Reparations for international crimes and the development of a civil dimension of international criminal justice

Cohen, M.G.

CHAPTER 2: THE CONTENT OF REPARATION FOR VICTIMS OF INTERNATIONAL CRIMES: THE EXPERIENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

I. INTRODUCTION

In the previous chapter, this thesis examined the divide between punishment and reparations in theories of justice, and how areas of law other than international criminal law treat the question of reparation for victims. The aim of the previous chapter was to lay the foundation of the paradigm of individual versus individual: the construction of a legal duty upon individuals to give reparations to victims. It was noted that throughout the development of international law, a divide between State responsibility and individual criminal accountability has existed. While a State cannot be criminally convicted, and it is individual perpetrators that actually commit international crimes, with or without the apparatus of the State, international criminal justice law was originally conceived as a tool to bring the actual perpetrators to justice, thus enforcing international law.

Alongside this development, international human rights law was conceived so that victims can have a forum to claim reparation for human rights violations from the injuring State. Before regional human rights courts and mechanisms, victims can enforce their right to reparation against States. Thus, human rights law was created in parallel to the law on State responsibility, which applied purely on an inter-State level, leaving individual victims without an avenue when it came to reparations for harm they had suffered as a consequence of acts of other States.

International human rights law has thus filled the gap that existed before: it has provided victims with the right to seek reparation directly from their own States[163]. Victims' right to reparation has been solidified in the jurisprudence of human rights courts and mechanisms. These institutions have contributed a great deal to the elucidation of

[163] For reparation to victims of international wrongs committed by third States, see the law on the treatment of aliens: see generally, Edwin Borchard, *Diplomatic Protection of Citizens Abroad of the Law of International Claims*, Banks Law Publishing, 1919. This body of law however deals with claims on an inter-State level.

principles and forms of reparation under international law. Much can be learned from their experience.

Another development in international law, which is the main focus of the present study, happened through the integration of reparation for victims of international crimes within international criminal justice, which from its nature is divorced from State responsibility and focuses on individual criminal responsibility. Thus, reparation in international criminal law may fill another gap: where State responsibility (in the international human rights system or otherwise) is not engaged, victims may be able to claim a right of reparation against the individual perpetrator as discussed in the previous chapter.

In this context, in this early stage of the development of applicable principles on reparations in international criminal justice and of the architecture of the jurisprudence from the ICC, it is important to reflect upon the content of the legal duty to repair. In this development of reparations under international criminal law, principles of reparations will need to be solidified and many difficult questions will arise.

Having discussed the legal basis of the duty to repair under international criminal law at the international level, the aim of the present chapter is to dwell upon the contents of a duty to repair for individuals and to what extent the case law on the contents of duties to repair for States can be transposed to the international criminal law setting. This chapter has a specific focus and attempts to address some subsidiary research questions as outlined above[164]: what is the scope and content of a duty to repair for individuals? To what extent can principles and the case law on the duty of States to repair inform the duty to repair for individuals?

This chapter addresses these questions through the study of international human rights jurisprudence on reparation and how the latter may inform the development of the content of a duty to repair for individuals in international criminal law. This chapter uses the jurisprudence of the Inter-American Court of Human Rights ("IACtHR") given that this Court has the most far-reaching jurisprudence in the development of the doctrine and

[164] Cf. Introduction to the present thesis.

practice of reparation. The selection of the jurisprudence of the IACtHR is thus aimed to be focused and provide a case-study which can inform the content of the legal duty to repair in international criminal law. In particular, through the analysis of some key cases from the IACtHR, this chapter proposes how concretely it can inform individuals' duty to repair. It is acknowledged that the study of international human rights jurisprudence and the comparison between human rights law and international criminal law pose very broad questions; the purpose of this chapter is however limited and focused, and will thus not address an exhaustive discussion of these questions.

This chapter focuses on international human rights law due to the similarities of the two fields: like in international criminal law, under international human rights law, victims are the direct beneficiaries of reparations. Additionally, the violations that are the object of international human rights law are similar to those in international criminal law. Furthermore, the link between international human rights law and international criminal law has been recognized as: "The reference to human rights in the [Rome] Statute is an important recognition of victims' rights as jurisprudence on redress in international and regional human rights systems … has significantly contributed to developing the concept of reparations"[165].

It should be explained, at the outset, that due to some significant and systemic differences of a system based on State responsibility, and one based on individual responsibility, the principles and case-law of the IACtHR cannot be directly transposed to international criminal law; rather, it is submitted that it may provide some guidance as to the contents and scope of the legal duty to repair under international criminal law.

Within the context of the ICC concerning principles of reparation, it is interesting to note that Parties and participants, as well as the Chamber itself, have referred to the jurisprudence of regional human rights courts, particularly the IACtHR and the European Court of Human Rights, as well as other texts and documents dealing with the question of

[165] Gilbert Bitti & Gabriela Gonzalez 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*, The International Bureau of the Permanent Court of Arbitration, Oxford University Press, 2006, p. 312.

reparations under international law[166]. It is submitted that this is a positive development demonstrating the interconnectedness of different fields of international law.

In its first Decision on Reparations, ICC Trial Chamber I recognised the relevance of the experience of human rights institutions, in stating that

> "given the substantial contribution by regional human rights bodies in furthering the right of individuals to an effective remedy and to reparations, the Chamber has taken into account the jurisprudence of the regional human rights courts and the national and international mechanisms and practices that have been developed in this field"[167].

Against this background, in the present chapter, this thesis examines how the content of the duty of States to provide reparations to individuals for human rights violations developed particularly at the IACtHR could inform the content of the legal duty of reparations for individuals.

While not intended to be exhaustive, the present chapter aims at shedding light on some interesting aspects of the case-law of the IACtHR that could inform the doctrinal foundations of the reparations jurisprudence of the ICC. It also discusses how systemic and structural differences between the ICC and the IACtHR may affect the extent to which the ICC can directly draw on IACtHR case law or whether it should be informed by it in a more general and indirect manner. The underlying theme of this chapter is that the principles and contents found in international human rights law may inform the content of the legal duty of individuals to repair in international criminal law. Overall, it is submitted that much can be learned from a continuous dialogue among regional and international institutions committed to the promotion of international justice and the rule of law[168].

---

[166] See e.g., ICC, *Prosecutor* v. *Thomas Lubanga Dyilo*, "Decision establishing the principles and procedures to be applied to reparations", 7 August 2012, ICC-01/04-01/06 ("Decision on Reparations"), para. 186 and footnote 377.

[167] *Ibid*.

[168] See in this regard, Antônio Augusto Cançado Trindade, *State responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Inaugural Address as Honorary Professor to the Chair in 'International and Regional Human Rights Courts', 10 November 2011 at Utrecht University, pp. 57-65.

II. INTERNATIONAL HUMAN RIGHTS COURTS AND INTERNATIONAL CRIMINAL COURTS: DIFFERENCES AND SIMILARITIES

International human rights courts, especially the IACtHR, have dealt with numerous cases of mass human rights violations, including cases of massacres. Much can be learned in terms of reparation for mass atrocities by looking to the jurisprudence of the IACtHR on this topic, considering its vast expertise and experience in the field. While this section examines general principles of reparation that could inform the architecture of the reparation scheme under international criminal law, attention will be given to cases of mass violations due to their similarity with international crimes and also the fact that often mass violations of human rights amount to international crimes[169].

The systems under which the IACtHR and the international criminal courts and tribunals operate share some similarities, but they are also divided by some structural and conceptual differences. For example, it has been noted that, although set up for the precise purpose of examining claims for reparation, human rights treaty bodies and human rights courts often suffer from limited budget and institutional constraints[170]. Furthermore, by their very nature, these institutions have to grapple with the individualized nature of human rights complaints when dealing with broader mass atrocities and mass victimisation. These constraints also form part of the reality under which the ICC operates. The main similarity between these two systems, it can be argued, rests on the nature of the violations that underlie both systems: international crimes involve mass violations of human rights. As it has been argued:

> "The practice of international human rights law bodies, like the IACtHR, is relevant for the ICC, not only because the Rome Statute clearly states that 'the application and interpretation of law pursuant to [article 21] must be consistent with internationally recognised human rights' but also

[169] See e.g. the crime of torture, which is considered a violation of human rights, which has been dealt with in many instances by human rights courts, and may also amount to an international crime, see e.g. Article 7 of the Rome Statute.

[170] See e.g. *Annual Report of the European Court of Human Rights*, 2006, Foreword by Jean Paul Costa, President of the European Court of Human Rights, p. 5 et seq.

> because most of the time the crimes that the ICC deals with also constitute a breach of international human rights law"[171].

In a similar vein, former ICC Judge Odio-Benito, stated that:

> "The extensive case law of the Inter-American Court of Human Rights, which has defined crucial concepts such as moral damage, damage to a life plan, and has interpreted the right to receive reparations taking into account the particu- larities of groups or communities (such as indigenous groups), could certainly serve as an exemplary model for our future judicial work"[172].

Importantly, however, some inherent and systemic differences between the IACtHR (and human rights systems more generally) and the ICC (and other international criminal courts) have a direct impact on how the jurisprudence of the IACtHR may influence the development of principles of reparation within the ICC. These differences make it impossible to *directly* transpose and apply the jurisprudence of the IACtHR to the ICC context, or more generically, to international criminal law.

For example, human rights reparations are awarded by a State to victims (individual or collective reparation awards), rather than against individual perpetrators of international crimes. With regards to the form of reparations and the principles followed for the award thereof, it is true that not all forms of reparation awarded on the basis of State liability can be directly transposed to international criminal proceedings, which is not aimed at State liability. This is a pivotal difference as some of the forms of reparation that have been awarded at the IACtHR which may require the participation of the State in question – for example, a change in legislation, or the building of a memorial, or the continuation of investigations – cannot be directly transposed to the ICC context and applied to individual perpetrators.

---

[171] See Octavio Amezcua-Noriega, "Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections", *Reparations Unit, Briefing Paper No.1*, Dr. Clara Sandoval, University of Essex, 2011, no. 13.

[172] Elizabeth Odio-Benito, "Foreword", in *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al. (ed.), Nijhoff, 2009, p. 3.

Furthermore, the aim of human rights systems is to examine claims of reparation against a State for its failure to prevent, punish or protect claimant victims. Conversely, reparation within an international criminal tribunal is a direct consequence of an international crime perpetrated by an individual. If one looks at Article 75 of the Rome Statute, the award of reparations depends on the conviction of the alleged perpetrator, whereas convictions of individual perpetrators are not necessary for the award of reparations at the IACtHR.

This also highlights a systemic difference between the ICC and the IACtHR pertaining to the objective of each system, and the role of victims therein: whereas in the IACtHR victims are parties, and the proceedings are aimed at deciding whether there has been a violation for which appropriate reparation is required, at the ICC, victims are participants in the proceedings, and their claims for reparation are not the principal object of the proceedings against the accused, but rather one possible consequence of a guilt verdict. Finally, as discussed in more detail below, the applicable law at the ICC may also limit the extent to which the ICC can use the jurisprudence of the IACtHR.

These important systemic, conceptual and structural differences that separate both systems need to be taken into account when assessing whether the jurisprudence of the IACtHR can be directly transposed to the ICC. Nevertheless, the principles developed by the IACtHR, along with its learned expertise, may prove helpful to the conception of the principles of reparation at the ICC. Specifically, the practice of the IACtHR may prove insightful to the building of a new system of international justice which aims at retribution as well as restoration[173].

---

[173] There are not many studies, at the time of the writing of the present study, which examine how the jurisprudence and principles developed by regional human rights courts, and notably the IACtHR, could inform the interpretation of the ICC provisions on reparations. I am very thankful for the following contributions, which have provided insightful guidance in writing the present article: Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*, Chile Eboe-Osuji, Nijhoff, 2010, pp. 571-594. See also, Thomas Antkowiak, "An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice", *Stanford Journal of International Law* 47 (2011), and more generally, Antônio Augusto Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Inaugural Address as Honorary Professor to the Chair in 'International and Regional Human Rights Courts', 10 November 2011 at Utrecht University, pp. 57-65.

Thus, based on the foregoing observations, it seems that while the jurisprudence of the IACtHR cannot be readily and directly transposed the ICC context, it can provide insightful guidelines as to how the reparation system should develop at the ICC, especially in the construction of the contents of the legal duty to repair. In my view, reparations in international criminal law can be informed by the jurisprudence of the IACtHR in an indirect manner, while bearing dividing differences in mind.

III. THE INTER-AMERICAN COURT OF HUMAN RIGHTS TRAILBLAZING JURISPRUDENCE ON REPARATIONS[174]

With the advent of international human rights law, victims of human rights violations have been afforded the right to claim reparation before various fora of human rights mechanisms. These include, for example: the European Court of Human Rights, the recent African Court of Human and Peoples' Rights, treaty bodies, and the Inter-American Commission for Human Rights. The jurisprudence of these bodies has been rich and together, they have contributed to the formation of a meaningful human rights system, where victims' voices can be heard. While the experience of each of these institutions is undoubtedly valuable, this part of the study will focus on the jurisprudence of the IACtHR due to its consolidated experience, as well as its extensive, diverse and creative jurisprudence that may provide guidance in the architecture of the contents of the legal duty to repair in international criminal justice, both at the ICC and beyond.

[174] On the importance of the jurisprudence of the IACtHR to the development of a rich jurisprudence on reparations for human rights violations, see Philippe Weckel, "La justice internacionale en le soixantième anniversaire de la Déclaration Universelle des Droits de l'Homme", *Revue générale de Droit international public* 113 (2009), pp. 14-17.

1. Contextual background

The IACtHR and the Inter-American Commission of Human Rights are the main organs of the Inter-American system of Human Rights, which monitor the compliance of States Parties with their obligations to the Inter-American Convention on Human Rights of 1979 (Pact of San José)[175]. This system of human rights protection appears as a response to the countless atrocities that have occurred in the Americas in the past centuries, and to the struggle of peoples against their governments[176].

Article 63 (1) of the Inter-American Convention concerning reparations provides as follows:

> "1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

The IACtHR, since its first proceedings, has cultivated a far-reaching jurisprudence on reparations which elaborates on many concepts that are omnipresent in every system of reparation and which can be taken into account for the development of reparation principles within the ICC. Thus, the present study examines the jurisprudence of the Inter-American system of human rights through the lens of principles and concepts developed therein in hopes that this may shed light on similar notions at the ICC.

2. The concept of victims: who is entitled to receive reparation?

This is a key question concerning the award of reparation. The IACtHR has defined "victims" as persons whose rights have been violated[177]. A main feature of the jurisprudence of the IACtHR in this context is its broad conception of persons entitled to

---

[175] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969 ("the Inter-American Convention").

[176] For an account of civil wars and dictatorships in Latin America in the past, see e.g. Paul H. Lewis, *Authoritarian Regimes in Latin America: Dictators, Despots, and Tyrants,* Rowman & Littlefield Publishers, 2005.

[177] Cf. e.g. ICtHR, *Amparo* v. *Venezuela,* Reparations Judgment, 14 September 1996, para. 40.

receive reparation; the Court developed the notion of "next of kin" which includes the immediate family of the victims, e.g. direct descendants, ascendants, siblings, spouses or permanent partners[178]. The development of the notion of "next of kin" as persons who may be eligible to reparation represents an enlargement of those who can receive reparation in addition to the direct victim of the violation for which reparation is awarded[179]. In this context, reparations have often been awarded to spouses and children of the direct victim since the Court considered that as a result of the violations, these persons also suffered material and moral harm[180].

Thus, it stems clearly from the jurisprudence of the IACtHR that the award of reparation goes beyond the strict definition of who is a "direct victim" of the violation in question and also includes "indirect victims" who may have suffered harm as a consequence of the violation[181]. It goes without saying that the award of reparations is not automatic to all persons related to the victim, and the Court has established some criteria on the basis of which reparation may be awarded[182].

At this juncture, it is also worth mentioning that the Court has taken a flexible approach in cases where the victim could not be found. For example, in cases of forced disappearances and massacres, surviving persons have been permitted to obtain reparation.

---

[178] See IACtHR, *Garrido Baigorria* v. *Argentina*, Reparations Judgment, 27 August 1998, para. 50.

[179] IACtHR, *Juan Humberto Sanchez* v. *Honduras*, Judgment, 7 June 2003, para. 155; IACtHR, *Lopez Alvarez* v. *Honduras*, Judgment, 1 February 2006, para. 120.

[180] *Ibid.*. See also, Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*, Chile Eboe-Osuji, Nijhoff, 2010, p. 577.

[181] IACtHR, *Garrido and Baigorria* v. *Argentina*, Reparations Judgment, 27 August 1998, Series C No 39, paras. 62, 63; IACtHR, *Blake* v. *Guatemala*, Judgment, 22 January 1999, para. 37; IACtHR, *Bámaca Velásquez* v. *Guatemala*, Reparations Judgment, 22 February 2002, paras. 33-36; IACtHR, *Aloeboetoe* v. *Suriname*, Reparations Judgment, 10 September 1993, para. 71; IACtHR, *Panel Banca* v. *Guatemala*, Reparations Judgment, 25 May 2001, para. 85, 86; IACtHR, *Case of Street Children* v. *Guatemala*, Reparations Judgment, 26 May 2001,para. 68; IACtHR, *Juan Humberto Sánchez* v. *Honduras,* Judgment, 7 June 2003, para. 152; IACtHR, *Loayza Tamayo* v. *Peru*, Reparations Judgment, 27 November 1998, para. 92.

[182] See IACtHR, *Aloeboetoe* v. *Suriname*, *Reparations* Judgment, 10 September 1993, paras. 67, 68.

Thus, the Court considers as victims not only those who have been killed or forcefully abducted, but also those displaced as a result[183].

Another interesting aspect of the jurisprudence of the IACtHR, which could shed some light on the development of the jurisprudence of the ICC, relates to the identity of a victim. In cases related to indigenous groups, for example, the Court has established that when no identity document is available, a declaration which is made to the competent authority can be used to determine the identity of the victim[184].

Thus, it can be seen from the jurisprudence of the IACtHR referred to herein that the Court has adopted an approach concerning persons entitled to receive reparation which goes beyond a strict understanding of who qualifies as a victim within the system. The Court has recognized the inconvenient truth: that human rights violations generally harm persons beyond the direct victim and that such individuals shall be considered victims for the purposes of claiming and potentially receiving reparations[185].

These are important lessons which ought to be kept in mind, in spite of the inherent differences that exist between both systems of reparations, for the devising of reparation principles within international criminal law. In the context of international crimes, where the consequences thereof go beyond the direct victims[186] of the crime, affecting families

---

[183] IACtHR, *Case of Acosta Calderon* v. *Ecuador*, Judgment, 24 June 2005, para. 154 and IACtHR, *Case of Mapiripan Massacre* v. *Colombia*, Judgment, 15 September 2005, para. 256. Cf., Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, p. 577.

[184] IACtHR, *Case of Moiwana* v. *Suriname*, Judgment, 15 June 2005, paras. 117 and 178; IACtHR, *Case of Massacre of Plan de Sanchez*, Reparations Judgment, 19 November 2004, para. 62.

[185] IACtHR, *Case of Caracazo* v. *Venezuela*, Reparations Judgment, 29 August 2002, paras. 63-73.

[186] Rule 85 of the Rules of Procedure and Evidence of the ICC provides the following definition of victims:

> "For the purposes of the Statute and the Rules of Procedure and Evidence:
>
> (a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
>
> (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or

and communities, it is fundamental, in my view, that the award of reparations does not follow a formalistic or inflexible approach as to the persons who can receive reparation.

3. Assessment of harm

The IACtHR has produced a very rich jurisprudence concerning the definition and classification of damage[187]. According to the Court, moral damage is the psychological impact on a victim or his/her family members as a consequence of the violations of the rights and freedoms guaranteed by the Convention[188]. This type of damage has been considered to include changes and deterioration of the standard of living of the victims and eventual financial difficulties or family disintegration[189].

An important remark about the jurisprudence of the IACtHR in this respect is that the Court has relied on some assumptions as regards the proof of immaterial damages and has taken decisions on this basis which stem from the gravity of the violations[190]. For example, the Court has found that aggression and abuses are important causes of moral suffering and

---

charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."

[187] Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, p. 579.

[188] IACtHR, *Case of Velasquez-Rodriguez* v. *Honduras*, Judgment, 21 July 1989, para. 51.

[189] IACtHR, *Case of La Rochela Massacre* v. *Colombia*, Judgment, 11 May 2007, paras. 262, 263, 264.

[190] See e.g., IACtHR, *Case of Mapiripan Massacre* v. *Colombia*, Judgment, 15 September 2005, para. 267; IACtHR, *Case of Villagrán Morales et al* v. *Guatemala, Street Children Case*, Reparations Judgment, 26 May 2001, , para. 79 ["in view of the lack of precise information on the real earnings of the victims, [the Court] should use the minimum wage for non-agricultural activities in Guatemala as a basis"]; IACtHR, *Case of Caracazo* v. *Venezuela,* ReparationJudgment, 29 August 2002, para. 88 [in the absence of detailed or reliable information, the reference for the Court was the minimum wage in national law]; IACtHR, *Case of Panel Blanca* v. *Guatemala*, Reparations Judgment, 25 May 2001, paras. 116-117 [in the absence of detailed or reliable information, the reference for the Court was the minimum wage in national law]; IACtHR*., Castillo Páez* v. *Peru*, Reparations Judgment, 27 November 1998, para. 75 [in the absence of detailed information, the reference for the Court was the minimum wage in national law]; IACtHR*, Case of Neira Alegría et al.* v. *Peru*, Reparations Judgment, 19 September 1996, paras. 49-52 [the Court determined the loss of income "for reasons of equity and in view of the actual economic and social situation of Latin America"]; IACtHR*, Case of Maritza Urrutia* v. *Guatemala*, Judgment, 27 November, 2003, paras. 158-159 [the Court determined the loss "in fairness"]; IACtHR*, Case of Suárez Rosero* v. *Ecuador*, Reparations Judgment, 20 January 1999, paras. 66 and 99; IACtHR*, Case of Cantoral Benavides* v. *Peru*, Judgment, 3 December 2001, para. 51.

that no evidence is necessary to arrive at such conclusion[191]. This is a particularly relevant consideration to be borne in mind when developing the contents of the legal duty of reparations under international criminal law. This is because it concerns the aftermath of international crimes where the gravity of the breach of international law is inherently present, but the moral harm pertaining to the consequences of conflicts and wars is often difficult to adduce.

Similarly, in relation to evidence of damage, reliance on presumptions and circumstantial evidence has been accepted "when they lead to consistent conclusions as regards the facts of the case"[192].

The use by the IACtHR of concepts of judicial fairness and equity, both in the decision to award moral damages as well as in the quantification of the damages, is worth taking into account also in the context of ICC reparations, as the latter may have to make a decision as to the award of reparation in contexts, where, for example, there is a lack of substantial evidence. In my view, it should not be overly formalistic to the detriment of the victim[193].

As to material damages, these concern the negative impact of the violations on the victim's earnings or the expenses resulting from the violations[194]. In this context, the Court

---

[191] IACtHR, *Garrido Baigorria* v. *Argentina*, Reparations Judgment, 27 August 1998, para. 49; IACtHR, *Case of Loaiza Tamayo* v. *Peru*, Reparations Judgment, 27 November 1998, para. 138; IACtHR, *Case of La Rochela Massacre* v. *Colombia*, Judgment, 11 May 2007, para. 256; IACtHR, *Case of La Cantuta* v. *Peru*, Judgment, 29 November 2006, para. 217.

[192] IACtHR, *Gangaram Panday v. Suriname*, Merits, Reparations and Costs Judgment, 21 January 1994, para. 49.

[193] In some cases, the IACtHR decided on the basis of equity and guided by principles of fairness, for example: IACtHR, *Case of Bámaca Velásquez* v. *Guatemala*, Reparations Judgment, 22 February 2002, para. 54 (a); IACtHR, *Case of Goiburú et al.* v. *Paraguay*, Merits, Reparations and Costs Judgment, 22 September 2006, para. 156; IACtHR, *Case of Caracazo* v. *Venezuela*, Reparations and Costs Judgment, 29 August 2002, para. 94 [*N.B.* the Court established non-pecuniary damage *inter alia* "through reasonable application of judicial discretion and in terms of fairness"]; IACtHR, *Case of Ituango Massacre* v. *Colombia*, Merits, Reparations and Costs Judgment, 1 July 2006, para. 380; IACtHR, *Case of Neira Alegría et al.* v. *Peru*, Reparations Judgment, 19 September 1996, paras. 49-52 [the Court determined the loss of income "for reasons of equity"]; IACtHR, *Case of Cantoral Benavides* v. *Peru*, Judgment, 3 December 2001, para. 62; IACtHR, *Case of Yvon Neptune* v. *Haiti*, Judgment, 6 May 2008, para. 168 [the amount of compensation for moral damage was based on equity].

[194] IACtHR, *Case of Acevedo Jaramillo and others* v. *Peru*, Judgment, 7 February 2006,

has also applied numerous assumptions as regards loss of future income and has made awards based on the principle of fairness[195]. The Court has also found that the Judgment itself can constitute a form of reparation for material damages, as it will be discussed below[196]. At this juncture, it is also worth mentioning the notion of damage to the "proyeto de vida", a concept developed by the IACtHR, which concerns a long-term reduced ability to benefit from life in light of the altered circumstances as a consequence of the violation[197].

These approaches by the IACtHR as to the assessment of damages may provide interesting insights as to the route that international criminal law should take with regards to the assessment of evidence of damage and causation, as well as the method of quantification of damages.

4. Collective reparations

The IACtHR's experience with collective reparations may prove pertinent for the award of reparations in international criminal law in instances where calculating individualized reparations for victims may be a rather difficult task. The following section dwells upon the question of collective reparations in the context of the ICC; in the present chapter, the goal is simply to provide some concrete examples of collective reparations from a State-based perspective (in the IACtHR context specifically) to inform collective reparations in the international criminal law context.

Again, the jurisprudence of the IACtHR has been a pioneer in this area[198]. While establishing that the award of collective reparation entails direct damage to individual

---

para. 301.

[195] IACtHR, *Case of Molina Theissen* v. *Guatemala*, Reparations Judgment, 3 July 2004, para. 57.

[196] See IACtHR, *Case of La Cantuta* v. *Perú*, Judgment, 29 November 2006, para. 162.

[197] See e.g. IACtHR, *Case of Cantoral Benavides* v. *Peru*, Reparations Judgment, 3 December 2001, para. 80; IACtHR, *Case of Loayza-Tamayo* v. *Peru*, Reparations and Costs Judgment, 27 November 1998, para. 147. See also C. Droege, "El derecho a interponer recursos y a obtenir reparación por violaciones graves de los derechos humanos: guía para profesionales", 2 Serie de guías para profesionales, 2007, pp. 141-142; S.G. Ramírez, "Las reparaciones en el sistema interamericano de protección de los derechos humanos", in El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI: tomo I (San José: Corte Interamericana de Derechos Humanos, 2001), pp. 150-152.

[198] Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the

victims[199], in several cases, collective reparations to entire communities have been awarded. These cases deal with massacres of entire communities, as illustrated, for example, in the *Plan de Sanchez Massacre* case, which concerned a massacre to a Mayan village by the Guatemalan army. The massacre almost completely destroyed the village. During the massacre, women were raped, tortured and assassinated; children were beaten to death[200]. The Court heard the testimony of survivors of the massacre and experts about the impact of the crimes on the community as a whole. The Court recognized in its Judgment the consequences of violence and extermination towards women for a community. The Court, while recognizing that it could not award reparation to victims who were not individually indicated, decided to give reparation to the communities where the victims used to live[201]. Furthermore, this case is also interesting in that the Court considered the loss of traditions and cultural values (due to the death of those members of the community who transmitted such values) and it qualified such loss as grounds for the award of moral damages[202].

These findings of the IACtHR can be enlightening to the ICC, which will likely have a similar task of awarding reparations in the context of massacres, where many victims cannot be individually singled out. Similarly, the ICC may also have to grapple with having to award reparations for crimes such as mass rape, extermination and torture. In my view, like the IACtHR experience demonstrates, the ICC should take into account the impact of certain types of violations on the entire community where the victims come from.

The experience of the IACtHR may also prove useful as to the kinds of collective reparation that can be awarded. The Court has awarded various kinds of collective

---

Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, p. 584.

[199] IACtHR, *Case of Aloeboetoe* v. *Suriname*, Reparations Judgment, 10 September 1993, para. 83.

[200] IACtHR, *Case of Massacre of Plan de Sanchez* v. *Guatemala*, Reparations Judgment, 19 November 2004.

[201] *Ibid.*, para. 62.

[202] *Ibid.*, paras. 12-49. See also, J. J. Rojas Báez, "La Jurisprudencia de la Corte Interamericana de Derechos Humanos en Materia de Reparaciones y los Criterios del Proyeto de Artículos sobre Responsabilidad del Estado por Hechos Internacionalmente Ilícitos", *American University International Law Review* 92 (2007-2008), p. 110.

reparations in its jurisprudence, for example[203]: the creation of a project for the entire community to provide potable water and sanitary infrastructure[204]; establishment of a community fund for specific projects for education, health, housing, and agriculture for members of the indigenous tribe affected[205]; educational grants for the population affected by the violation[206]; setting in place safety measures for displaced persons in case they decide to return to their villages[207]; public apology and acknowledgment by the State to the community where the human rights violations took place[208]; the building of memorials as a means to prevent the reoccurrence of such serious violations[209]; and setting up courses in human rights[210], among others.

This list of collective reparations is of course not exhaustive; the jurisprudence of the IACtHR is not exhaustive either, as there are other types of collective reparations that can be awarded in cases of massacres[211]. The point to be taken from these examples of collective reparations, awarded in cases of massacres, is the open and creative attitude of the Court to award reparations that uniquely fit the violation with which it is seized. The lesson to be learned, it is submitted, is that the overwhelming task of assessing claims of reparation for massive human rights violations has not stopped the Court from awarding significant redress to victims.

---

[203] See in this regard, Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, p. 586.

[204] IACtHR, *Case of YakyeAxa* v. *Paraguay*, Judgment, 17 June 2005, paras. 205-206.

[205] *Ibid.*

[206] IACtHR, *Case of Barrios Altos* v. *Peru*, Reparations Judgment, 30 November 2001, para. 43.

[207] IACtHR, *Case of Mapiripan Massacre* v. *Colombia*, Judgment, 15 September 2005, para. 313.

[208] *Ibid.* at para. 314.

[209] *Ibid.*, at para. 315.

[210] *Ibid.* at para. 316.

[211] See e.g. Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, p. 586, who claims that: "… until now, these collective reparations do not include specific reparations for women survivors of sexual violence such as gynaecological clinics, HIV treatment programs, stigma-sharing programs, preventive campaigns on violence against women, etc."

5. Types of reparation

This thesis claims that one lesson that can be learned from the experience of the IACtHR is that reparations for mass atrocities ought to take into account the perspective of the victim and it should include a holistic approach to reparations, bearing in mind the goal and types of reparations that can be awarded.

One of the main challenges of reparations in the international criminal law context is that the accused may not have any financial resources at the end of the trial to pay reparations to victims[212]. This criticism can be easily rebutted if one takes a broader approach of what it means to "repair" the harm caused. In this section, this thesis examines the jurisprudence of the IACtHR with respect to the forms of reparations that have been awarded to victims of human rights violations. The aim of this section is not to be exhaustive, but rather to demonstrate that the mandate of reparations in international criminal law can be much more encompassing than the translation of reparations into a sum of money. This notion has guided the IACtHR in the development of its jurisprudence on reparation for human rights violations.

The IACtHR has taken a broad approach to reparations and has referred to the concept of "full reparation". In this perspective, it went beyond pecuniary reparations[213] and has awarded reparations in the form of restitution[214], rehabilitation[215], satisfaction and guarantee of non-repetition[216], reparations of symbolic or emblematic nature, going beyond individual victims and having an impact on the community in which the victim belongs.

---

[212] See e.g. Saul Levmore, "Reparations in the Wake of Atrocities: A Plan for Encouraging Participation by Governments", *Human Rights and International Criminal Law Online Forum*, Invited experts on reparations question, available at: http://uclalawforum.com/reparations#Levmore

[213] See IACtHR, *Case of Loayza Tamayo* v. *Peru*, Reparations Judgment, 27 November 1998, para. 124.

[214] See e.g. IACtHR, *Case of Velazquez Rodriguez* v. *Honduras,* Reparations Judgment, 21 July 1989.

[215] See e.g. IACtHR, *Case of Barrios Altos* v. *Peru*, Reparations Judgment, 30 November 2001, para. 42.

[216] See e.g. IACtHR, *Case of Villagrán Morales et al* v. *Guatemala*, Street Children Case, Reparations Judgment, 26 May 2001.

An example of the diversity of forms of reparations ordered by the Court is illustrated in the *Villagrán Morales and Others* case ("*Ninõs de la Calle*")[217]. In addition to indemnification for moral and material damage, the Court ordered a change in legislation to conform with Article 19 of the American Convention, the transfer of the mortal remains of one of the assassinated children and its exhumation in the place chosen by his family members, the designation of an educational centre with an allusive name of the victimized children and bearing a plate of the five victims as well as the investigation of the facts and punishment of those responsible[218]. This case demonstrates, it is submitted, the willingness of the Court to take the perspective of the victim in the award of reparations, their needs and their wishes.

Moreover, the IACtHR has awarded reparations to victims consisting of sums of money and has also relied on positive obligations by the State. For example, in the *Bulacio v. Argentina* case[219], which concerned the detention and killing of a teenager by the police, the Court ordered, in addition to financial compensation, the continuation of investigation in the case and the adoption of legislative and other measures in order to ensure the non-repetition of the violation[220].

Significantly, the Court has acknowledged that the right to truth[221] is also a form of reparation[222]. It has ordered, in this respect, *inter alia,* "the translation of the American

---

[217] *Ibid.*

[218] *Ibid*.

[219] Merits, Reparations and Costs Judgment, September 18, 2003.

[220] C.f. also, Antônio Augusto Cançado Trindade, "The Inter-American System of Protection of Human Rights (1948-2009): Evolution, Present State and Perspectives", in *Dossier Documentaires/Documentary File- XL Session d'Enseignement* , Tome II, Strasbourg, IIDH, 2009, p. 102.

[221] See Revised final report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations (civil and political), 2 October 1997, E/CN.4/Sub.2/1997/20/Re v.1, para. 19, where the Inter-American Commission on Human Rights stated that: "Every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be commit ted, in order to prevent repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to what happened to their relatives. Such access to the truth presupposes freedom of speech, which of course should be exercised responsibly; the establishment of investigating committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources, so that the judiciary itself may undertake whatever investigations may be necessary. The Commission considers that the observance of the principles cited above will bring about justice rather than vengeance, and thus

Convention and Judgments into the language of the victims … [and also] that these be widely disseminated among the victims of violations and … published in official journals and newspapers with national circulation."[223] In addition to the right to truth, apology, public acknowledgement and acceptance of responsibility are also recognized by the Court as fundamental forms of reparation[224]. The IACtHR and the Inter-American Commission have also acknowledged that a Judgment of the Court in this respect provides a form of reparation[225]. Certainly, as the IACtHR itself has recognized, in cases of human rights

---

neither the urgent need for national reconciliation nor the consolidation of democratic government will be jeopardized." See also, Report 21/00, Case 12.059, Carmen Aguiar de Lapacó (Argentina), 29 February 2000, where Argentina guaranteed "the right to truth, which involves the exhaustion of all means to obtain information on the whereabouts of the disappeared persons."

[222] IACtHR, *Case of Prison Miguel Castro Castro* v. *Peru*, Judgment, 25 November 2006, para. 440. In this sense, the Court has ordered the translation of Judgments into the language of the victims and that the Judgments be disseminated among victims of violations, see IACtHR, *Case of Massacre of Plan de Sanchez* v. *Guatemala*, Reparations Judgment, 19 November 2004, para. 102; IACtHR, *Case of Cantoral Benavides* v. *Peru*, Reparations Judgment, 3 December 2001, para. 79.

[223] Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, pp. 590-591, citing IACtHR, *Case of Massacre of Plan de Sanchez* v. *Guatemala*, Reparations Judgment, 19 November 2004, para. 102 and IACtHR, *Case of Cantoral Benavides* v. *Peru,* Reparations Judgment, 3 December 2011, para. 79.

[224] For cases where the Court ordered recognition of responsibility and public apology: IACtHR, *Case of Barrios Altos* v. *Peru*, Reparations Judgment, 30 November 2001, para. 44 e) and operative paragraph 5 e); IACtHR, *Case of Cantoral Benavides* v. *Peru*, Reparations Judgment, 3 December 2001, para. 81; IACtHR, *Case of Durand and Ugarte* v. *Peru*, Reparations Judgment, 3 December 2001, para. 39 b) and operative par agraph 4 b); IACtHR, *Case of Bámaca Velásquez* v. *Guatemala*, Reparations Judgment, 22 February 2002, para. 84; IACtHR, *Case of Juan Humberto Sánchez* v. *Honduras,* Judgment, 7 June 2003, para. 188; IACtHR, *Case of Plan de Sánchez Massacre*, Reparations Judgment, 19 November 2004, para. 100. Guatemala apologized publicly for the massacre: AP Guatemala Apologizes for 1982 Massacre [available at http://news.yahoo.com/s/ap/ 20050719/aponrelaamca/guatemala_human_rights]. For cases where the IACtHR has ordered States to make their Judgments public: IACtHR, *Case of Trujillo Oroza* v. *Bolivia*, Reparations Judgment, 27 February 2002, para. 119; IACtHR, *Case of Barrios Altos* v. *Peru*, Reparations Judgment, 30 November 2001, para. 44 (d) and operative paragraph 5 d); IACtHR, *Case of Cantoral Benavides* v. *Peru*, Reparations Judgment, 3 December 2001, para. 79; IACtHR, *Case of Durand and Ugarte v. Peru*, Reparations Judgment, 3 December 2001, para. 39 a) and operative paragraph 3 a); IACtHR, *Case of Bámaca Velásquez* v. *Guatemala*, Reparations Judgment, 22 February 2002, para. 84; IACtHR, *Case of Caracazo v. Venezuela*, Reparations Judgment, 29 August 2002, para. 128; IACtHR, *Case of Juan Humberto Sánchez* v. *Honduras,* Judgment, 7 June 2003, para. 188. See also UN Human Rights Commission resolutions, Resolutions on Impunity E/CN.4/RES/2001/70, 25 April 2001, para 8; E/CN.4/RES/2002/79, para 9; E/CN.4/RES/2003/72 I, para. 8, where it is recognized that "for the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators, including their accomplices, of these violations are essential steps towards rehabilitation and reconciliation."

[225] IACtHR, *Case of Cesti Hurtado Case,* Reparations Judgment, 31 May 2001, para. 59, where the Court found that the judgment constitutes satisfaction with regard to the reputation and honour of the victim.

violations, the Judgment alone may fail to fully do justice to victims[226]. The point, however, is that the focus should not always and in all cases be on pecuniary reparation.

In this sense, in line with the findings of the IACtHR and the Inter-American Commission that the right to truth is a form of reparation[227], the ICC is already contributing to restoration and reparation within its activities, by investigating situations and cases, by outreaching to communities and victims and by revealing certain acts as criminal. The same is true for cases before national courts in relation to international crimes.

IV. How the jurisprudence of the IACtHR can inform the content of the duty to repair in international criminal law

Many kinds of reparations in international human rights courts can only be ordered against a State, as opposed to individual perpetrators. Nevertheless, the above review of collective reparation awards and other forms of reparations serve at least two purposes. First, it shows that reparation may take various forms in addition to financial compensation and that creativity has its place when awarding reparations for acts which are difficult to repair. Secondly, principles of reparation may be distilled from these examples in order to guide the content of the legal duty to repair for individuals, as well as the principles of reparation for the ICC and the Trust Fund for Victims in their mandate.

As ICC Trial Chamber Judge Odio Benito stated, the jurisprudence of the IACtHR "offers evidence of the complementarity between international human rights law and international criminal law."[228] It is argued that international criminal law, like other

---

[226] IACtHR, *Case of El Amparo* v. *Venezuela*, Reparations Judgment, 14 September 1996, para. 35; IACtHR, *Case of Neira Alegría et al* v. *Peru*, Reparations Judgment, 19 September 1996, para. 56; IACtHR, *Case of Castillo Páez* v. *Peru*, Reparations Judgment, 27 November 1998, para. 84; IACtHR, *Case of Blake* v. *Guatemala*, Reparations Judgment, 22 January 1999, para. 55; *Case of Panel Blanca* v. *Guatemala*, Reparations Judgment, 25 May 2001, para. 105.

[227] The right to truth, as the Court defined it in the *Barrios Alto Massacre* case, "se encuentra subsumido en el derecho de la véctima o sus familiars a obtener de los órganos competentes de Estado el esclarecimiento de los hechos violatorios Ibid. las responsabilidades correspondientes, a través de la investigación Ibid. el juzgamiento que previenen los artículos 8 Ibid. 25 de la Convención", IACtHR, *Case of Barrios Alto* v. *Peru*, Judgment, 14 March 2001, para. 48. See also, IACtHR, *Case of Bámaca Velásquez* v. *Guatemala*, Judgment, 25 November 2000, para. 201.

[228] Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the

branches of international law, should not develop in a vacuum, without taking into account principles and the practice devised and applied in other areas of international law[229].

As stated above, the assessment and award of reparations to victims within international criminal proceedings is a new phenomenon in international criminal law. This is all the more reason to learn from institutions that have proven experience in the domain, albeit from a State-based perspective. It goes without saying that certain adaptations need to be put into place, as there are inherent differences between the two fields of international law. It remains, nevertheless, that much can be borrowed from the jurisprudence of the IACtHR in relation to reparations, especially pertaining to cases of massacres.

Turning specifically to the case of the ICC, and how the contents of the legal duty to repair for States can inform the legal duty to repair for individuals, some contextual analysis is required. As to formal criteria for utilizing international human rights principles and jurisprudence to inform the ICC framework for reparations for victims, one first needs to inquire into the legal applicability of the former within the Rome Statute "applicable law".

Article 21 of the Rome Statute establishes the applicable law at the International Criminal Court:

> "1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, p. 591.

[229] See as an example of the possibility of cross-fertilisation, the IACtHR in the *Case of Miguel Castro Castro Prison* v. *Peru* used the definition of sexual violence, and the typification as rape of certain acts, of the ICTR Trial Chamber in the Akayesu case: IACtHR, *Case of Miguel Castro Castro Prison* v. *Peru*, Judgment, 25 November 2006, para. 306, citing: ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 688.

> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."[230]

As it can be perceived, where appropriate, the Court may apply principles and rules of international law (Article 21 (1) (b)). Thus, it could be argued, on a first read, that this provision grants the legal basis for the application of principles of international human rights law, as developed by the jurisprudence of international human rights courts, within the proceedings in the International Criminal Court.

This provision should however be read in light of the 2006 Judgment of the Appeals Chamber, whereas it stated that such sources of law can only be applied when there is a gap in the Rome Statute[231]. Furthermore, in its previous Judgment of 13 July 2006, the Chamber explained that the sources cited in Article 21 (1) (b) and (c) are subsidiary sources and thus cannot be applied so as to create procedures other than those included in the Statute and the Rules of Procedure and Evidence[232].

---

[230] Compare and contrast the applicable law as stated in Article 21 of the ICC Statute with the sources of law at the International Court of Justice, pursuant to its Article 38:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

[231] ICC*, Prosecutor* v. *Thomas Lubanga Dyilo*, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, ICC-01/04-01/06-772, para. 34.

[232] ICC, *Situation in the 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", 13 July 2006, ICC-01/04-168, paras. 33-42.

It remains however that Article 21 (3) may potentially have a broad effect on the application of principles of international human rights jurisprudence to the work of the Court, in particular in relation to reparations. This provision states that the application and interpretation of the law as stated in Article 21 of the Rome Statute, "must be consistent with internationally recognized human rights…" As expected, this provision has been much commented upon[233]. One author has pondered that Article 21 (3) "provides a standard against which all the law applied by the court should be tested. This is a sweeping language, which, as drafted, could apply to all three categories in Article 21."[234]

As to the interpretation of Article 21(3), in its Judgment of 13 July 2006, the Appeals Chamber stated that the Rome Statute, being a treaty itself, is to be interpreted in accordance with Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*[235].

As the Preamble of the Statute recalls, "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity". The Appeals Chamber, in its Judgment of 14 December 2006, dwelled further upon this provision. According to the Chamber:

> "Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and applied in accordance with internationally recognized human rights; …"[236]

---

[233] See Mahnoush Arsanjani, "The Rome Statute of the International Criminal Court", *American Journal of International Law* 93 (1999), p. 22; Gilbert Bitti, "Article 21 of the International Criminal Law Statute and the Treatment of Sources of Law in the Jurisprudence of the ICC", in *The Emerging Practice of the International Criminal Court,* Carsten Stahn and Göran Sluiter, Nijhoff, 2008, pp. 285-304.

[234] Mahnoush Arsanjani, *ibid*.

[235] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155 ("VCLT"), p. 331.

[236] ICC, *Prosecutor* v. *Thomas Lubanga Dyilo*, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, ICC-01/04-01/06-772, para. 37.

Be that as it may, even if the Court is not required *per se* to refer to principles developed by the human rights courts and bodies, such reference may prove very useful and insightful in many respects. For instance, as illustrated above, the jurisprudence of human rights courts provide many examples of types of reparation awarded to victims. A well-developed practice of awarding collective reparations could also provide useful guidelines for determining those who can receive reparation and for defining the notion of harm.

A number of Judgments and decisions of the ICC Chambers referred to the jurisprudence of regional human rights courts to assist in the definition of some terms, such as "victim" and "harm". Such reference to the case law of the IACtHR, if applicable, will of course have to be adapted to the circumstances of each case and will need to take into consideration the differences that exist between the two systems (see above). Nevertheless, it remains that such jurisprudence may serve as trailblazers to some of the difficult questions the Court will be concerned with in the years to come.

As to the significance of the jurisprudence of the IACtHR to the development of principles and practice of the ICC, in my view, there are numerous ways in which the former can inform and, to a certain extent, indirectly influence the latter. First and foremost, I am of the opinion that a great contribution of such jurisprudence is the creative and holistic approach to reparations. As Judge Cançado Trindade, former President of the IACtHR has posited, in one of his Separate Opinions,

> "… one ought to focus the whole theme of the reparations of violations of human rights as from the integrality of the personality of the victims, discarding any attempt of mercantilization - and the resulting trivialization - of such reparations. It is not a question of denying importance to the indemnizations, but rather of warning for the risks of *reducing* the wide range of reparations to simple indemnizations. It is not by mere chance that contemporary legal doctrine has been attempting to devise distinct *forms* of reparation - *inter alia*, *restitutio in integrum*, satisfaction, indemnizations, guarantees of non- repetition of the wrongful acts - *from the perspective of the victims*, so as to fulfill their needs and claims, and to seek their full rehabilitation. (...) I am not at all convinced by the 'logic' - or rather, the lack of logic - of the *homo oeconomicus* of our days, to whom, amidst the new idolatry of the god-market, everything is reduced to the fixing of compensation in the form of amounts of indemnizations, since in his outlook human relations themselves have - regrettably - become commercialized. Definitively, to the integrality of the personality

> of the victim corresponds an *integral* reparation for the damages suffered, which is not at all reduced to the reparations for material and moral damages (indemnizations). (...) Article 63(1) of the American Convention, on the contrary, renders it possible, and requires, that reparations be enlarged, and not reduced, in their multiplicity of forms. The fixing of reparations ought to be based on the consideration of the victim as an integral human being, and not on the degraded perspective of the *homo oeconomicus* of our days. (...)"[237]

In my view, this is an important point that goes to the heart of critiques to reparations within the ICC, and international criminal law more broadly. As discussed above, one of the main challenges of awarding reparations within the context of an international criminal trial, in the aftermath of mass atrocities, and against individual perpetrators pertain to practical considerations. The first often mentioned is the concern that the individual perpetrator may not have the financial ability to pay compensation. Nevertheless, at this juncture, it is important to state clearly that such concern, in my view, misses the point. It misses the point because it is grounded on a potentially flawed premise: the idea that reparations must necessarily be monetary[238]. As it has been stated:

> "Monetary damages can provide funds for basic necessities. But commentators note that many civil plaintiffs want an apology above all else, and frequently only file a lawsuit when unsuccessful in obtaining one. Several observe that cash damages are often "much less important than emotional or symbolic reparation" for litigants. Monetary compensation does not aptly address a person's need for "dignity, emotional relief, participation in the social polity, or institutional reordering."[239]

---

[237] IACtHR, *Case of Villagrán Morales et al* v. *Guatemala, Street Children Case*, Reparations Judgment, 26 May 2001, Separate Opinion of Judge Cançado Trindade, paras. 28, 35 and 37.

[238] There are many short-comings in a monetary award of reparation. It can be argued that money does not carry moral or symbolic significance and that money does not heal wounds. Also, it appears that monetary awards, especially when victims' wishes point away from such a type of award, places the offender in the centre of the proceedings on reparation which are intended to focus on victims; it is not supposed to be translated into a form of punishment of the offender. From a moral perspective, money can be spent and its moral and spiritual value, if any, lost.

[239] Thomas Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond", *Columbia Journal of Transnational Law* 46 (2008), p. 284, citing many relevant sources: Brent T. White, "Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy", *Cornell Law Review* 91 (2006), pp.1271-1272; John Braithwaite, "A Future Where Punishment Is Marginalized: Realistic or Utopian?", *UCLA Law Review* 46 (1999), pp. 1727, 1744 ; Eric K. Yamamoto, *Interracial Justice: Conflict and Reconciliation in Post-civil Rights America*, New York University Press, 1999.

Bearing this consideration in mind, the practice of the IACtHR can prove useful in its efforts to hear victims and not to focus solely on monetary compensation awards. Borrowing this idea, and applying it to ICC reparation proceedings, it can address the criticism that reparation awards may not be enforceable against a convicted person if he or she does not have financial resources to honour the award.

The reparation phase of proceedings is, more than any other phase, about the victim, his/her suffering and how an award may redress such suffering. In this context, it is important to take victims' views into account. For instance, it has been argued that the IACtHR's approach to reparation as not limited to monetary awards has been viewed positively and is constructive with victims[240]. In this regard, it has been noted that, for example, Mr. Cantoral Benavides, a victim in a case heard by the IACtHR, claimed that the state apology ordered by the Court was a "triumph" to him[241].

In conclusion, it is argued that one of the most important contributions of principle that the jurisprudence of the IACtHR can provide to the building of a solid jurisprudence at the ICC is the idea that harm caused must be accompanied by due reparation to the victim; the inclusion of the victim in the centre of the justice process; and the creativity exercised by the Court to award reparation even in cases where such an award is neither intuitive nor an easy task. This lesson should be borne in mind when the ICC Judges are to give life to the grandiose task of trying and punishing the accused while also including victims in the process and delivering justice.

V. CONCLUSIONS

It seems that, at the current print of international law, the civil and criminal dimensions of justice are not completely dissociated, they go in fact hand-in-hand: an international crime or a gross human rights violation may entail both the prosecution and eventual punishment of the offender as well as the right of the victims to seek and obtain

[240] Thomas Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond", *Columbia Journal of Transnational Law* 46 (2008), p. 287.

[241] Carlos M. Beristain, *Diálogos sobre la Reparación: Experiencias en el Sistema Interamericano de Derechos Humanos* (2008), p. 93.

reparation. Significantly, the right of victims to obtain reparation has transcended the realm of international human rights law and is contemporarily also recognized in international criminal law[242], demonstrating the doctrinal interconnectedness of the fields of international human rights law and international criminal law.

Although the ICC is an international criminal court, its mandate is a noble, yet ambitious, one: it includes perspectives for offenders, victims and the broader international community. The rights of victims are recognized in the founding documents of that institution and the ICC should live up to its grand task. My claim is that international courts and tribunals, and international law in general, should work in synergy, one feeding off of the other, and ensuring a fertilization and integration of systems[243]. In this perspective, while there are some systemic and structural differences between the ICC and the IACtHR which make it impossible to directly apply the jurisprudence of the IACtHR in ICC proceedings, the latter can be informed by the practice and jurisprudence of the former. This chapter has addressed the question of how the principles and case law from the IACtHR (dwelling upon State-based reparations) can inform the content of a legal duty of individuals of reparation within international criminal law. Within that framework, as this chapter has argued, the experience of the IACtHR in cases of reparation proves insightful in many ways in international criminal law[244].

---

[242] Christine Evans, *Reparations for Victims in International Criminal Law*, available at: http://Ibid..rwi.lu.se/ktfestschrift/On-line_festschrift_in_honour_of_Katarina_Tomasevski_files/Reparations%20for%20Victims%20-%20Evans.pdf

[243] Antônio Augusto Cançado Trindade, *International Law for Humankind*, Nijhoff, 2010, pp. 57-65.

[244] Decision on Reparations.