within the post-trial phase, the same phase where the ICC considers sentencing and penalties. The argument is only strengthened once we consider that Rule 98 falls under Chapter 4, entitled '[p]rovisions relating to various stages of the proceedings'.

⁷⁰Though may appeal the decision; see Rome Statute of the International Criminal Court, *supra* note 3, Art. 82(4).

⁷¹See *The Prosecutor v. Germain Katanga*, *supra* note 15, para. 17, with further references.

⁷²See Rules of Procedure and Evidence, *supra* note 8, Rule 98(1).

Both reparations and penalties are conditional on conviction. Before imposing reparations against the individual offender, the ICC must find the person guilty.⁷³ Previous conviction is paramount, even if this is ‘dissatisfactory to the victims’.⁷⁴ In case of acquittal, reparations cannot be issued.⁷⁵ Opposing voices have been raised, claiming that reparations should be ordered regardless of a guilty verdict; yet, such arguments have fallen short.⁷⁶ This observation serves to remind us that the ICC remains a criminal court – not a civil tribunal, not an arbitrator, nor a restorative justice mediator. Its nature is reflected on all aspects, including reparations.

Regarding the TFV and its non-punitive mandate, which allegedly carries over to reparations. Reparations may be implemented and/or complemented by the TFV, yet they are determined and issued by the ICC, which remains a criminal court. In addition, and besides handling reparations, the TFV may also deal with money and property collected through punitive forfeiture measures and fines.⁷⁷ While the ICC orders such measures as punishment, it may nevertheless transfer them to the TFV, to be used towards victim compensation. This does not change the nature of either forfeiture orders or fines – nor should it dictate the nature of reparations. The Trust Fund may well have a non-punitive mandate and utilize its funds towards a purely reparative purpose, yet this does not mean that ICC reparations orders must share such traits.

Turning to the arguments stemming from a contextual interpretation.

It shall be recalled that the orthodox position claims that the ordinary usage of the term ‘reparations’ underlines its non-punitive nature. Two points prove relevant here. First, the ICC has six official languages;⁷⁸ a focus on the term as used in English is too narrow to draw any definitive conclusions. Second, and though I concur that the term ‘reparations’ is commonly associated with redress, it would be excessive to claim that this marks a departure from the notion of the ICC punishment. This is because punishment in the ICC is also understood primarily in terms of redress. Indeed, the primary justification of the ICC penalties is retribution,⁷⁹ understood as condemnation of the crime, and acknowledgment of the harm.⁸⁰ In this fashion, retribution serves to redress international society’s and victims’ ‘need for truth and justice’,⁸¹ and may be viewed also as an expression of solidarity to the victims.⁸² This understanding of retribution matches the dictionary definition of the term: ‘to redress or repay a debt to society’.⁸³ In this light, reparation is not too detached a notion from retribution – since retribution is the primary objective and justification of ICC punishment, it may also be said that reparation is not far off the concept of the ICC punishment.

Regarding the understanding of the concept in international practice: it shall be recalled that the orthodox position utilizes examples stemming from the Permanent Court of Arbitration, the Inter-American Court of Human Rights, and the European Court of Human Rights case law.

⁷³As made clear in Rome Statute of the International Criminal Court, *supra* note 3, Art. 75(2) and Rules of Procedure and Evidence, *supra* note 8, Rule 98.

⁷⁴*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr, Trial Chamber V(a), 5 April 2016, para. 149; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2, 8 June 2018, para. 75.

⁷⁵*Prosecutor v. Jean-Pierre Bemba Gombo*, Final decision on the reparations proceedings, ICC-01/05-01/08-3653, Trial Chamber III, 3 August 2018, para. 3.

⁷⁶See *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, *supra* note 74, para. 201.

⁷⁷See Rome Statute of the International Criminal Court, *supra* note 3, Art. 79; this point is acknowledged also by McCarthy, *supra* note 29, at 78.

⁷⁸See Rome Statute of the International Criminal Court, *ibid.*, Art. 50.

⁷⁹M. A. Drumbl, *Atrocity, Punishment, and International Law* (2007), 35.

⁸⁰See *The Prosecutor v. Bosco Ntaganda*, *supra* note 13, para. 10.

⁸¹*The Prosecutor v. Germain Katanga*, Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04-01/07-3484-tENG, Trial Chamber II, 23 May 2014, para. 38.

⁸²D. Shelton, *Remedies in International Human Rights Law* (2015), 402.

⁸³This is matched by the etymology of the word which is ‘retribuere’, meaning ‘to recompense, to repay’; see Oxford Middle English, available at quod.lib.umich.edu/m/middle-english-dictionary/dictionary/MED37256.

The claim is that such case law provides for an appropriate context in which to assess the nature of ICC reparations. In response, it should be noted that the non-punitive nature of reparations in these courts is far from undisputed truism.⁸⁴ Even if that were so, it is doubtful whether such comparisons have the potential to prove fruitful in the first place. The ICC is not an arbitrator tasked with resolving tensions between parties, it is not a human rights tribunal, nor does it address its reparations orders to state actors. Instead, the ICC is a criminal court,⁸⁵ with a mandate of retributive justice, and preoccupied with addressing individual criminal liability.⁸⁶ It follows that any comparison should focus on the reparation regimes of similar courts and tribunals.⁸⁷ Yet, even such a comparison would be challenging, and it remains doubtful whether it could provide for a useful source of cross-pollination. As has been rightly noted, the ICC marks the ‘first real attempt to develop a reparation regime in the context of international criminal justice’.⁸⁸ Indicatively, the Nuremberg and Tokyo Charters did not mention victims.⁸⁹ The International Criminal Tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR) included scarce references to victim rights and reparations, of minimal practical importance.⁹⁰ The Special Court for Sierra Leone (SCSL) reparations regime has been similarly characterized as a missed opportunity, failing to substantially advance reparations.⁹¹ While the Extraordinary Chambers in the Courts of Cambodia (ECCC) attach reparations to individual liability, they nevertheless never permitted individual reparations awards, opting instead for a civil claims approach.⁹² In this light, ICC reparations orders are unique. The claim that international tribunals assign a solely compensatory nature to reparations (even if accurate) should not preclude any further examination of the ICC regime.

Concerning the argument deriving from the *travaux* analysis. It is true that early proposals explicitly referred to a punitive element of reparations, whereas later ones did not incorporate such references. However, the mere silence of the late proposals on the matter should not be taken to signal a concession (much less clear intent) to deprive reparations of any punitive function. It would be more accurate to read the omission of clarifying the nature of reparations as expressing the drafters’ desire to leave the final determination of the issue to the ICC itself. This would reflect the well-known tensions that arose in the negotiations process, and the general tendency of the drafters to allow a range of contradictions and ambiguities to remain in the ICC regulatory framework, ‘pushing problem solving into the future’.⁹³ In other words: the drafters strived to

⁸⁴See Barker, *supra* note 29, at 605; P. Pinto de Albuquerque and A. van Aaken, ‘Punitive Damages in Strasbourg’, in A. van Aaken and I. Motoc (eds.), *The European Convention on Human Rights and General International Law* (2018), 230; T. Hamilton and G. Sluiter, ‘Principles of Reparations at the International Criminal Court: Assessing Alternative Approaches’, (2022) *Max Planck Yearbook of United Nations Law Online* 272.

⁸⁵With the legal bite that this carries see G. Simpson, *Law, War and Crime* (2007), 57.

⁸⁶C. Stahn, *A Critical Introduction to International Criminal Law* (2019), 117; E. van Sliedregt, *Individual Criminal Responsibility in International Law* (2012), 17.

⁸⁷Including Nuremberg, Tokyo, Kosovo Special Chambers, Special Tribunal for Lebanon, Special Panels of East Timor, African Criminal Court, and domestic trials for international crimes (Control Council 10, Eichmann, Barbie, Touvier), among others.

⁸⁸F. McKay, ‘Are Reparations Appropriately Addressed in the ICC Statute?’, in D. Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (2000), 163.

⁸⁹S. Zappala, *Human Rights in International Criminal Proceedings* (2003), 220.

⁹⁰A. Cassese, *International Criminal Law* (2003), at 429; I. Bottiglieri, *Redress for Victims of Crimes under International Law* (2004), 202.

⁹¹See Evans, *supra* note 49, at 184.

⁹²J. P. Pérez-León-Acevedo, ‘Reparation Modalities at the Extraordinary Chambers in the Courts of Cambodia (ECCC)’, (2020) *The Law & Practice of International Courts and Tribunals* 451, at 455-6; C. Sperfeldt, *Practices of Reparations in International Criminal Justice* (2022), 205.

⁹³*Ibid.*, at 167; see also I. Bottiglieri, *Redress for Victims of Crimes under International Law* (2004), 225; C. Sperfeldt, ‘Rome’s Legacy: Negotiating the Reparations Mandate of the International Criminal Court’, (2017) 17(2) *ICLR* 351; C. Muttukumaru, ‘Reparations to Victims’, in S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute, Issues, Negotiations, Results* (1999), at 262; see Evans, *supra* note 49, at 86, 100; C. Ferstman, ‘The Reparation Regime of the International Criminal Court: Practical Considerations’, (2002) 15 *LJIL* 667. Cf. Hamilton and Sluiter, *supra* note 84, at 276.

reach a negotiation consensus, which would allow for the finalization of the Statute. To this end, and instead of making concessions and explicitly dictating one way or another, they left the thorny matter of reparations to be decided in the future, by the ICC, on a case-by-case basis. This is reflected in today's Article 75(1), which declares that it is the task of the Court to 'establish principles relating to reparations'. Granted, the Court is explicitly obliged to account for victim restitution, compensation and rehabilitation objectives – yet is otherwise unfettered in its task. The *travaux* never prohibited reparations from pursuing a punitive goal, on top of their compensatory one.

The volition of the drafters and the intentional community – as inferred by the regulatory framework, *travaux*, and context – expressly equips reparations with compensatory goals, yet is not at all clearly excluding exemplary objectives. Claiming that regulatory and contextual arguments establish the non-punitive nature of the ICC individual reparations is a feeble claim. On the contrary, the nature of reparations remains ambiguous, open to interpretation – and definitely far from renounced.

I have shown that the nature of reparations remains ambiguous, in light of the regulatory framework and context. Yet, this argument alone remains insufficient to establish the article's premise. To successfully undertake such a task, one would necessarily have to also consider the practical implementation of reparations by the ICC judges themselves. It is to this task the analysis now turns.

3.3 The dual nature of reparations orders in practice

An analysis of the reparations orders themselves reveals that the ICC imposes reparations pursuing the same objectives with penalties; and, similar to punishment, reparations are often better equipped to achieve primarily retributive functions.⁹⁴

Punishment in the ICC is traditionally understood as seeking retributive, deterrent, rehabilitative, and expressive goals.⁹⁵ I shall be first sketching each objective, before explaining how they apply to reparations.

Retribution, as already noted, justifies punishment by viewing it as the condemnation of the international community. Penalties hold the perpetrator accountable for their acts,⁹⁶ simultaneously acknowledging the harm caused to the victims.⁹⁷ Now, if reparations do not have any punitive objective, the following statement must hold true: 'reparations orders do not hold the perpetrators accountable, nor acknowledge the harm caused'. Yet, this is simply untrue. Such orders are dependent on the culpable commission of a codified crime that merits retribution.⁹⁸ More importantly, and as made evident in the latest reparations order, reparations seek to 'oblige those responsible for serious crimes to repair the harm they have caused and enable the Court to ensure that offenders account for their acts'.⁹⁹ In this fashion, reparations acknowledge both the victim suffering and the perpetrator responsibility, fulfilling the retributive purpose of punishment.¹⁰⁰

⁹⁴The question of whether ICC reparations and penalties achieve their objectives in practice in an appropriate, just manner, is a matter that escapes the scope of this article, as it warrants its own, separate discussion. See indicatively L. Moffett and C. Sandoval, 'Tilting at Windmills: Reparations and the International Criminal Court', (2021) 34 LJIL 749, at 754; I. Tallgren, 'The Sense and Sensibility of International Criminal Law', (2002) 13 EJIL 561; T. Krever, 'International Criminal Law: An Ideology Critique', (2013) 26 LJIL 701.

⁹⁵Similar to reparations, the Statute itself does not provide for any explicit, detailed answers in this regard; the 'traditional understanding' I speak of refers to the literature, and the sentencing judgments of the ICC, as cited in the following paragraphs.

⁹⁶See Drumbl, *supra* note 79, at 35; D. Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice', (2009) 31 HRQ 592, at 599.

⁹⁷See *The Prosecutor v. Bosco Ntaganda*, *supra* note 13, para. 10.

⁹⁸For a more general discussion see R. A. Duff, 'Torts, Crimes and Vindication: Whose Wrong Is It?', in M. Dyson (ed.), *Unravelling Tort and Crime* (2014), 146, at 155.

⁹⁹See *The Prosecutor v. Bosco Ntaganda*, *supra* note 13, para. 2.

¹⁰⁰*Ibid.*, para. 3; see *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 9, para. 65.

Deterrence strives to ensure that similar crimes do not occur in the future. Punishment is justified as it instils fear and deters both potential offenders *in abstracto* and the individual perpetrator *in concreto*.¹⁰¹ Once more, if reparations do not fulfil any punitive objective (as per the orthodox understanding), it follows that reparations orders are *not* in place to deter offenders. Yet, the ICC explicitly states that '[r]eparations also aim, to the extent possible and achievable, to . . . deter future violations'.¹⁰² Once more, the phrasing of the Court is rather straightforward, confirming that deterrence forms one of the purposes of reparations, similar to penalties.

Punishment is also meant to rehabilitate. The objective here is to reconcile offender, community, and victim, so that the offender may be reintegrated and re-join society in conditions of peace.¹⁰³ This exact purpose is fulfilled by reparations as well. This is made evident by Article 75 of the Statute, which explicitly acknowledges rehabilitation as one of the purposes of reparations. The ICC adopts the same stance. Characteristically, *Ntaganda* notes that reparations 'may assist in promoting reconciliation between the victims of the crime, the affected communities, and the convicted person',¹⁰⁴ a position echoed in previous reparations orders too.¹⁰⁵

Punishment holds an expressive purpose too, aligning with the well-known Durkheimian notion that sentencing reflects and confirms society's 'moral opprobrium'.¹⁰⁶ Punishment is justified as a pedagogical tool,¹⁰⁷ which may 'show victims that their wrongs are taken seriously and demonstrate respect for perpetrators by treating them as responsible agents'.¹⁰⁸ In similar fashion, reparations orders are addressed to the convicted person, while acknowledging the harm suffered by the victims. In this manner, reparations acknowledge harm and suffering in a meaningful, personal way,¹⁰⁹ appreciating 'the individual dimension of the crimes'¹¹⁰ and underscoring the value of each human being by recognizing victims as rights-holders.¹¹¹ Simultaneously, reparations orders are made in public, imposed by a criminal tribunal in the aftermath of prosecution and conviction, obliging the defendant to suffer an unpleasant

¹⁰¹See *The Prosecutor v. Bosco Ntaganda*, *ibid.*, para. 10, with further references; Rome Statute of the International Criminal Court, *supra* note 3, Preamble; for an analysis see O. Triffterer, 'The Preventive and Repressive Functions of the ICC', in M. Politi and G. Nesi, *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001), 137, at 143; H. Jo and B. A. Simmons, 'Can the International Criminal Court Deter Atrocity?', (2016) 70 *International Organization* 443; D. Bosco, 'The International Criminal Court and Crime Prevention: Byproduct of Conscious Goal', (2010) 19 *Michigan State University College of Law Journal of International Law* 163, at 172.

¹⁰²See *The Prosecutor v. Bosco Ntaganda*, *supra* note 13, para. 3 (emphasis added).

¹⁰³*The Prosecutor v. Bosco Ntaganda*, Sentencing Judgment, ICC-01/04-02/06-2442, Trial Chamber VI, 7 November 2019, para. 10, with further references. For an analysis see S. D'Ascoli, *Sentencing in International Criminal Law* (2011), 273; E. Riegler, 'Rehabilitating Enemies of Mankind: An Exploration of the Concept of Rehabilitation as a Sentencing Aim at the ICTY and the ICC', (2020) *ICLR* 701, at 721; E. Baumgartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court', (2008) 90 *International Review of the Red Cross* 409.

¹⁰⁴See *The Prosecutor v. Bosco Ntaganda*, *supra* note 13, para. 82.

¹⁰⁵See *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 14, para. 28; ICC-01/04-01/06-3129-AnxA, *supra* note 16, para. 71.

¹⁰⁶As expressed by R. Henham, 'Some Issues for Sentencing in the International Criminal Court', (2003) 52(1) *The International and Comparative Law Quarterly* 81, at 83; see further S. Nimaga, 'An International Conscience Collective? A Durkheimian Analysis of International Criminal Law', (2007) 7 *ICLR* 561; I. Tallgren, 'The Durkheimian Spell of International Criminal Law', (2013) 71 *Revue interdisciplinaire d'études juridiques* 137.

¹⁰⁷See *The Prosecutor v. Bosco Ntaganda*, *supra* note 103, para. 10, with further references. On the expressive function of punishment in the ICC see R. D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', (2007) 43 *Stanford Journal of International Law* 39; B. Sander, 'The Expressive Turn of International Criminal Justice: A Field in Search of Meaning', (2019) 32(4) *LJIL* 851.

¹⁰⁸R. A. Duff, 'Authority and Responsibility in International Criminal Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 589, at 594.

¹⁰⁹See *The Prosecutor v. Bosco Ntaganda*, *supra* note 13, para. 82; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 14, para. 49; *The Prosecutor v. Germain Katanga*, *supra* note 15, para. 298; ICC-01/04-01/06-3129-AnxA, *supra* note 16, para. 34.

¹¹⁰J. P. Pérez-León-Acevedo, 'The Katanga Reparation Order at the International Criminal Court: Developing the Emerging Reparation Practices of the Court', (2018) 36(1) *Nordic Journal of Human Rights* 91, at 97.

¹¹¹L. Magarrell, *Reparations in Theory and Practice* (2007), 5.

consequence. It follows that reparations orders have a high potential to stigmatize the individual offender, while also sending a message to potential future victims and perpetrators alike. Similar to punishment, ICC reparations orders reflect the judgment of international society in its entirety.¹¹²

On the basis of such observations, it becomes clear that the ICC employs reparations to address also retributive, deterrent, rehabilitative, and expressive concerns. Such considerations are not merely incidental, an afterthought to compensatory objectives. On the contrary, the exemplary purposes of reparations are indispensable. Reparations orders must, by definition and design, hold the convicted individual accountable, acknowledge the harmful consequences suffered by the victims, entail consequences that seek to dissuade future offenders, pursue the reconciliation between offender, society, and victim(s), and express the international community's condemnation of the crime, and sympathy towards the victim. A reparations order that does not pursue these goals is no reparations order at all. One may no longer convincingly claim that reparations orders aim solely towards acknowledging and remedying victim harm, as suffered by the defendant's hands. The ICC reparations regime blends reparative *and* punitive rationales, in theory and in practice. In short, punitiveness emerges as a *conditio sine qua non* of reparations.

Two considerations, as potential rejoinders to my argument, remain to be addressed.

One may stand as a non-punitive reading of reparations, claiming that the ICC itself treats them as such, especially after *Ntaganda* detached reparations from individual liability. Yet, this argument is circular. It claims that reparations are non-punitive because they are detached from individual liability – yet reparations are detached from individual liability exactly because they are deemed non-punitive. To escape this fallacy, and to clearly establish the non-punitive nature of reparations orders, one would need to justify both points cumulatively, presenting reasons as to why: (i) the determination of reparations should exclude individual liability and focus solely on victim harm, *and*; (ii) an exclusive focus on victim harm renders reparations entirely non-punitive, in spite of the punitive purposes pursued. The argument presented above falls short of satisfactorily fulfilling both tasks.

Perhaps more convincingly, one may focus on the practical impact of reparations orders on the convict. Reparations orders have been faced with implementation issues, no less because those convicted by the ICC prove indigent, with no assets to pay over to their victims.¹¹³ Indeed, so far none of the five individuals has paid. In this light, one may argue that the arguments I have outlined before are moot: a reparations order that has no impact on the perpetrator, and hence fails to effectively achieve any retributive objectives, is no punishment at all.

Such an argument may be rebutted on the basis of three observations. First, it is probable that, in the future, an individual offender will not be found indigent.¹¹⁴ Second, the fact that the convict is indigent at the moment of proclamation does not absolve them of any responsibility. Instead, they still bear the burden of paying to the TFV – reparations orders do not expire, but rather remain in force *ad infinitum*, hanging over the individual's head as the proverbial sword of Damocles.¹¹⁵ Third, and while the indigent convict may well escape the narrow consequences of deprivation of property, the expressive condemnation and retributive force of the reparations order remains.¹¹⁶ In other

¹¹²M. U. Walker, 'The Expressive Burden of Reparations: Putting Meaning into Money, Words, and Things', in A. MacLachlan and A. Speight (eds.), *Justice, Responsibility and Reconciliation in the Wake of Conflict* (2013), 205, at 211; Dwertmann, *supra* note 29, at 31. Note also B. C. Zipursky, 'A Theory of Punitive Damages', (2005) 84 *Texas Law Review* 105.

¹¹³A risk that was foreseen early, see S. Garkawe, 'Victims and the International Criminal Court: Three Major Issues', (2003) 3(4) *ICLR* 345.

¹¹⁴See McCarthy, *supra* note 29, at 240.

¹¹⁵Regulations of the Court, Regulation 117; *The Prosecutor v. Bosco Ntaganda*, *supra* note 13, paras. 97, 221; *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 9, para. 70; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Final Submissions on the reparations proceedings, ICC-01/12-01/15-225, 16 June 2017, para. 29.

¹¹⁶Similarly, one may hardly suggest that a custodial sentence is not punitive, if the convict passes away before the execution of the sentence begins – the very proclamation of the penalty carries enough force on its own to warrant treating it as a punitive measure at the moment, regardless of whether enforcement follows suit.

words: while the compensatory purpose of reparations orders may never be fulfilled (since the convict will never pay to the victims), their retributive purpose is always satisfied.

This last point is particularly important, as it marks another parallel between reparations and penalties. Indeed, it has been noted that sentencing and punishment in the ICC often fulfil primarily retributive functions.¹¹⁷ Non-retributive concerns remain normatively relevant, yet often prove largely impossible to achieve.¹¹⁸ The same holds true for reparations, as made clear in the reparations orders themselves. Characteristically in *Ntaganda*, it was noted that holding those responsible accountable for their acts is, in fact, the *main purpose* of reparations.¹¹⁹ Other objectives, including deterrence, rehabilitation, and, most importantly, achieving victim-oriented justice, remain equally important, normatively – yet practically, they are to be pursued *to the extent possible and achievable*.¹²⁰ Similar observations are to be found in all reparations orders.¹²¹ It becomes clear that reparative goals such as the relief of victim suffering, while normatively important, may practically assume a more ancillary role.¹²² Accountability via retribution, while not the sole nor absolute priority, is often the principal role that reparations effectively fulfil.¹²³ Simply put, the ICC has been ‘primarily established to try an accused, not to award reparations to victims’¹²⁴ – a reality that is clearly reflected in judicial practice.

In light of such considerations, reparations remain punitive, regardless of the financial status of their addressee.

3.4 Reparations as simultaneously remedial and punitive measures

It is maintained that reparations are not at all incompatible or distinct to penalties, as the orthodox position would have it. Reparations are linked to criminal prosecution, trial, and proclamation of guilt, and inexorably pursue punitive goals identical to penalties – often fulfilling primarily retributive functions. Reparations and penalties do not stand opposite one another. They are, rather, complementary, contributing equally towards ending impunity.¹²⁵ Instead of being incompatible as oil and vinegar, compensatory and exemplary objectives and functions ‘combine to make an acceptable salad dressing’.¹²⁶

¹¹⁷See Rome Statute of the International Criminal Court, *supra* note 3, Preamble, paras. 3–5; Drumbl, *supra* note 79, at 35; D’Ascoli, *supra* note 103, at 271; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, Trial Chamber VIII, 27 September 2016, para. 66; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, Trial Chamber III, 21 June 2016, para. 10. See also J. Klabbbers, ‘Just Revenge? The Deterrence Argument in International Criminal Law’, (2001) 12 *Finnish Yearbook of International Law* 249, at 251; S. H. Song, *International Criminal Court: The Centrepiece of an Evolving System of International Criminal Justice* (2013), 1.

¹¹⁸M. M. Deguzman, ‘Proportionate Sentencing at the International Criminal Court’, in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), 946. Note also *The Prosecutor v. Bosco Ntaganda*, *supra* note 103, para. 10; *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 117, para. 11; S. Ford, ‘A Hierarchy of the Goals of International Criminal Courts’, (2018) 27 *Minnesota Journal of International Law* 179, at 235.

¹¹⁹See *The Prosecutor v. Bosco Ntaganda*, *supra* note 13, para. 2.

¹²⁰*Ibid.*, para. 3.

¹²¹See ICC-01/04-01/06-3129-AnxA, *supra* note 16, paras. 2, 71; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 14, paras. 27–28; *The Prosecutor v. Germain Katanga*, *supra* note 15, para. 15.

¹²²See Stahn, *supra* note 61, at 813.

¹²³This is why reparations are conditional on conviction, and why counterproposals have been rejected; see A. Wiersing, ‘Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court’, (2012) 4 *Amsterdam Law Forum* 21, at 31.

¹²⁴As noted in F. Capone, ‘An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage’, (2018) 16 *Journal of International Criminal Justice* 645, at 649, with further citations. Note also *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 74, para. 75.

¹²⁵See Rome Statute of the International Criminal Court, *supra* note 3, Preamble, paras. 4, 5; Drumbl, *supra* note 59, at 243.

¹²⁶As stated by Lord Hoffmann in *The Gleaner Co Ltd v. Abrahams*, [2004] 1 AC 628, 647.

4. Implications and the need for reform

Revealing that the orthodox position is out of kilter with reality has clear and profound implications for the understanding and application of reparations against individual convicts.

The analysis has shown that punishment is also a purpose of reparations orders. Yet, currently reparations are not treated as a (at least quasi-) punitive measure. This disparity is problematic for the individual convict. The (intended) onus of the ICC financial penalties and reparation orders is identical. Reparations have, or at least strive to have, equally adverse consequences for the offender, regardless of their official classification as punishment (or lack thereof).¹²⁷ Acknowledging that the victims have suffered adequately justifies the remedial pursuit of reparations orders, yet it does not explain why this remedy must come at the offender's expense.¹²⁸ This becomes possible only if we acknowledge the offender's guilt. This guilt is determined by a criminal court that obliges the individual to suffer a series of unpleasant consequences in response to criminal wrongdoing.

Despite this, current ICC practice detaches them from individual culpability, focusing solely on the harm inflicted to the victims. This is problematic, as it creates an unwarranted distinction. ICC penalties must meet certain requirements, in accordance with the principles of legality and proportionality. Imposing punitive measures (i.e., measures that serve punitive objectives and functions) that are not codified as such by the Statute goes against Article 23 that enshrines the *nulla poena sine lege* principle. Similarly, punitive reparations should be assessed under the lens of the *ne bis in idem* (prohibition of double jeopardy) principle.¹²⁹ As for proportionality: punishment should fit the crime, and ICC judges should strive to calibrate sentencing decisions to the individual culpability of the offender.¹³⁰ Reparations orders are punitive in nature, yet do not match the culpability of the perpetrator. To be just, principles should be laid out that ensure that ICC reparations orders should equally adhere to these principles. There must be clear limits and rationales produced by the ICC and followed consistently. This would also ensure that everything is in line with the principle of legality, as it would allow defendants to have sufficient notice, and avoid the risk of wide, unwarranted disparities.

It follows that the current reparations regime needs to be reconsidered. The ICC needs to account for the current clash between the punitive aspects of reparations, on the one hand, and individual prerogatives and good sentencing principles, on the other.¹³¹ Two potential avenues are briefly sketched here. First, the ICC could formally acknowledge the punitive nature of reparations, bringing them firmly under the penalties framework.¹³² A scenario where the Court formally imposes reparations as punishment would solve the tension with sentencing principles, while also fulfilling the purposes of reparations, retribution, deterrence, rehabilitation, and

¹²⁷G. P. Fletcher, *The Grammar of Criminal Law: Volume Two: International Criminal Law* (2019), 59.

¹²⁸C. Morris, 'Punitive Damages in Tort Cases', (1931) 44(8) *Harvard Law Review* 1173, at 1177.

¹²⁹C-F. Stuckenberg, 'Cumulative Charges and Cumulative Convictions', in Stahn, *supra* note 118, at 841; Rome Statute of the International Criminal Court, *supra* note 3, Art. 20; *The Prosecutor v. Germain Katanga*, *supra* note 23, para. 185.

¹³⁰*The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, Trial Chamber I, 13 July 2012, para. 26; *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 117, para. 11: 'The objectives underlying sentencing are fulfilled with "the imposition of a just and appropriate sentence, and nothing more". As reflected in Art. 81(2)(a) and Rule 145(1), and as emphasized by the Appeals Chamber, the sentence must be proportionate to the crime and the culpability of the convicted person.' See also D'Ascoli, *supra* note 103, at 292; M. M. DeGuzman, 'Proportionate Sentencing at the ICC', in Stahn, *supra* note 118, at 933. K. Ambos, *Treatise on International Criminal Law* (2014), vol. II, at 293. G. Werle and A. Epik, 'Theories of Punishment in Sentencing Decisions of the International Criminal Court', in F. Jeßberger and J. Geneuss (eds.), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law* (2020), 323, at 337.

¹³¹S. Zappala, 'The Rights of Victims v. the Rights of the Accused', (2010) 8 *Journal of International Criminal Justice* 137, at 140.

¹³²Another suggestion revolves around the ICC construing its own *sui generis* torts liability system; note Hamilton and Sluiter, *supra* note 84, at 304. I am not convinced: the ICC deals with crimes, not torts, contracts, or equitable wrongs.

condemnation.¹³³ Such a course of action should also revisit procedural and evidentiary principles relating to victim participation in reparations proceedings.¹³⁴ Second, as an alternative, the ICC could detach individual reparations from criminal proceedings and the need for a guilty verdict altogether.¹³⁵ As suggested elsewhere, the ICC could establish the principles relating to the scope and extent of damages, and appropriate form of reparations – yet avoid issuing reparation orders against accused and convicted individuals.¹³⁶ Detaching reparations from prosecution would move the reparations mandate towards fully restorative justice.¹³⁷ Instead of the Court acting *proprio motu*, it could attach the entire regime to prior consent of both offender and victim, who would meet in a non-adversarial, collaborative setting. Rather than obliging individuals to pay, the ICC should instead extend an invitation to this end. The offender could either refuse, or voluntarily accept responsibility and seek to make sincere amends, instead of being forced to by the Court.¹³⁸

My remarks here are not meant to be exhaustive – further reflection should yield alternative paths. Importantly, it should be noted here that ICC judges remain bound by the Statute limitations. Any formal changes to the current statutory and procedural framework can only be enacted by the Assembly of States Parties (ASP),¹³⁹ which shall likely prove a significant practical hurdle.¹⁴⁰

5. Conclusion

Reparations are a useful tool, which complements the Court's task of ending impunity. Yet to end impunity, we should take care to properly define the concept, alongside its inverse *poena*. To this day, the orthodox position abides by a narrow reading of the latter term, proclaiming that it is delimited by the black letter of Article 76 itself, and the alleged non-punitive volition of ICC drafters and judges. I have shown that this reading is overly restrictive. The close nexus between reparations and criminal trial and conviction, alongside the ambiguity of the regulatory framework, the explicit acknowledgment of punitive goals in reparations orders, the (at least intended) onus on the individual, and the practical considerations that often result in reparations fulfilling primarily retributive functions, are all factors that must be considered, for they go against the reading of reparations as entirely non-punitive measures. In consequence, the dual nature of reparations orders must be acknowledged and accounted for. Reparations do not stand opposing, but rather complementing punishment. Overthrowing the traditional understanding has important prescriptive implications, as mapped in the previous section.

Further reflection on this topic is pivotal. This contribution aspires to set the stage for future discussion, which should be grounded on the following observation: a principled approach, and a coherent system of legal rules and principles that govern reparations, is in order.¹⁴¹ The ICC reparations regime needs to be revisited, and revised. In accordance with the Statute, this task falls

¹³³See Drumbl, *supra* note 59, at 260; also T. Campbell, 'Compensation as Punishment', (1984) 7 *UNSW Law Journal* 338.

¹³⁴See Hamilton and Sluiter, *supra* note 84, at 304.

¹³⁵See M. Cohen, *Realizing Reparative Justice for International Crimes: From Theory to Practice* (2020), 210.

¹³⁶See Moffett and Sandoval, *supra* note 94, at 1216. Arguably, detaching reparations from conviction would allow the ICC and TFV to more effectively and efficiently address victim needs altogether.

¹³⁷J.-A.M. Wemmers, *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (2014), 222.

¹³⁸A. Cuppini, 'A Restorative Response to Victims in Proceedings before the International Criminal Court: Reality or Chimera?', (2021) *ICLR* 328.

¹³⁹See Rome Statute of the International Criminal Court, *supra* note 3, Art. 121.

¹⁴⁰I thank the anonymous reviewer for inviting my attention to this point.

¹⁴¹Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report (2020), available at asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

first to the ICC judges, who must account for the dual (remedial *and* punitive) nature of reparations. A challenging, yet very much necessary endeavour, for the fairness and effectiveness of the Court depend on it.

Whichever path the ICC follows, we should recall that its cause is that ‘of all humanity’¹⁴² – including individual offenders, the rights of which must be respected.

¹⁴²As noted by the Former United Nations Secretary-General Kofi Annan.