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50

THE INTERNATIONAL LAW CLINIC

Pedagogical approach and research

Special Volume for the XV Anniversary of the International Law Clinic (2011-2025)

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Pedagogical approach and research
2011-2025

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Preliminary Note

Based on the experience acquired between 2009 and 2011 at the Utrecht Law Clinic on Conflict, Human Rights and International Justice (The Netherlands), Prof. Héctor Olasolo launched the International Law Clinic (ILC) in the 2011-II Semester, initially known until 2014 as the Legal Clinic on International Criminal and Humanitarian Law. For this purpose, he counted on the invaluable support of the Dean of the Faculty of Jurisprudence of Universidad del Rosario, Prof. Antonio Aljure, Prof. Andrea Mateus Rugeles, and Prof. Mauricio Vanegas Moyano, as well as then young researcher Andrés Contreras, during the process of its establishment between August and November 2011.

Since then, under the direction of Prof. Olasolo, and with the collaboration of an excellent group of young researchers who have served as teaching assistants at the ILC, it has been organized annually between 2011 and 2025 by the Faculty of Jurisprudence of Universidad del Rosario and the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (IIH). Between 2011 and the Covid-19 pandemic in 2020, the ILC was carried out in partnership with the Justice and Peace (JyP) Chamber of the Superior Court of Bogotá (Colombia). Moreover, starting in 2013 and continuing to the present day (2025), it has also been conducted in partnership with the Office of Public Counsel for Victims (OPCV) of the International Criminal Court (ICC) (The Netherlands), based on the Memorandum of Understanding signed for that purpose in 2013.

From that same year, the ILC became an annual program with one semester of intensive training and another of pro bono legal advisory work regarding research questions posed by the OPCV, and until 2020, also by the JyP Chamber of Bogotá, in relation to cases developed both in The Hague before the ICC and in Bogotá before the JyP Chamber. In addition, every year, each ILC cohort travels to the Netherlands to personally present their work to the OPCV's international officials; presentations that were also conducted annually until 2020 before the judges of the JyP Chamber in Bogotá.

In 2014 and 2015 respectively, the International Internship Program (undergraduate or graduate students) and the Research Residency Program (professors) were opened at the ILC. After spending ten weeks in Bogotá, participants in these two programs had the opportunity to travel to The Hague with the rest of the ILC members to jointly present their work before OPCV officials and to participate in the various activities of the Ibero-American Week of International Justice, organized annually by the IIH.

The ILC's comprehensive training project revolves around its members, who become its central figure, based on the understanding that knowledge is primarily obtained through observation, experimentation, and reasoning. In this non-directive process, the professor's main role is to pose problems and present several possible alternatives to address them, which must be solved collectively by ILC members through teamwork. The process also aims to provide its members with tools to articulate a coherent way of being and understanding the world, by discussing human and social values and problems, and by fostering young people's dream of a different international society that gives meaning to life.

Acknowledgments

To the 150 members of the International Law Clinic between 2011 and 2025, for all their effort and dedication in preparing the research papers presented in this volume.

To the excellent team of teaching assistants who have supported the International Law Clinic over these fifteen years, as well as the exchange students and visiting professors who have joined us from universities in Canada, Spain, the United States, Ireland, Mexico, the Netherlands, and Peru.

To the Faculty of Jurisprudence of Universidad del Rosario (Colombia) and the Ibero-American Institute of The Hague (The Netherlands) for their permanent commitment to the International Law Clinic.

To Uldi Teresa Jiménez and the other judges of the Justice and Peace Chamber of the Superior Court of Bogotá, for their warm welcome from 2009 until the Covid-19 pandemic in 2020 to the Clinic's members.

To Paolina Massidda, Sarah Pellet, Enrique Carnero Rojo, Dmytro Sunpun, and the rest of the members of the OPCV of the ICC, for the trust placed in the Clinic from 2013 to the present.

To ICC judges Sylvia H. Steiner, Olga Herrera Carbuccia, and Ekaterina Trendafilova, and to the Director of the Secretariat of the Assembly of States Parties of the ICC, Renán Villacis, for their support in the preparation of the bilingual series International Law Clinic Reports / Informes de la Clínica Jurídica Internacional.

To Prof. Antonio Aljure Salame, Dean of the Faculty of Jurisprudence of Universidad del Rosario (2011–2015), and to Professors Andrea Mateus and Mauricio Vanegas Moyano for their important support during the process of launching the Clinic in the 2011-I Semester.

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To all those who, through their work, have made its development possible every day.

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Trujillo Fiesco, María Alejandra (2012)
Trujillo, Valeria Isabel (2022)
Urrea Rodríguez, Sebastián (2013)
Vacca Moyano, Laura (2024)
Vargas Montoya, Laura Stepanie (2018)
Velásquez Medina, Gabriela (2020)
Velázquez Aponte, Daniela (2021)
Villa, María Carolina (2011)
Villarraga Zschommler, Luisa Fernanda (2018)
Wirken, Sander (2015)

Participants in the International Law Clinic from universities outside Colombia in the period 2011-2025

Ballesteros Sánchez, Julio (2015): University of Salamanca (Spain)

Ballesteros Moya, María Vanessa (2014): University of Castilla la Mancha (Spain)

Becerra Becerra, Lucia (2016): University of Santiago de Compostela (Spain)

Bosdriesz, Hanna (2015): University of Leiden (Netherlands)

Buck, Kerrin Geoffrey (2014), University College Dublin (Ireland)

Bustamante Chávez, Sol Cristina (2021): Nacionational University of San Marcos (Peru)

Domínguez Fernández, Macarena (2015): University of McGill (Canada)

Gaviria Orjuela, María Paola (2014): University Carlos III (Spain)

Guadarrama Prado, Andrea (2014), University of Notredame (United States)

Jarne Cubero, Cubero (2012): University Carlos III (Spain)

Marcher Reyes, Melissa (2014): Pontifical Catholic University of Peru, PUCP (Peru)

Miranda Leyva, Víctor (2012): National Autonomous University of Mexico, UNAM (Mexico)

Petronilla Cruz, Dayanna Margot (2021): Nacionational University of San Marcos (Peru)

Trujillo, Valeria Isabel (2022): Nacionational University of San Marcos (Peru)

Winker, Sander (2015): University of Amsterdam (Netherlands)

Other participants in the International Law Clinic in the period 2011-2025

Professors

Prof. Andrea Mateus Rugeles (2011)

Prof. Mauricio Vanegas Moyano (2011)

Teaching Assistants

Albarracín Barrera, Juan David (2017)

Carcano Fernández, Lucía (2017-2018)

Contreras Fonseca, Andrés (2011-2012)

Freydell Mesa, Federico (2023)

Jaramillo García, Álvaro Pío (2015-2016)

Hernández Cortés, Clara Esperanza (2019)

Linares Botero, Sofía (2021-2022)

Martínez Agudelo, Ana María (2023)

Sánchez Sarmiento, Andrés (2020)

Suárez Ángel, Camila A. (2013)

Suárez Vargas, Daniela (2014)

Tole Ramírez, María Paula (2017)

Velásquez Medina, Gabriela (2022)

Villarraga, Zschommler, Luisa (2020-2021)

Montaño Vélez, Pedro (2024)

Ramírez Barrera, Valentina (2024)

Table of abbreviations

AC/SA	Appeals Chamber
ARS/ARN	Agency for Reincorporation and Normalization/ *Agencia para la Reincorporación y la Normalización*
AUC	United Self-Defence Forces of Colombia/ *Autodefensas Unidas de Colombia*
AFRC	Armed Forces Revolutionary Council
ACHR/CADH	American Convention on Human Rights/ *Convención Americana sobre Derechos Humanos*
ACMM	Peasant Self-Defense Forces of the Magdalena Medio/ *Autodefensas Campesinas del Magdalena Medio*
AP I	Additional Protocol I to the Geneva Conventions, on the Protection of Victims of International Armed Conflicts
AP II	Additional Protocol II to the Geneva Conventions, on the Protection of Victims of Non-International Armed Conflicts
APRODEH	Association for Human Rights/ *Asociación Pro Derechos Humanos*
C.C.	Constitutional Court
C. IV	Hague Convention (IV) respecting the Laws and Customs of War on Land.
CAH	Crime(s) Against Humanity
CAE	Extraordinary African Chambers
CAJAR	*Colectivo de Abogados José Alvear Restrepo*
CAR	Central African Republic
CAT	Committee Against Torture

CCE	Common Criminal Enterprise
CCJE	Consultative Council of European Judges
CCPE	Consultative Council of European Prosecutors
CED	Committee on Enforced Disappearances
CEDAW	Committee on the Elimination of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CIFW/ICBF	Colombian Institute of Family Welfare/*Instituto Colombiano de Bienestar Familiar*
CLA	Congolese Liberation Army
CLM	Congolese Liberation Movement
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CONADEP	National Commission on the Disappearance of Persons
CONADI	National Commission for the Right to Identity
CPK	Communist Party of Kampuchea/*Partido Comunista de Kampuchea*
CRC	Committee on the Rights of the Child
CRP/PIR	Comprehensive Reparations Program/*Programa Integral de Reparaciones*
CRPD	Committee on the Rights of Persons with Disabilities
DINAC	Manual for Criminal Investigation in the National Directorate of Analysis and Contexts
DRC	Democratic Republic of the Congo
DRK	Democratic Republic of Kampuchea

EC	Elements of the Crimes
ECCC/ECTC/SETC	Extraordinary Chambers in the Courts of Cambodia
ECHR/CEDH	European Convention on Human Rights
ECOSOC	Economic and Social Council of the United Nations
ECtHR/TEDH	European Court of Human Rights
ESMA	Memorial Space at the Navy Mechanics School
FARC	Colombian Revolutionary Armed Forces/*Fuerzas Armadas Revolucionarias de Colombia*
FIDH	International Federation for Human Rights
FNI	Front of Nationalists and Integrationists/*Front des Nationalistes et Intégrationnistes*
FPLC/PFLC	Patriotic Forces for the Liberation of Congo/*Forces Patriotiques pour la libération du Congo*
GAOML	Organized Armed Groups Outside the Law
GC I	Geneva Convention I on the Wounded and Sick in Armed Forces in the Field
GC II	Geneva Convention II on the Wounded, Sick and Shipwrecked of Armed Forces at Sea
GC III	Geneva Convention III on the Treatment of Prisoners of War
HIV	Human Immunodeficiency Virus
HRC/CDH	Human Rights Committee
IAComHR	Inter-American Commission of Human Rights
IACtHR/CtIDH	Interamerican Court of Human Rights
IASHR	Inter-American System of Human Rights
ICC/CPI	International Criminal Court/*Corte Penal Internacional*

ICCPR/PIDCP	International Covenant for Civil and Political Rights/*Pacto Internacional de Derechos Civiles y Políticos*.
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC/CICR	International Committee of the Red Cross
ICTR/TPIR	International Criminal Tribunal for Rwanda
ICTY/TPIY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL/ DIDH	International Human Rights Law/*Derecho Internacional de los Derechos Humanos*
IIH	Ibero-American Institute of The Hague for Peace, Human Rights and International Justice
ILC	International Law Clinic
IOM	Organization for Migration
IPRF	Ituri Patriotic Resistance Forces
JEM	Justice and Equality Movement
LOPIVI	Organic Law 8/2021 on the Comprehensive Protection of Children and Adolescents from Violence
LRA	Lord's Resistance Army
LSWDO	Local Social Welfare and Development Office
MLC	Movement for the Liberation of Congo
MONUC	Mission of the United Nations in Congo
MRND	National Revolutionary Movement for Development/*Mouvement Révolutionnaire National pour le Développement*
NATO	North Atlantic Treaty Organization

NCPIT/CNPPT	National Commission on Political Imprisonment and Torture/ *Comisión Nacional sobre Prisión Política y Tortura*
NCTR/CNVR	National Commission for Truth and Reconciliation/ *Comisión Nacional de Verdad y Reconciliación*
NCSDC/CNBND	National Commission for the Search for Disappeared Children / *Comisión Nacional de la Búsqueda de Niñez Desaparecida*
NIAC	Non-International Armed Conflict
NRP/PNR	National Reparations Program/ *Programa Nacional de Reparaciones*
NUP	National Unity Party
NGO	Non-Governmental Organization
OAS	Organization of American States
OCHA	Office for the Coordination of Humanitarian Affairs
ODM	Orange Democratic Movement
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights of the United Nations
OPCV	Office of Public Counsel for Victims of the International Criminal Court
OTP	Office of The Prosecutor
OPSP/OOPS	United Nations Relief and Works Agency for Palestine Refugees/ *Organismo de Obras Públicas y Socorro de las Naciones Unidas para los Refugiados de Palestina en el Cercano Oriente*
PTC/SCP	Pre-Trial Chamber/ *Sala de Cuestiones Preliminares*
RPE	Rules of Procedure and Evidence

RPEICTR	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
RPEICTY	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia
RPESCSL	Rules of Procedure and Evidence of the Special Court for Sierra Leone
RUF	Revolutionary United Front
SCJ	Supreme Court of Justice
SCK	Specialized Chambers of Kosovo
SCSL/TESL	Special Court for Sierra Leone
SCSLS	Statute of the Special Court for Sierra Leone
SCOTUS	Supreme Court of the United States of America
SCP/PTC	Pre-Trial Chamber
SGBV	Sexual and gender-based violence
SICC/ ICCS	Statute of the International Criminal Court
SICTR/ICTRS	Statute of the International Criminal Tribunal for Rwanda
SICTY/ICTYS	Statute of the International Criminal Tribunal for the former Yugoslavia
SJP/JEP	Special Jurisdiction for Peace/*Jurisdicción Especial para la Paz*
SLTRC	Sierra Leone Truth and Reconciliation Commission
SPI/TC	Trial Chamber
SPLM	Sudanese People's Liberation Movement and Army
STL	Special Tribunal for Lebanon
STLS	Statute of the Special Tribunal for Lebanon

TFV	Trust Fund for Victims of the International Criminal Court
TC/SPI	Trial Chamber
TRC	Truth and Reconciliation Commission
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNITAR	United Nations Institute for Training and Research
UNOSAT	United Nations Operational Satellite Applications Programme
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UPC	Congolese Patriotic Union/*Union des Patriotes Congolais*
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
USD	United States Dollar
VCLT	Vienna Convention on the Law of Treaties
VRS	Commander of the Army
WHO	World Health Organization
WPARC/TOAR	Works, Projects, and Activities with Restorative Content/*Trabajos, Obras y Actividades con Contenido Reparador*

Foreword

I.

The International Criminal Court (ICC) was created with the aim of fighting impunity in the face of the commission of serious crimes, thereby contributing to the construction of a stable and lasting peace. From the moment of its creation, the Court has been dedicated in its work to achieve this objective within the framework of the ICC Statute. For more than twenty years it has not only held those responsible for the commission of atrocities accountable for their actions, but also ensured that the interests and voices of victims can be heard and recognized as justice is delivered.

It is undeniable that the mandate of the Court is extensive and complex. In order to translate its objectives into realities, the Court is reliant upon on the collaboration of multiple actors in the international community. A clear example of this are those States which are part of the ICC Statute, whose cooperation is necessary to guarantee the good work of the ICC. They provide their assistance in highly relevant areas such as the arrest and turning over of suspects, the execution of sentences or the relocation of witnesses in situations of risk, among many other things. For its part, the civil society, as a key actor in the international community, also plays an essential role for the ICC.

As part of the civil society, the actions of the academic community, in whose hands lie the world leaders of tomorrow, are of fundamental importance in spreading the mandate, and the work and values of the ICC both nationally and internationally, as well as in promoting a better understanding of the justice system created by the Rome Statute and International Criminal Law. The academic community is of particular relevance at the national level, as it can conduct studies aimed at identifying aspects requiring improvement within national justice systems, thereby influencing their strengthening through the promotion of the Statute's standards in decision-making spaces. These opportunities, accordingly, manifest that academic institutions

constitute key actors in the model of global justice of which the Court seeks to raise awareness.

Through the public information and communications section of its Secretariat, the ICC actively advocates for the consolidation and strengthening of its ties with academic institutions. In this way, the Court seeks to promote academic efforts through its platforms, making available to students, teachers and / or researchers different alternatives that may benefit their training. So, for example, the Court's website compiles a wide variety of academic resources that can be consulted by members of the public who are interested in studying the Rome Statute system in greater depth. These resources range from legal instruments translated into various languages, to manuals, research articles, and model courses for the teaching of International Criminal Law and the ICC. Along these lines, the Court also has an internship program that offers students and recent graduates the opportunity to increase their knowledge and to gain a practical focus on the work of the Court.

One very important aspect of this relationship is the valuable contribution that academic institutions make to the Court in addressing legal problems and issues that the ICC regularly faces, through research and the creation and dissemination of knowledge. In particular, the work carried out by the academic community provides valuable legal tools for the interpretation of the provisions of the Statute and its complementary instruments in accordance with the system of sources set forth in article 21, and sometimes assisting the parties to procedures in the preparation of solid arguments to strengthen the positions they represent.

It is within this context that the framework of the innovative International Law Clinic Program, was set up in 2011 and, since 2013, has been developed through the cooperation of the Office of Public Counsel for Victims of the International Criminal Court (OPCV) together with the Faculty of Law of the Universidad del Rosario (Colombia) and The Hague Ibero-American Institute for Peace, Human Rights and International Justice (The Netherlands).

The results of this fruitful collaboration process, which for 15 years (2011-2025) has been effectively led by Prof. Héctor Olasolo -

whom I met in New York in 1999 when he served as legal adviser to the Spanish delegation in the Preparatory Commission of the Court, and who subsequently joined my work team at the ICC between 2004 and 2010 before his departure first for the University of Utrecht (The Netherlands), and later to the Universidad del Rosario —are presented in this volume.

The International Criminal Court represents an opportunity to provide justice to victims of war crimes, crimes against humanity, genocide and the crime of aggression, and to prevent these crimes from being committed again. However, the overall objective of the Court, of fighting impunity, can only be achieved to the extent that the efforts of different actors in the international community are directed towards that goal. The cooperation of academic institutions is essential in this cause which, as ex-Secretary General of the United Nations, Kofi Annan, has underlined, "is the cause of humanity".

Sylvia H. Steiner
Judge (2003-2016)
International Criminal Court

II.

In the last fifteen years, the International Law Clinic (ILC) has addressed several important issues that have been raised in the Bemba and Ongwen cases before the International Criminal Court (ICC). I will briefly discuss three of them, which refer to areas as diverse as grounds for excluding criminal liability, sentencing and reparations. This shows the ability of the International Law Clinic to provide a comprehensive analysis of any ICL topic that is relevant for ICC proceedings.

The first issue refers to the question as to whether insanity and duress could provide grounds for excluding the criminal liability of Dominic Ongwen, one of the highest commanders of the Lord´s Resistance Army (LRA) in Uganda. To answer this question, the ILC first addresses the scope and nature of the case against Ongwen, placing particular attention to the following circumstances: (a) the

defendant´s abduction at the age of ten by LRA members and his subsequent torture and brutal training; (b) the defendant´s ascent within the LRA's military structure so as to become, by 2004, the commander of the Sinia Brigade (one of the LRA's four brigades); (c) the brutal and hostile environment established within the LRA by Joseph Kony (its supreme leader), and the violent reprisals by the LRA against those who tried to leave it; and (d) the seventy charges of crimes against humanity and war crimes committed between July 2002 and December 2005, that the Pre-Trial Chamber (PTC) II confirmed against the defendant. These crimes include murder, slavery, torture, cruel treatment, inhumane acts, attacks against personal dignity, pillaging, destruction of property and persecution.

Subsequently, and considering article 21 of the ICC Statute on the applicable law, the ILC has addressed the content and scope of application of the elements of insanity and duress, as grounds for excluding criminal liability, under article 31 (1) (a) and (d) of the ICC Statute.

Concerning insanity, the following two elements are specially dealt with: (a) the existence of a disease or mental defect; that (b) causes, at the time in which the alleged crime is committed, the deprivation of the defendant´s capacity to (i) appreciate the unlawfulness or nature of his conduct; or (ii) control his conduct according to the requirements of law.

With regard to coercion, the analysis focuses on the following three elements: (a) the existence of a threat of imminent death or continuing or imminent serious bodily harm for the defendant or another person; (b) the defendant's necessary and reasonable response to avoid this threat; and (c) the defendant's lack of intention to cause a harm greater than the one sought to be avoided.

The analysis of the ILC on this first issue comes to an end with the application of the elements of insanity and coercion to the specific circumstances of the Ongwen case. In doing so, the ILC takes into consideration that circumstances falling short of constituting grounds for exclusion of criminal responsibility may constitute, pursuant to rule 145(2)(a)(i) of the ICC Rules of Procedure and Evidence (RPE), a mitigating factor in sentencing.

The second issue refers to the difficulties of intepretation posed by the complex interrelation between article 78(1) of the ICC Statute and rule 145 of the RPE. According to article 78 (1) of the ICC Statute, "[i]n determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person". Rule 145(1)(a) and (b) of the RPE complements article 78 (1) by stating that, in the determination of sentences, which must reflect the culpability of the convicted person, the ICC must balance all relevant factors, including: (i) the 'circumstances of the crime' (which could be interpreted as the gravity of the crime); (ii) the 'circumstances of the convicted person' (which could be interpreted as the individual circumstances of the convicted person); and (iii) any mitigating and aggravating factor provided for in rule 145(2)(a) and (b) of the RPE.

Nevertheless, some aggravating factors provided for in this rule (such as, victims' multiplicity or defencelessness, cruelty, discriminatory motive or other similar circumstances) could also be considered when assessing the gravity of the crime. Moreover, according to rule 145 (1) (c) of the RPE, in addition to the factors mentioned in article 78 (1), the ICC has also to consider other factors in sentencing (including, the extent of the damage caused (in particular the harm caused to victims and their families), the nature of the unlawful behaviour, the means employed to execute the crime and the degree of participation of the convicted person), which tend to overlap with those circumstances that establish the gravity of the crime and the personal circumstances of the convicted person under article 78(1) of the ICC Statute.

In light of this unclear framework, which has not been so far clarified by ICC case law, the ILC analyses whether the following circumstances could constitute relevant factors in sentencing: (a) the nature and extent of victimization; (b) the acts of violence constituting the contextual elements of crimes against humanity; and (c) the special gravity of some international crimes. In doing so, it looks into the case law of the ICC and of other international and hybrid criminal tribunals, such as the International Criminal Tribunals for the for-

mer Yugoslavia and Rwanda, the Special Court of Sierra Leone and the Extraordinary Chambers of the Courts of Cambodia.

Finally, the ILC also addresses the issue of reparations, through the ICC Trust Fund for Victims (TFV), to the more than five thousand victims that have participated in the proceedings of the case against Jean Pierre Bemba (president of the *Mouvement pour la Libération du Congo* (MLC), commander in chief of the MLC armed wing (the *Armée de Libération du Congo*) and former Vice-president of the Democratic Republic of the Congo). This issue came to be of special relevance as a result of Bemba´s acquittal by the ICC Appeals Chamber.

To answer this question, the Clinic first addresses the two-fold mandate of the TFV: (a) compliance with reparation orders issued by ICC chambers; and (b) provision of general assistance to victims of ICC crimes committed in the territory of States under investigation. Subsequently, it examines the several projects that have been implemented by the TFV since 2008 through its assistance programs, using voluntary contributions by donors to promote victims' physical and psychological rehabilitation and to provide them with material help. The ILC then goes on to study the feasibility of relying on the TFV´s assistance mandate to provide redress to victims in the Bemba case. Finally, it analyses the scope and extent of the interaction between the legal representatives of the victims and the TFV provided for in the ICC Statute and the RPE for this purpose.

Finally, I would like to congratulate the Faculty of Law of *Universidad del Rosario* (Bogotá, Colombia), the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice and the ICC Office of Public Counsel for Victims for the close and fruitful cooperation that have had in the last fifteen years through the ILC.

Ekaterina Trendafilova
Judge (2006-2015), International Criminal Court
Judge and President (2016-2025), Kosovo Specialist Chambers

III.

The ICC Statute is the first international instrument that has recognized the right of victims to participate in the judicial process and in addition to also obtain reparations.

The inclusion of the system of reparations provided for in article 75 of the Statute was an effort by the drafters to deliver justice to the victims.

In the Reparations Order issued in the Lubanga case on 3 March 2015, the Appeals Chamber stated the following: "[…] reparations fulfill two main purposes that are assigned to the Statute: they oblige those responsible for serious crimes to repair the damage that they have caused to the victims and allow the Court to ensure that the offenders are held accountable for their actions".

The ICC jurisprudence in relation to reparations, while establishing important precedents, is still in its initial stages. That said, the study and analysis of the cases shows us how the Court has applied and decided the essential issues in this area, thus consolidating the victims' right to reparation.

It is important to point out that international criminal law cannot be built solely on the basis of the jurisprudence of the ICC or of ad-hoc or hybrid courts, but also on the basis of the jurisprudence of international human rights courts, particularly the jurisprudence of the Inter-American Court of Human Rights (IACtHR) as well as the development of doctrine and research, as we see in the case of the International Law Clinic (ILC).

The ILC has addressed several legal issues related to the ICC reparations system, being especially relevant its study on the legal issue of transgenerational damage.

"Transgenerational damage" was identified in the descendants of survivors of the Holocaust and has been the subject of numerous studies and investigations.

The serious crimes provided for in the Statute such as rape, sexual abuse, genocide, massacres, among others, can affect future genera-

tions, thus causing traumatizing consequences in descendants that could give rise to claims for reparation.

The analysis of the concept of transgenerational harm was conducted for the first time by ICC Trial Chamber (TC) II in the Reparations Order issued in the Katanga case. The ILC addresses this important step and represents a significant contribution to the analysis of the reparation adjudication procedure.

The Reparations Order issued by TC VI on 8 March 2021 in the Bosco Ntaganda case was partially revoked by the Appeals Chamber (AC). Among its conclusions, one of them was the lack of a basis regarding the evidentiary accreditation within the concept of transgenerational damage. As the AC uses the terms transgenerational damage and intergenerational cycle in an indeterminate manner, the ILC, in addition to analyzing these two decisions, looks into: (a) the distinction between intergenerational and transgenerational damage in psychology doctrine; and (b) the irrelevance of these expressions for the literature on International Human Rights Law and International Criminal Law (ICL).

Furthermore, the ILC studies the jurisprudence of international criminal and hybrid courts, taking into account that the statutes of these tribunals do not provide for a system of reparations as in the case of the ICC Statute. The ILC analyses, in particular, the case of the Extraordinary Chambers of Africa (CAE) in the proceeding against Hissein Habre, that, when deciding on the request for reparations made by the victims, only applied the notion of "indirect victim" and did not apply the concept of transgenerational damage.

Another aspect that is analysed by the ILC is the reference to transgenerational damage under the universal and regional systems for the protection of human rights. The analysis in respect to the Inter-American system and the case law of the IACtHR is of particular importance. The ILC points out that, although the IACtHR "has never used the expressions intergenerational and transgenerational damage, it has repaired the psychological damage caused to children and grandchildren in various scenarios, particularly in cases of forced disappearance".

Reflecting upon different ICL issues promotes knowledge and is, undoubtedly, an important contribution to the discussion and critical examination of international criminal jurisprudence.

Finally, I would like to congratulate for this exemplary academic effort to the ILC, established by the Faculty of Law of the *Universidad del Rosario* (Bogotá, Colombia) jointly with the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (The Netherlands), and in cooperation with the ICC Office of Public Counsel for Victims (OPCV).

Olga Herrera Carbuccia
Judge (2012-2021), International Criminal Court

Creation and consolidation of the International Law Clinic

Fifteen years ago, the Faculty of Law of the *Universidad del Rosario* and the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (IIH), in alliance with the Chamber of Knowledge of the Special Jurisdiction for Justice and Peace of the Superior Court of Bogotá (J&P Chamber), gave rise to an academic and formative project which has left a deep imprint on the clinical education of international law: the International Law Clinic (ILC).

Founded in August 2011 under the direction of Professor Héctor Olasolo - who has led this initiative since its inception - the ILC was conceived as a space for practical training, critical reflection and commitment to international justice. Its consolidation was possible thanks to the institutional support of professors, researchers and strategic allies, including the Office of Public Counsel for Victims (OPCV) of the International Criminal Court, which since 2013, has become its main partner.

The ILC has evolved through its vision and perseverance. Initially conceived as a semestral course, in 2013 it adopted its current annual structure, connecting an intensive academic training semester with a second semester dedicated to the practical work of providing legal advice. Since then, students who participate in the ILC - supported by monitors and teachers - not only deepen their knowledge in International Humanitarian Law, International Human Rights Law and International Criminal Law, but also apply it to real cases raised by the OPCV and, until 2020, by the J&P Chamber.

One of the most significant attainments of the program is the annual visit to The Hague, in which the members of the ILC present their advice before officials of the International Criminal Court, participate in the Ibero-American Week of International Justice and contribute to academic activities such as the Seminar for Ibero-American Thought and the ICC Moot Court competition (Spanish version). These spaces for exchange allow students to project their training

towards international scenarios, while having a committed, rigorous and ethical approach.

Throughout these fifteen years, more than 150 students of the Faculty of Law have been part of the sixteen cohorts of the ILC. They have been joined by international students and visiting teachers from various countries, which has enriched the global nature of the experience. Everyone has shared the common purpose of putting their knowledge at the service of institutions that work for justice and the rights of victims.

The chapters that comprise this collectively written book are testimony to the reach, dedication and impact of the ILC. They reflect the intellectual effort, the legal sensitivity and the ethical commitment of those who have been part of this formative experience.

On the occasion of this anniversary, we extend our gratitude and recognition to Professor Héctor Olasolo, the authors of this work, and to all the people who have contributed to the development and consolidation of the ILC. The work of Professor Olasolo and of all the others has been key for the transformation of an academic initiative born in 2011 into a consolidated reference for clinical legal education in Latin America.

Today we take this opportunity to emphasize that the consolidation of the ILC throughout these fifteen years would not have been possible without the commitment, vision and the joint effort of numerous people and institutions, to whom we wish to express our most sincere recognition.

First, we reiterate thanks to Professor Olasolo, the founder and director of the ILC since its creation in 2011, whose dedication has been the constant driving force of this academic project. His leadership has inspired generations of students and has consolidated an academic community committed to international justice.

We recognize with special gratitude the support provided at the beginning of the ILC by Dr. Antonio Agustín Salame, dean of the Faculty of Law between 2011 and 2015, as well as the academic support of professors Andrea Mateus Rugeles and Mauricio Vanegas Moyano, and Andrés Contreras as research assistant. Their participation was

fundamental in the process of the institutionalization of the clinic in its early stages.

We also thank the magistrates and officials of the J&P Chamber, who were fundamental allies until 2020, and to the officials of the OPCV, whose continuous commitment has allowed students to apply their knowledge in real and complex contexts, and providing support from the Academy to the strengthening of international justice.

Finally, we highlight the generous participation of monitors, national and international students, and visiting professors who have been part of this experience over the years. Their work, enthusiasm and vocation to the service to the law have been essential for the ILC to have become, as it is today, a living community of learning and transformation.

To all, thanks for making possible these first fifteen years of the history of the ILC.

Bogotá (Colombia), 31st April 2025.

Antonio Aljure Salame & Laura Victoria García Matamoros
Deans, Facultad of Law, *Universidad del Rosario* (Colombia)
2011-2015 & 2022-2025

First approach to the creation process and the model of the International Law Clinic

HÉCTOR OLASOLO*

In the Western tradition, legal education has traditionally been divided into two main stages. Students were taught, in the first place, a theoretical foundation during the undergraduate or bachelor's degree stage which was then applied during traditional internships. This system was accompanied by the institutionalization at the undergraduate or bachelor's level of so-called *ex cathedra* lessons, which constituted a teaching technique characterized by minimal interaction between a professor who, from a distance, explained the general principles, and students who, for the most part, limit themselves to following this explanation.

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As a result of this model, a significant gap was produced between law schools on the one hand, where students learned the general principles of a plurality of legal disciplines, and those judicial institutions, law firms, and non-governmental entities on the other hand in which students subsequently developed their internships. This model, in turn, resulted in students not being exposed to problems of practical application during the first years of theoretical training.

However, with the beginning of the 21st century, there has been a gradual trend in Latin America and Europe towards other types of legal education, long past developed in the United States, which combine theoretical teaching of fundamental legal principles with familiarization with the main problems posed by their practical application. For this reason, case studies, judicial simulation competitions, and legal clinics are forms of education that are increasingly used in Latin America and Europe.

Yet, while the first two are found in broad application, legal clinics have followed a slower and more gradual process to opening spaces in undergraduate or graduate courses. In this context, the International Law Clinic (ILC), organized jointly by the *Universidad del Rosario* and the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (IIH), was founded in August 2011 in alliance with the Chamber for the Examination of Cases on the Specialized Jurisdiction of Justice and Peace of the Superior Court of Bogotá (J&P Chamber of Bogotá). In addition, from 2013, the alliance was also extended to the Office of Public Counsel for Victims (OPCV) of the International Criminal Court (ICC), which would eventually become the Clinic's main ally.

During the process of establishing the ILC between August and November 2011, Prof. Olasolo benefited from: (a) the invaluable collaboration of Professors Antonio Agustín Salame (Dean of the Faculty of Law of the *Universidad del Rosario* between 2011 and 2015), Andrea Mateus Rugeles and Mauricio Vanegas Moyano, as well as research assistant Andrés Contreras; and (b) the important experience acquired between 2009 and 2011 at the Law Clinic on Conflict, Human Rights and International Justice of the University of Utrecht (The Netherlands), of which he was co-founder together with Professor Leo Zwaak, together with the important support of Prof. Rick Wil-

son of the American University in Washington and Enrique Carnero Rojo of the OPCV.

Following the tradition of American public interest clinics, the ILC, which until 2014 was called the "Legal Clinic of International Criminal and Humanitarian Law", was officially recognized in the undergraduate program in jurisprudence at the *Universidad del Rosario*, so as to allow students to qualify for their degree requirement through it. Likewise, starting in the first semester of 2013, it went from having a single semester duration (cohorts of 2011 semester II, 2012 semester I and 2012 semester II), to its current annual structure (cohorts of 2013, 2014 and 2015), with one semester of training and another of legal advice. In addition, the academic direction of the Program, under the charge of Prof. Olasolo, was able to count from then on the valuable contribution of between one and two monitors per cohort.

The ILC shares most of the paradigmatic features of a public interest legal clinic in Latin America, the United States, or Europe, since: (a) it is recognized by the Faculty of Law's undergraduate program, and students obtain their degree requirement through it; (b) students provide *pro bono* legal services (in this case, consulting) to individuals or institutions that have real legal problems (such as the OPCV or the J&P Chamber of Bogotá); (c) students are closely supervised by experienced jurists; and (d) practical work is usually accompanied by a theoretical and skills training component.

In this regard, it should be noted that during the first semester of each year, the students of the *Universidad del Rosario* who participate in the clinic receive intensive training in those aspects that they need to know in order to successfully carry out the practical advisory work that must be carried out during the second semester. Likewise, until the Covid-19 pandemic in 2020, this training period included a visit to the Bogotá J&P Chamber.

For their part, during the second semester, the ILC participants form a research group dedicated to offering legal advice regarding the different problems raised by the OPCV in relation to the cases in progress before the ICC in which the OPCV itself intervenes, as long as they are not linked to Colombia (this was done from 2011 with the

Bogotá J&P Chamber until the Covid-19 pandemic (2020)). During this second semester, the members of the ILC also hold video conferences with the members of the OPCV.

After sending the required written advice to the OPCV, the members of the ILC travel to The Hague in May/June of the following year to present and discuss the results achieved with the international officials of the OPCV (until 2020, the written advice was also sent to the J&P Chamber in Bogotá, whose content was presented and discussed personally with the judges). During their stay in The Hague, the members of the ILC also participate in the organization and development of the various activities of the Ibero-American Week of International Justice (https://www.iberoamericaninstituteofthehague.org/actividades/semana-iberoamericana-de-la-justicia-internacional-y-los-derechos-humanos), including the Ibero-American Seminar on International Justice (https://www.iberoamericaninstituteofthehague.org/actividades/seminario-de-pensamiento-iberoamericano) and the ICC Moot Court Competition before the International Criminal Court (https://www.iberoamericaninstituteofthehague.org/actividades/concurso-de-simulacion-judicial-sobre-la-cpi), which are organized annually by the IIH between mid-May and mid-June.

In 2014 and 2015, the International Internship Programs (undergraduate or graduate students) and Research Stays (professors) were opened at the ILC. Under these programs, after spending ten weeks in Bogotá, participants in these aspects of the project had the opportunity to travel to The Hague with the rest of the members of the ILC to jointly make their presentations to the OPCV officials and participate in the various activities of the Ibero-American Week of International Justice. As a result, between 2014 and the Covid-19 pandemic (2020), students from universities in Canada, Spain, the United States, Ireland, Mexico, the Netherlands and Peru participated in these programs, and also had the opportunity to follow the public hearings of the paramilitarism trials held in the J&P Chamber of Bogotá.

Despite all these novel elements, the ILC maintains the core elements of clinical education, and in particular has been developed with a view to providing students with the opportunity to apply their knowledge in real cases by placing them in situations where, under

the close supervision of experienced jurists, they can provide legal advisory services to institutional users. The papers presented in this volume, coinciding with the XV anniversary (2011-2025) of the ICJ, perfectly reflect this situation.

However, the ILC is distinguished from most public interest legal clinics in at least two respects: (a) the type of user to which they provide legal services (an autonomous department of an international organization and a specialized national jurisdiction); and (b) the level of autonomy of the students and the degree of supervision in the preparation of the work that is finally to be delivered to the user. Both aspects are interrelated since the level of autonomy of the students and the degree of supervision vary depending on who the user is and the nature of his or her requirements.

There is today a consensus that public interest clinics must serve a social function within their communities. For this reason, the vast majority of them focus their activities on people who cannot access justice due to their lack of resources or their marginality.

However, there are a number of public interest legal clinics that operate in a different way with respect to this particular characteristic. For example, the legal clinic of the University of Amsterdam (The Netherlands) provides legal services to law firms based in the financial capital of The Netherlands and to non-governmental organizations, which do not suffer limitations in accessing justice due to their poverty or marginality.

For their part, the legal clinics of the Spanish universities *Rovira i Virgili* (Tarragona) and *Carlos III* (Madrid) work in highly specialized areas: the first is specialized in Environmental Law, while the second works mainly with the Inter-American Commission on Human Rights. Both provide legal advice to institutions and non-governmental organizations that are not necessarily based in Spain.

As for the ILC, it constitutes a unique model because it provides *pro bono* legal advice to the Office of Public Counsel for Victims of an international organization based outside Colombia and with a significant judicial component (the ICC). In addition, until the Covid-19 pandemic, it also provided legal advice to the judges of the J&P

Chamber of Bogotá, which is based just a fifteen-minute walk from the Faculty of Law of the *Universidad del Rosario*.

As a result, during its first decade, the social impact of the ILC has taken place both at a global and local level, as its activities have been directed at strengthening the application of justice in its dual national and international sphere. It has only been since 2020 onwards that the activities of the ILC were reoriented towards its increasingly close collaboration with the OPCV.

The particularities of the ILC's institutional users, as well as their requests for advice, require certain adjustments with respect to the way in which public interest legal clinics operate. First, in choosing to work with national and international judicial institutions, the ILC has developed on the premise that it will not participate in proceedings currently before these institutions (through, for example, the filing of *amicus curiae* briefs) so as to avoid any conflict of interest.

Secondly, the staff of national and international judicial institutions require that the ILC submit briefs that are sufficiently elaborate and detailed so that they have an incentive to review and discuss them once a year with their members. Therefore, the ILC's work cannot be limited to a broad compilation of legal sources; rather, all legal research must be translated into a report containing a thorough and detailed analysis of the most relevant issues.

In this way, the method of analysis and the format in which the information is presented constitute key elements of the practice of the ILC. If we add to this the high degree of specialization required to be able to competently address the issues of International Criminal and Humanitarian Law raised by the OPCV and the Bogotá J&P Chamber, and the many years of professional experience of its national and international officials, it is not surprising that a greater degree of supervision of the students and a more active participation of the director and the monitors in the final stages of the preparation of the briefs of the ILC are often necessary.

It is in this way that the director, monitors and students form a single legal team. In this context, the loss of a certain degree of experimentation in learning (an element of clinical education) is compensated by an intense practical interaction with the director of the

ILC (who has served in different international judicial institutions for more than a decade) and with his monitors.

It is from this perspective, as well, that we can affirm that, due to the specific characteristics of its users and the type of requests it receives, the ILC constitutes a truly innovative model for addressing clinical education, which deviates significantly from the model traditionally followed by public interest clinics in Latin America, the United States or Europe.

The relevance for victims of the first cases at the International Criminal Court: the perspective of the Principal Counsel of the Office of Public Counsel for Victims of the International Criminal Court

[*]**PAOLINA MASSIDDA**[*]

1. The implications for victims of the proceedings in the cases concerning Thomas Lubanga Dyilo and Bosco Ntaganda

1.1. The Lubanga case

On 14 March 2012 Trial Chamber I of the International Criminal Court (ICC) delivered its judgment in the case of Mr. Thomas Lubanga Dyilo, former President of the *Union des Patriotes Congolais/ Forces Patriotiques pour la Libération du Congo* (UPC/FPLC). Lubanga was found guilty of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities in the Ituri region in the Democratic Republic of the Congo (DRC) between 2002 and 2003. On 10 July 2012, Lubanga was sentenced to 14 years of imprisonment. The judgment and sentence have been confirmed on appeal.

This case is particularly significant for the development of jurisprudence concerning child soldiers. It builds upon relevant decisions

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[*] The views expressed in this piece are solely the ones of the author and should in no way be attributed to the International Criminal Court.

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of other tribunals and sets a very high standard for the prohibition of the use of child soldiers. It applies even if, for example, their families support their actions due to the circumstances of the conflict. A high threshold for accountability is also established in relation to children who played an 'indirect role' (who were forced to carry out daily activities which might not necessarily require the use of weapons or combat). Indeed, in examining the level of danger to which the child was exposed, the judges "[f]ound that both the 'child's support and this level of consequential risk' meant that a child could be actively involved in hostilities even if he or she was absent from the immediate scene of the conflict".

While the judgement marked a significant step against the punishment of crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities, it was also criticized for its overly narrow focus. In particular, sexual and gender-based violence (SGBV) crimes were not included in the charges despite the notorious fact that such crimes were committed as part of the recruitment practice, as shown during the trial by numerous witnesses who testified to this effect. This was at best inconsistent with a growing appreciation that crimes and human rights violations specific to women are not just a casualty of conflicts, but a deliberate tool thereof.

The exclusion of sexual and gender-based violence (SGBV) crimes led to disappointment among victims who considered that the presentation of the Prosecution case did not fully consider what happened to them and the extent of their victimization. In turn, the choice by the Prosecution to not charge any gender-based crimes limited the possibility for victims to assert reparations claims for the damage suffered. This is in contrast to the increasing international recognition that justice demands the strengthened implementation of gender-sensitive reparations schemes.

The Lubanga case was also the first proceeding in which the reparations procedure was triggered. On 7 August 2012, the Trial Chamber issued its decision establishing principles and procedures to be applied to reparations. The judges indicated two goals of reparations, namely, to oblige perpetrators to "repair the harm" caused, and "to ensure that offenders account for their acts". The Chamber consid-

ered it unnecessary to remain seized throughout the reparations proceedings and refrained from issuing a reparation order against Lubanga in light of his indigence. It found, instead, that reparations should be awarded "through" the Trust Fund for Victims and tasked the Fund with the dual mandate to determine and apply the appropriate forms of reparation.

This approach caused disappointment among victims and triggered several appeals. In particular, victims questioned the fact that the convicted person was not considered liable for reparations, that the Chamber only adopted a collective approach to reparations and that judicial functions were delegated to the Trust Fund.

On 3 March 2015, the Appeals Chamber reversed the Trial Chamber's decision issuing an Amended Order for Reparations.

The Appeals Chamber's most important conceptual clarification was the establishment of the principle of accountability of the convicted person towards victims which complements the punitive dimensions of the ICC. In particular, the Chamber recognized a "principle of liability to remedy harm", which flows "from the individual criminal responsibility" of the perpetrator. It specified that the accountability of the offender must be "expressed" through an order "against" the convicted person and that the indigence of the latter is not an obstacle to the imposition of liability for reparations.

This finding was a clear victory for victims who sought express judicial acknowledgment of accountability, independently of the convicted person's indigence.

The Appeals Chamber also stressed the need for legal certainty and held that a judicial reparation order must contain at least five "essential elements". Moreover, the decision made it clear that the establishment of accountability towards victims through reparation proceedings may be an asset per se, sending a clear message that the Court should not rush over reparation decisions, but listen to victims and pay greater attention to their harm.

Following the Appeal's Judgment, the new Trial Chamber - to which the matter was referred to for implementing the Amended Reparations Order - adopted a methodology allowing the efficient

collection of new dossiers of potential beneficiaries of reparations, in order to inform the court of the total amount of reparations for which Lubanga would be liable.

Consequently, on 15 December 2017, the Trial Chamber found that 425 new victims would qualify for reparations awarded in the case and issued a decision setting the amount of Lubanga's liability for reparations at USD 10,000,000.00 In this regard, the Chamber justified its decision taking into account that the scope of a convicted person's liability is in the circumstances of the case, proportionate to the harm caused and, among other things, his or her participation in the commission of the crimes for which he or she has been found guilty.

Importantly, the Chamber recognized that evidence established the existence of hundreds or even thousands of additional victims affected by the convicted person's crimes, indicating that the Trust Fund for Victims should continue to assess - at the implementation stage of reparations - the files of potential beneficiaries who were not in a position to submit a dossier on time.

The implementation of reparations awards has still not begun at the time of writing (March 2020) due to still very volatile security situation in Ituri and the Ebola and COVID-19 outbreak in the region.

1.2. The Ntaganda case

On 8 July 2019 Trial Chamber VI delivered its judgment in the case of Mr. Bosco Ntaganda. Ntaganda was found guilty of war crimes and the crimes against humanity of murder, pillaging, intentional attacks against the civilian population, rape, sexual slavery, persecution, conscription of minors under the age of 15 and using them to participate actively in hostilities, deportation and forcible transfer of population, attacks against protected objects, and destruction of the adversary's property committed in the Ituri region in the DRC between 2002 and 2003. On 7 November 2019, Ntaganda was sentenced to 30 years of imprisonment. Appeals against the judgment and the sentence are ongoing at the time of writing.

The Ntaganda case is unique in that the accused held a senior position when the crimes for which he has been convicted were committed. The case is also important in several aspects: (i) because of its broad scope which allows for the depiction of the full range of experiences of Congolese victims and the full range of the brutalities they endured; (ii) because it is the first case judged on the situation in the Democratic Republic of the Congo to include charges of SGBV; and (iii) because it is the first time that the ICC has charged acts of rape and sexual slavery committed against child soldiers under an official's command, within a militia group, as well as against civilians.

While the case against his predecessor, Lubanga, contributed to truth and justice around child recruitment in the FPLC, the broad set of charges brought against Ntaganda reflected the wide range of atrocities committed against the population in the Ituri region and answered the needs of victims for truth and justice.

Moreover, the case represents a significant step forward in the recognition of crimes of sexual violence against members of perpetrator's own armed group. Indeed, the Trial Chamber determined that the ICC has jurisdiction over the war crime of rape and sexual slavery under Article 8(2)(e)(vi) of the ICC Statute where the victims belong to the same armed forces as the alleged perpetrators. In particular, the Chamber found that, provided there is a nexus to the armed conflict, rape and sexual slavery against any person is prohibited, and that therefore members of the same armed force are not *per se* excluded as potential victims of said crimes.

In this regard, the judges determined, "[w]hile most of the express prohibitions of rape and sexual slavery under international humanitarian law appear in contexts protecting civilians and persons hors de combat in the power of a party to the conflict, the Chamber does not consider those explicit protections to exhaustively define, or indeed limit, the scope of the protection against such conduct". To arrive at this conclusion, they undertook a textual, contextual and historical analysis of the pertinent provisions of the Statute, and considered that the "established framework of international law" allowed such conclusion as a result of a teleological interpretation of the Geneva Conventions, the Additional Protocols and of the case law of *ad hoc* tribunals; as well as the rationale of the IHL.

The ruling was upheld by the Appeals Chamber which confirmed that the Statute does not import a status requirement. The appellate judges carried out an autonomous assessment on whether such status requirement could be derived from the "established framework of international law" to which article 21 of the Statute refers for interpretative purposes. Despite the admitted lack of relevant state practice and the contrary evidence coming from the post-war trials and the Special Court for Sierra Leone's case law, the Appeals Chamber concluded that IHL does not categorically exclude protection for victims of crimes in intra-party relations. With particular regard to rape and sexual slavery, judges concluded that there are no compelling reasons to put limits on who may be victim of such conduct based on status, considering that sexual violence is never justified or necessitated in armed conflicts. The judges on appeal further acknowledged the "unprecedented" character of this conclusion but considered the resulting extension of the scope of criminal responsibility for war crimes permissible both under the Statute (thereby rejecting the Defense's concerns on the principle of legality) and the established framework of international law.

Finally, in relation to the crime of sexual slavery, the Trial Chamber found that Ntaganda was responsible as commander for the acts committed by his subordinates against: (i) several captured victims who were deprived of their liberty for a prolonged period of time, forced into sexual intercourse and to undertake tasks such as carrying goods and cooking; as well as against (ii) former child soldiers who were subjected to repeated acts of sexual violence by use of force, threat of force or coercion, or taking advantage of the coercive environment in which they were obliged to remain, exercising therefore some of the powers attached to the right of ownership.

By virtue of the convictions of the accused, in both cases reparations proceedings are opened: in the Lubanga case at the stage of implementation of reparations award; in the Ntaganda case at the very preliminary stage and a reparation order has not yet been issued.

As the Lubanga case has shown, reparations proceedings entail a long judicial procedure, triggering, therefore, the question of the actual benefit for victims. Indeed, lengthy reparations proceedings have negative effects because of continuous traumatization or

re-traumatization, thus increasing victims' fatigue and causing new grievances.

Moreover, there is a more fundamental question as to whether and how the perpetrator-centered reparation regime at the ICC can redress damages in specific situations, without creating further harm and societal division. These tensions are even more apparent in proceedings where patterns of victimization reflected in the analysis of crimes and charges may privilege the harm of one group while sidelining the victimization suffered by others. In this regard, the Lubanga case involved predominantly perpetration and victimization within the Hema population; while in the Ntaganda case the majority of the victims were of Lendu ethnicity.

Yet reparations are about more than just responding to victims' basic needs. Reparations must respond to the real impact of violations in victims' lives and at the same time be received as sincere efforts on the part of the larger society to acknowledge what happened and to provide some real measure of justice to those harmed. Moreover, reparations in restoring the dignity of the victims can help to create the conditions necessary for reconciliation. The community dialogue provides an opportunity for victims and their families to discuss the underlying causes of the conflict, and to address community understandings and perceptions that can prevent or fuel conflict. This process will help to rebuild trust within and between communities, and foster reconciliation.

2. The impact of the proceedings in the case concerning Germain Katanga on victims: special attention to the reparation order of Trial Chamber II

2.1. Background of the case

On 7 March 2014, Trial Chamber II of the ICC declared, by majority, with Judge Van den Wyngaert dissenting, Mr. Katanga guilty, as an accessory, within the meaning of article 25(3)(d) of the Rome Statute, of one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, de-

struction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro, in the Ituri district of the Democratic Republic of the Congo (DRC). The Trial Chamber acquitted Mr. Katanga of rape and sexual slavery as a crime against humanity and of the war crimes of using children under the age of fifteen years to participate actively in hostilities, sexual slavery, and rape[1].

On 23 May 2014, Trial Chamber II, by majority with Judge Van den Wyngaert dissenting, sentenced Mr. Katanga to 12 years of imprisonment[2].

On 25 June 2014, the Defence for Mr. Katanga and the Prosecutor discontinued their appeals against the judgment which became final.

On 24 March 2017, Trial Chamber II issued an Order awarding individual and collective reparations to the victims of crimes committed by Mr. Katanga[3].

Because of Mr. Katanga's indigence, the Trust Fund for Victims (TFV) was invited to consider using its resources for the reparations and to present an implementation plan. In May 2017, the TFV Board of Directors decided to provide 1 million USD for the reparations awarded to victims in the Katanga case covering the full amount ordered by the Trial Chamber. The Board also welcomed a voluntary contribution of €200,000 by the Government of The Netherlands, which included earmarked funding to cover the cost of individual awards. On 25 July 2017, the TFV presented its draft implementation plan to the Chamber[4].

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1 Vid.: ICC, the Prosecutor v. Germain Katanga, Trial Chamber II, Judgment pursuant to article 74 of the Statute, March 7, 2014, ICC Doc. No.: ICC-01/04-01/07-3436-tENG.

2 Vid.: ICC, the Prosecutor v. Germain Katanga, Trial Chamber II, Decision on Sentence pursuant to article 76 of the Statute, May 23, 2014, ICC Doc. No.: ICC-01/04-01/07-3484-tENG-Corr.

3 Vid.: ICC, the Prosecutor v. Germain Katanga, Trial II, Order for Reparations pursuant to Article 75 of the Statute, March 24, 2017, ICC Doc. No.: ICC-01/04-01/07-3728-tENG.

4 Vid.: ICC, the Prosecutor v. Germain Katanga, Trial Chamber II, Public redacted document Draft implementation plan relevant to Trial Chamber II's

On 8 March 2018, the Appeals Chamber confirmed the Reparation Order in the case[5].

2.2. The reparation order of Trial Chamber II

The Katanga reparation order constitutes one of the first major reparation decisions in the ICC's emerging reparation practice—preceded by the reparation decision in the Lubanga case[6], partially amended by the Appeal Chamber[7].

The Katanga Reparation Order builds up on principles, procedural and substantive law of reparations developed in the Lubanga case, but it elaborates certain aspects of the ICC reparation system, including the quantification of the harm suffered by victims and the granting of individual compensations for the first time.

The Trial Chamber found that the principles established by the Appeals Chamber in Lubanga case were equally applicable in the Katanga case, in particular: humanity and dignity; equal treatment; inclusiveness; safety, physical and psychological well-being and privacy of victims; and non-discrimination[8]. These principles have been inferred from international human rights law sources. The Trial Chamber also determined that reparation orders under article 75 of the Statute must be against the convicted person; establish and inform the convicted of his/her liability; indicate the type(s) of repa-

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order for reparations of 24 March 2017 (ICC-01/04-01/07-3728), July 25, 2017, ICC Doc. No.: ICC-01/04-01/07-3751-Red.

5 Vid.: ICC, the Prosecutor v. Germain Katanga, Appeals Chamber, 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, March 9, 2018, ICC Doc. No.: ICC-01/04-01/07-3778-Red.

6 Vid.: ICC, the Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, Decision Establishing the Principles and Procedures to be Applied to Reparations, August 7, 2012, ICC Doc. No.: ICC-01/04-01/06-2904.

7 Vid.: ICC, the Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Order for Reparations (amended), March 3, 2015, ICC Doc. No.: ICC-01/04-01/06-3129-AnxA.

8 Vid.: ICC, the Prosecutor v. Germain Katanga, Trial II, Order for Reparations pursuant to Article 75 of the Statute, supra no. 4, par. 30.

rations (individual/collective); define the harm inflicted on direct and indirect victims as a result of the crimes for which the accused was convicted and determine modalities of reparations; and identify the victims who can benefit from awards or set out eligibility criteria[9].

Unlike in the Lubanga case, the Trial Chamber evaluated each of the 341 applications for reparation and granted awards to 297 victims[10]. In this regard, the Chamber found that victims for reparation purposes are those who suffered harm as a result of a crime under the ICC's jurisdiction provided that these crimes correspond to those for which the accused was convicted. Although harm must have been suffered personally, reparations can be provided to direct and indirect victims (who suffered harm as a result of a prejudice suffered by a direct victim)[11].

Concerning evidentiary criteria, the applicants for reparations had to prove their identity and the causal link between the harm suffered and the crime(s) for which Mr. Katanga was convicted. Importantly, the Chamber recognised that victims may have a problem in accessing to evidence proving their prejudice because of the destruction or loss of documents during the attack and the lapse of time (14 years) since the events occurred. Consequently, the Judges found that the standard of 'balance of probabilities' rather than the more demanding standard of 'beyond reasonable doubt' was applicable. In this regard, the Chamber relied on case law of the Inter-American Court of Human Rights (IACtHR) and of the Extraordinary Chambers in the Courts of Cambodia (ECCC)[12]. Moreover, by referring to the IACtHR, the German Forced Labour Compensation Programme and the UN Compensation Commission, the Chamber concluded that the use of presumptions and indirect evidence to establish certain facts was appropriate in the case[13].

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9 Ibid., par. 31.
10 Ibid., par. 33.
11 Ibid., parrs. 35 and 37.
12 Ibid., parrs. 48-50.
13 Ibid., parrs. 57-61.

The Chamber considered several types of damages:

1. Material damage claims involved destruction of homes, annexes and office buildings, destruction/pillage of furniture, personal items and merchandise, pillage of livestock, crops and destruction of fields, and destruction of familial patrimony.

For all material damage claims, the Chamber established a test of whether the harm was connected to the crimes for which Mr. Katanga was convicted, the evidence offered to support the allegations, and, if the damage was found to exist, the appropriate extent of reparations.

For claims involving destruction of homes, annexes and office/business buildings, the Chamber found that the damages were committed during the attack, the claimants provided proof that they had owned the buildings, and that reparations were appropriate. For claims involving destruction/pillage of furniture, personal items and merchandise, the Chamber asserted that there was a connection between the alleged damage and the attack. There were some questions as to the claimants' ability to prove the items destroyed, but the Chamber recognized a presumption that those living in the destroyed structures had possessed such items.

For claims involving pillaging of livestock, crops and destruction of fields, the Chamber found a nexus between the damage and the crimes. It recognized that agriculture was an important aspect of the personal and commercial survival of many in Bogoro. Although it was difficult to establish agricultural ownership at the individualized level, the Chamber recognized a presumption that when possession of a home was established there was an agricultural interest as well. Furthermore, the Chamber decided that it was impossible to assess commercial agricultural interests but that there was sufficient evidence to find that the victims used agriculture for individual consumption and to set reparations. Finally, the Chamber found that it lacked jurisdiction for the question of destruction of familial patrimony, as it was essentially a matter of Congolese law.

2. Physical and Psychological damages claim.

In terms of physical damage, the Chamber had previously established that the infliction of physical damage was part of the plans

for the Bogoro attack and that many who survived suffered lasting injuries. Since the majority of claims were substantiated by medical reports the Chamber found that reparations were appropriate. Victims indicated several forms of psychological damages suffered: harm from the death of a parent in the attack, harm for those present at the attack, transgenerational harms, and loss of way of life, loss of chance and forced exile.

In particular, the issue of harm from the death of a parent in the attack (extended to other family members based on the societal structure in Bogoro) raised an essential issue for the Chamber, namely whether reparations could be awarded for indirect harms. In this regard, the Chamber found reparations appropriate, provided that the victims could prove that the psychological harm resulted directly from the death of a parent/family member, a direct familial connection between him/her and deceased, the death was the result of the Bogoro attack, and a personal relationship between him/her and the deceased.

Regarding individual psychological harms to those present at the attack, the Chamber recognized the brutality of the Bogoro attack, its potential to cause psychological harm, and that be present at the attack was in itself sufficient to establish a presumption of personal trauma. For transgenerational harms, the Chamber found an insufficient causal link between the crimes committed and the allegations of psychological harms passed on to the children of the victims.

3. Other damages claim.

Victims claimed also two additional damages: the first related to physical and psychological damages stemming from rape and sexual violence during the Bogoro attack; the second related to child soldiers. Since Mr. Katanga was not convicted of said crimes, reparations could not be awarded.

In terms of valuing the damages, the Chamber determined that the date on which the valuation should be made was the date of the issuance of the judgment. For economic standards to be applied, the Chamber created a dual system in which material damages were assessed in terms of the place where they occurred and physical and

psychological damages at a universal level because they relate to interests of humanity[14].

In relation to the type of reparations warded, two important aspects have to be underlined: (a) the principle that individual and collective reparations are not mutually exclusive and can be granted cumulatively[15]; and (b) the discussion about the conceptual scope of both individual and collective reparations.

In relation to the second aspect, the Chamber found that a collective award may address one of the following two general groups: an ethnic, racial, social, political or religious group that pre-existed the crime; or a group that can be identified subsequently to the collective harm out of the crimes for which a person was convicted[16]. Collective reparations avoid stigmatisation, are responsive to common needs and the complexity of harm of different victims as well as promote reconciliation. In turn, individual reparations prevent victims from feeling excluded or being marginalized, individually recognize victims, and enable victims to recover their autonomy and take their own decisions based on their real needs[17]. Consequently, in awarding reparations, the Chamber adopted a methodological approach.

Concerning individual reparations, the Chamber focussed on compensation. In particular, the Chamber for the first time conducted a quantitative determination of the harm suffered by each victim. The components of the harm were broken down and quantified in USD as follows: (a) material harm, including damages to houses, businesses, livestock, and fields/harvests (50-3000 USD); (b) physical harm caused by bullet wounds (250 USD); and (c) psychological harm, considering two sub-categories: loss of a close relative (8000 USD) or a distant relative (4000 USD), and harm related to the experience of the attack (2000 USD)[18].

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14 Ibid., par. 230.
15 Ibid., par. 270.
16 Ibid., par. 274.
17 Ibid., parrs. 284, 285, 289.
18 Ibid., par. 239.

The total amount of harm inflicted on the Katanga victims was quantified in 3.752.620 USD and Katanga was found to be individually liable for 1 million USD[19]. However, because of the lack of resources, the Chamber only granted a symbolic sum of 250 USD to each victim, while recognising that said amount does not fully compensate the harm inflicted but only assists to relieve harm, helping victims to become economically autonomous.

Regarding collective reparations, the Chamber granted measures that support housing, income-generating activities, education and psychological well-being[20].

In accordance with the Draft Implementation Plan presented by the TFV, housing assistance may entail constructing a home with basic household furnishings, expanding a current home, purchasing a plot of land, or assisting with rent payments. Education assistance may include payment of primary or secondary school fees and related costs for victims' children.

Income-generating activities may include payment for university-level enrolment and tuition, and vocational training in small business enterprises such as dressmaking and taxi driving, animal husbandry, agriculture, and fishing. Training in developing business plans and provision of business kits—such as sewing machines and clothes-making materials, or livestock, seeds, and farming tools—are others.

Psychological rehabilitation may include individual trauma-based counselling sessions and group counselling sessions.

For the purpose of the implementation of the reparation awards, the TFV created categories representing proportionality between the collective reparations and the different degrees of the type of harms suffered by the victims.

All 297 victims suffered psychological harm from the Bogoro attack, and this harm is covered by the individual symbolic compensation of 250 USD across the five categories of harm. The categories are: (a) loss of home and livestock; (b) loss of home or equivalent

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19 Ibid., parrs. 239, 264.

20 Ibid., par. 302.

material loss; (c) loss of an immediate family member; (d) loss of personal affairs and minor material loss; and (e) general moral harm.

Applying said categories to the situation of each victim, in terms of income-generating activities, victims that suffered extensive family loss (more than five immediate family members) would get two cows and a veterinary kit, whereas families that suffered only general harm would get one cow. Victims who do not have minor dependents and who would not benefit from education assistance may choose to "top up" the modalities of housing assistance or income-generating activities. Similarly, victims that need to support more children in school might forego housing assistance or income-generating activities so as to have more of their children benefit from education. Finally, a financial adviser would advise victims on means to swiftly and confidentially receive and use their 250 USD award.

While the current reparations activities are still conducted confidentially to preserve the security and well-being of the beneficiaries, by mid-2019, the TFV had fully disbursed the individual reparation awards. By the end of 2020, the TFV had concluded the implementation of the educational assistance and nearly fully concluded the implementation of the income-generating activities.

For the implementation of the housing assistance and the psychological support, the TFV continues to work closely with counsel for victims and the Registry in order to find suitable solutions.

The Katanga Reparation Order constitutes and important step in the development of the ICC reparation system. However, the implementation phase shows that important challenges remain to be overcome the lack of resources, the timely implementation and the difficulties linked to the still volatile security situation in the Ituri region.

The reparations mandate of the ICC is a crucial component of its overall framework for giving victims a voice and allowing them to exercise their rights within the international criminal justice system. The promise of reparations set out in article 75 of the Statute reflects the consensus in the international community that reparation is essential to address the terrible consequences experienced by victims of international crimes and gross human rights violations. Efforts

should therefore be deployed to find more efficient and timely way to deliver reparations to victims.

3. The implications for victims of the proceedings of the case concerning Jean Pierre Bemba Gombo

On 21 March 2016, Trial Chamber III of the ICC convicted Mr. Jean-Pierre Bemba Gombo (President and Commander in chief of the *Mouvement de Libération du Congo* – MLC*)* of crimes against humanity of murder and rape and war crimes of murder, rape and pillaging, committed by his troops in the Central African Republic (CAR) between 2002 and 2003[21]. He was sentenced to 18 years of imprisonment[22].

The case was the first before the ICC to find a defendant guilty of command responsibility under article 28 of the Rome Statute and the first involving a conviction for rape which was recognised as used as a "tool" to terrorize the civilian population in CAR. The Trial Chamber focussed on Mr. Bemba command responsibility indicating that the defendant possessed the authority but failed to properly prevent, repress, investigate, and prosecute crimes he should have known were being committed by the troops under his command and control.

The trial was significant because the Judges granted 5,229 victims the right to participate in the proceeding. This is the highest number of victim participants to date allowed in any trial conducted by the ICC. During the trial victims not only provided testimony, describing crimes, including gang-rapes, committed by MLC soldiers during the armed conflict, but three victims appeared before the Judges to

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21 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, March 21, 2016, ICC Doc. No.: ICC-01/05-01/08-3343.

22 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, June 21, 2016, ICC Doc. No.: ICC-01/05-01/08-3399.

express their views and concerns in person[23]. In this regard, Trial Chamber III emphasised that the "[t]hreshold to grant applications by victims to give evidence is significantly higher than the threshold applicable to applications by victims to express their views and concerns in person. For this reason, victims who fail to reach the threshold to be authorised to give evidence may still be permitted to express their views and concerns in person[24]" in the form of unsworn statements.

In practice, the legal representative guided the victims through their presentation by only facilitating it, with a few questions, and the victims were not questioned by the parties but by the Judges[25]. In light of the importance for victims to be able to express their views and to share their experience with the Judges, this was an important step in the recognition of their victimisation and of the possibility to contribute to establish the truth. The account of the victims was not considered evidence, but it could be used to corroborate evidence before the Chamber.

However, on 8 June 2018, the Appeals Chamber reversed, by a majority of three judges, the decision of the Trial Chamber, acquitting Mr. Bemba, finding that his conviction exceeded the facts and circumstances described in the charges brought against him and declining to permit a new trial on the facts it found to be outside the scope of the initial Trial Chamber judgment[26]. Two of the five Judges

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23 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Trial Chamber III, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, February 22, 2012, ICC Doc. No.: ICC 01/05-01/08-2138.

24 Idem, par. 20.

25 Idem, par. 7. See also, the transcripts of the hearing held on 1 March 2017, ICC Doc. No.: ICC-01/04-02/06-T-198-Red2, p. 3, lines 8-20.

26 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Appeals Chamber, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's Judgment pursuant to Article 74 of the Statute, June 8, 2018, ICC Doc. No. ICC-01/05-01/08-3636-Red. See also, ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Appeals Chamber, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, June 8, 2018, ICC Doc. No.: ICC-01/05-01/08-3636-Anx2.

filed a Dissenting Opinion indicating that they would have upheld the conviction[27]. One Judge filed a Concurring Opinion indicating that he would have permitted a retrial on the new charges his colleagues found to be outside the scope of the original conviction[28].

In essence, the Appeals Chamber concluded that the Trial Chamber erroneously convicted Mr. Bemba for specific criminal acts that were outside the scope of the case. The majority also stated that the Trial Chamber made serious errors in its assessment of whether Mr. Bemba took all necessary and reasonable measures to prevent, repress, or punish the commission of the crimes by his subordinates. In particular, the majority considered that Mr. Bemba had faced limitations in investigating and prosecuting crimes as a remote commander. In the words of the Appeals Chamber, "the Trial Chamber paid insufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr. Bemba's ability, as a remote commander, to take measures"[29].

The acquittal of Mr. Bemba was very disappointed for Victims. It opens a door for all military commanders to possibly escape criminal responsibility for crimes committed by forces under their effective authority, command and control: it means that as soon as one can prove that he was far enough from the war field, the ICC can conclude that he or she was unable to take all the necessary and reasonable measures to prevent or repress the crimes. This exonerating factor is very questionable especially given the technology available at the time the crimes were committed. Indeed, with modern technology, one does not need to be in the active war zone to have effective authority, control or command over troops. Moreover, the judgement was felt as a huge blow for the many victims of rape which was committed on large scale and systematically by MLC troops in CAR.

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27 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, June 8, 2018, ICC Doc. No.: ICC-01/05-01/08-3636-Anx1-Red.

28 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Appeals Chamber, Concurring Separate Opinion of Judge Eboe-Osuji, June 8, 2018, ICC Doc. No.: ICC-01/05-01/08-3636-Anx3.

29 ICC, Bemba Appeals Judgment, supra n. 7, par. 171.

For the Victims the verdict was an insult to the thousands of them who suffered greatly from the abuses committed by MLC troops. Victims were anxiously awaiting reparations for the crimes they suffered from which still bear huge consequences for their lives today. The judgment – in their words – stole their last hopes for compensation, sending them back to their loneliness and precariousness with no acknowledgment of their suffering. Victims contributed to the proceedings by agreeing to share and explain their sufferings as well as the multiple consequences of the crimes on their lives and on the fate of their families and communities, from the first day of the proceedings and during the following 10 years.

Because the defendant was finally acquitted, reparations proceedings were concluded, despite the attempt by counsel for victims to persuade the Chamber to nevertheless establish principles that could be applied for the purpose of future reparations before other *fora*, and to recognize, to that end, the scope and extent of the victimisation, or in other words, the harms Victims suffered from and continue suffering from as a result of the events.

In particular, in light of the spirit and objectives of the Rome Statute, counsel requested the Trial Chamber to read jointly paragraphs 1 and 6 of article 75, and to interpret them as giving it the power to issue an order establishing principles relating to reparations and determining the scope and extent of victimisation of the persons who have been in contact with the Court throughout the case[30].

Such an order would have brought a recognition more than necessary to the thousands of Victims concerned, and would have allowed them to seek guidance and look for the assistance of other authorities without losing the benefit of the years of proceedings, warding off starting from scratch and having to revisit their sufferings. In addition, the order would also have had the advantage of guiding the Trust Fund for Victims in its assistance mandate, and of providing the latter with precious information in order to implement

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30 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Appeals Chamber, Legal Representatives of Victims' joint submissions on the consequences of the Appeals Chamber's Judgment dated 8 June 2018 on the reparations proceedings, July 12, 2018, ICC Doc. No.: ICC-01/05-01/08-3649, parrs. 40-65.

its mandate in an expeditious, targeted and appropriate manner, in particular for the benefit of the victims already known in the case.

Indeed, immediately after the issuance of the Appeals' judgment, the Trust Fund for Victims announced its intention to accelerate the launch of its assistance programme in CAR in the form of physical and psychological rehabilitation, as well as material support, for the benefit of Victims and their families[31]. Unfortunately, at the time of writing, in May 2020, the assistance programmes are still not operational in CAR

These observations lead to a more fundamental issue related to the extent of the role of the Trust Fund for Victims.

In the authors' experience, reparations proceedings are lengthy and often delayed by the situation in the field which can evolve rapidly leading to the impossibility to carry on operations and activities. Moreover, when reparations proceedings are opened, Victims have already waited for several years for their harms and needs to be addressed; some have died in the meantime; for the majority of them, measures of reparations effective at the time of the commission of the crime(s) may not be appropriate or feasible anymore; on occasions, Victims may have been re-victimised by subsequent events.

Therefore, the authors advocate for a stronger role of the TFV and its involvement in the country as soon as a situation is brought before the ICC. The early design and implementation of assistance programmes will address the needs of the Victims and their families already when proceedings before the ICC will still be at the embryonic phase. This will, first, respond to the needs of the Victims in a more timely fashion, but will also contribute to alleviate disappointment in case of non-conviction. Moreover, it will set the basis for the

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31 ICC, Trust Fund for Victims, 2018, Press release: following Mr. Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic, June 13, 2018. See also: ICC, Trust Fund for Victims, 2018, Communication from the Chair of the Board of Directors of the Trust Fund for Victims to the President of the Assembly of States Parties, June 13, 2018.

implementation of services at the local level, therefore strengthening the national capacities to assist Victims.

Furthermore, in case of conviction, the assistance programmes in place could help as models for the reparations measures to be implemented. In this regard, most assistance programmes implemented by the TFV thus far can be re-designed for reparations purposes[32]. This course of events will avoid further delays in implementing reparations awards and possibly avoid lengthy procurement procedures.

The TFV also bears the responsibility to generate enough resources to meet the financial burden ensuing from a reparation order to benefit Victims to the required degree, when the convicted person is indigent. In this regard, since the ICC's current reparations system is almost completely dependent on the Fund's ability to secure funding because convicted person so far were found indigent, the TFV should be urged to diversify its funding sources and develop its fundraising ability by enhancing its communications capacity to become a more visible and well-known institution, and to ensure effective synergies and strategies amongst relevant actors[33].

4. The impact of the proceedings in the case relating to Dominic Ongwen on victims: special attention to the specificities of the crimes of forced marriage and forced pregnancy

4.1. Background of the case

During the decades of armed conflict in Northern Uganda, the Lord's Resistance Army (LRA) systematically abducted girls and women – preferably aged between 10 and 15 - for the purpose of

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[32] In this regard, please refer to the description of assistance programmes in relation to physical, psychological rehabilitation and material support on the TFV website: ICC, Trust Fund for Victims, n. d., Assistance programmes.

[33] REDRESS, 2019, No Time to Wait: Realising Reparations for Victims before the International Criminal Court" (the "REDRESS Report"), January, 2019, pp. 34-35. See also, Regulation 23 of the Regulations of the Trust Fund for Victims.

raping and forcibly marrying them to commanders and fighters as rewards, abusing them sexually and forcing them to do chores in their respective households. The victims who participated in the trial indicated that rape, sexual violence, sexual slavery, forced marriage and forced pregnancy were crimes systematically committed by the LRA rebels, including by senior commanders and notably by Mr. Ongwen.

As recalled by one of the witness former wives of Mr. Ongwen at trial, "[The girls who were selected] do not have a voice. If you are told go there, then you must go. […] If you refuse, you were either beaten or killed. […][34]".

Studies find that at least a quarter of all girls and women abducted for any length of time were forcibly married to members of the LRA, and that half of them gave birth to children conceived during these forced relationships[35]. The use of the label "wife" causes a unique psychological suffering which often leads to stigmatization and rejection of the victims by their families and communities. Forced marriage also inflicts grave physical injury and results in long-term moral and psychological suffering for the victims. Victims have indicated that their condition of "wife" had, and still continues to have, serious repercussions on their possibility of restoring what they call a 'normal' relationship with men; and that even if they are re-integrated into their community, they feel that said reintegration is not – to use their word - 'full' and sometimes only dictated by social conventions more than by a genuine will to help them in rebuilding their lives.

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34 See.: Public redacted version of Common Legal Representative of Victims' Closing Brief, ICC-02/04-01/15-1720-Conf, No. ICC-02/04-01/15, 28 February 2020, para. 43. See also paras. 82-83.

35 See.: K. Carlson and D. Mazurana, "Forced marriage within the Lord's Resistance Army, Uganda", may 2008; According to the data consulted by the Professor Reicherter (the expert on SGBC called by the Common Legal Representative at trial): "Estimates of the proportion of girls abductees that were forcibly married to members of the LRA range from 42% to 55%. Close to half of girls forced into marriage bore children".

4.2. How Victims' concerns were considered in the Ongwen case?

On 23 March 2016, Pre-Trial Chamber II confirmed the charges brought by the Prosecutor against Mr. Ongwen and committed him to trial[36]. On 6 December 2016 the trial opened before Trial Chamber IX. The closing statements took place from 10 to 12 March 2020. The case is currently under deliberation.

Mr. Ongwen faces 70 charges of war crimes of attack against the civilian population; murder and attempted murder; rape; sexual slavery; torture; cruel treatment; outrages upon personal dignity; destruction of property; pillaging; conscription and use of children under the age of 15 to participate actively in hostilities; and crimes against humanity of murder and attempted murder, torture; sexual slavery; rape; enslavement; forced marriage as an inhumane act; persecution; and other inhumane acts. He is accused in his capacity as Brigade Commander of the Sinia Brigade of the Lord Resistance Army (LRA), an armed group active in Uganda with the intent of carrying an insurgency against the Government of Uganda and the Ugandan Army. The crimes have allegedly been committed in several localities in Northern Uganda from 1 July 2002 to end 2005. Four specific attacks against the civilian population of internal displaced persons' camps are charged: Pajule (October 2003), Odek (April 2004), Lukodi (May 2004) and Abok (June 2004).

In the proceedings related to the Uganda situation, Victims waited for 10 years before seeing any progress. At the time of Mr. Ongwen's arrest, an important number of Victims had already communicated with the Court and requested to participate in the proceedings. They all expressed a lot of frustrations regarding the long-lasting non-execution of the warrants of arrest issued in 2005. Some victims also articulated a disbelief and loss of trust in the proceedings of the Court and willingness to withdraw their applications for participation.

Therefore, at the news of the arrest of Mr. Ongwen many Victims expressed relief and hope to contribute to the search for the truth

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[36] ICC, the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen, March 23, 2016, ICC Doc. No.: ICC-02/04-01/15-422-Red.

about the events at the origin of their victimisation and to have their voice heard in the proceedings.

Unfortunately, in January 2015, once the warrant of arrest against Mr. Ongwen was unsealed, Victims realised that he was sought by the Court only for one attack against the civilian population. This created great disappointment. Indeed, the Victims' account of events to their counsel revealed that the crimes they suffered from did not originate from spontaneous or isolated acts of violence, but were rather part of a planned, directed and organised attacks against them perpetrated by the LRA and that many attacks were committed. In particular, Victims indicated that the LRA engaged in a cycle of violence and established a pattern of brutalization of civilians by acts including murder, abduction, sexual enslavement, mutilation, as well mass burnings of houses and looting of camp settlements; and that civilians, including children, were abducted and used as fighters, porters and sex slaves. Victims also indicated that rape, sexual violence and sexual slavery, as well as the abduction of children to be trained and used in hostilities were crimes usually committed by LRA, including by senior leaders.

Therefore, counsel for victims expressed concerns regarding the limited crimes at the time included in the warrant of arrest which were not representative of the extent of the victimisation their clients suffered from[37].

Victims and their counsel engaged in a constructive dialogue with the Prosecution which resulted in the higher number of charges at the time brought against a defendant. Said charges included not only three more attacks against the civilian population, but a range of gender-based crimes and the enlistment, conscription and use of children in hostilities; therefore, considering the concerns expressed by Victims.

An important aspect of the proceedings for victims concerns the fact that Mr. Ongwen is charged with the direct commission of

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37 ICC, the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Pre-Trial Chamber II, Views and concerns of victims in relation to the proceedings against Mr. Dominic Ongwen, January 26, 2015, ICC Doc. No.: ICC-02/04-01/05-420-Red2.

a number of gender based crimes against at least seven identified women and importantly the charges include forced marriage and forced pregnancy.

In this regard, the Pre-Trial Chamber in confirming the charges against the defendant held for the first time before the ICC that forcing another person to serve as a conjugal partner may, *per se*, amount to an act of a similar character to the ones explicitly enumerated by article 7(1) of the Statute, intentionally causing great suffering or serious injury to body or to mental or physical health[38]; and that the crime of forced marriage is not subsumed by the crime of sexual slavery; a finding further confirmed in the Al Hassan case by both the Pre-Trial and the Appeals Chamber[39].

Victims welcomed this interpretation of the law recognising that restrictions on the freedom of movement, repeated sexual abuses, forced pregnancies, or forced labours, in particular, forced performance of domestic duties, are all factors which indicate a situation of forced marriage; and that the central element of the crime is the imposition of marriage on the victim, against her will, with the consequent social stigma attached to it.

Victims were also satisfied that the separate and additional harm caused by this crime as opposed to the crime of sexual slavery or other gender-based crimes under the Statute was recognised since this offense violates the independently recognised basic right to consensually marry and establish a family.

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38 ICC, Ongwen Confirmation of Charges, supra n. 15, parrs. 87-95.

39 ICC, the Procescutor v. Al Hassan, Pre-Trial Chamber I, *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, November 13, 2019, ICC Doc. No.: ICC-01/12-01/18-461-Corr-Red, parrs. 552-582, 638 y 647-651; See.: ICC, the Prosecutor v. Al Hassan, Appeals Chamber, Judgment on the appeal of Mr. Al Hassan against the decision of Pre-Trial Chamber I entitled '*Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense*, February 19, 2020, ICC Doc. No.: ICC-01/12-01/18-601-Red, parrs. 121-123.

Victims hope that this interpretation will be confirmed by the Trial Chamber in the judgment under article 74 of the Statute if the Accused will be declared guilty.

Finally, the proceeding poses a crucial issue in relation to the criminal liability of Mr. Ongwen. Indeed, the Defence alleges that he is "only a victim", abducted at a young age, psychologically manipulated and subjected - while in the LRA - to injuries, constant fear of death or serious bodily harm and long-term mental impairment. Consequently, in the view of the Defence, he cannot be held responsible.

This is an argument which Victims consider totally unfounded in fact and in law; and, worst, disrespectful of their sufferings.

It is not disputed that Mr. Ongwen might have been a victim of one or several crimes when he was a minor. However, this fact alone does not constitute a legal basis for excluding criminal responsibility under the Rome Statute. The fact that Mr. Ongwen had been abducted at a young age does not absolve him from criminal responsibility for his acts and conducts as an adult.

Victims are of the view that it is impossible to seriously envisage that Mr. Ongwen did not understand at all the extremely grave nature of the criminal acts in which he engaged and that he was able to understand his wrongdoing. Therefore, Victims hope that the Trial Chamber will recognise the full extent of the liability of the Accused.

4.3. Legal considerations about the crimes

Girls forced into marriage are commonly referred to as "sex slaves". This inaccurate categorization of their role within the LRA perpetuates a common misunderstanding about their experiences. While forced marriage involves rape, sexual violence and enslavement, one of the fundamental elements of the crime is the mental and moral trauma resulting from the imposition, by threat or force arising from the perpetrator's words or conduct, of a forced conjugal association and a relationship of exclusivity between the "couple" -

which takes on an additional specific detrimental dimension in the Acholi culture[40].

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[40] As emphasised by Prof. Musisi (expert on Acholi culture and trauma called by the Common Legal Representative at trial); "[t]he whole social fabric is organized around the family, consisting of the young and old in an extended family system whereby strong family bonds hold together generations of the old, the matured, the youths and the children for the benefit of all. The typical Acholi family lives in a homestead called the gang kal with multiple huts/houses for all in an enclosure. A prospective young girl is introduced to the prospective husband through a family arrangement via her paternal aunt, wayo, and grandmother. After she accepts the boy, a lengthy marriage process called nyom is arranged where the families meet and pre-marriage negotiations are held including "getting to know each other (luk), the issues of bride price/dowry and the wedding ceremony itself called nakub kub. Food, drink and festivities are carried out including much dancing including the Lakaraka courtship dance. After the wedding, the girl moves to the family of the boy where she will live with her husband to start their own family. Sex with her husband is consensual. On getting pregnant, she will be excused from certain duties, fed very nutritious food and will be helped by the traditional midwife/birth attendant called the lacele throughout her birthing process and taught how to look after her newborn including breastfeeding. The whole community participates and celebrates in her marriage, pregnancy and birthing ceremony. The new baby is introduced to her patriarchal lineage's ancestors, the abila, and her family and given a name which she will keep as a member of her lineage till death. Then it will take the whole village to raise the child. This way the child will learn the Acholi ways, traditions and customs and will belong to a family and clan. There were no bastards or abandoned street children in traditional Acholiland. There were no children that lived on their own. All children were looked after. Kony's LRA disrupted all the above. Girls were abducted and forced into marriage to people they or their families did not know. These perpetrators were seen as having committed atrocities to their in-laws by beating, raping, stealing or even killing. It was not possible to forge family relationships with one's captors who had hurt and even killed one's family members. This was the dilemma of the girl abductees who were forced into marriage, raped daily, gotten pregnant and even given birth. There were no Acholi customary traditions to address this except to carry them through ritual ablution and cleansing rituals and ceremonies such as moyo piny (cleansing the home of the returnee), nyono tong gwen (cleansing a combatant) or moyo kum (cleansing the body). […] Moreover some of these ceremonies demand that they be performed at the scene of the abominable act and with the opposite party present (the rapist or killer) in

Forced marriages are coercive relationships without valid consent of the women. They have the characteristics of shared domicile, domestic responsibilities, sex, bearing of children and exclusivity. The nature of these relationships forces girls to take on roles as sexual partners, mothers to the children born from these forced relationships, cooks, domestics, water collectors, porters, food producers, etc[41]. The relationships consist of a familial aspect where children are born and raised by abducted mothers and their captor husbands.

Forced marriage is prohibited by many human rights instruments providing that "[n]o marriage shall be entered into without the free and full consent of the intending spouses"[42]. The crucial element of the crime is the mental and moral trauma resulting from the imposition, by threat or force arising from the perpetrator's words or conduct, of a forced conjugal association and a relationship of exclusivity between the so-called "couple".

The testimonies of Mr. Ongwen's forced wives shed light on the following common elements of the crime: they were chosen to come and live in his household; they were fairly young when they were abducted and chosen to become his "wives", which invariably happened by a first act of rape, followed by repeated forced sexual intercourse on a rotated basis; they did not have a choice, but were coerced and threatened with their lives; they all were subjected to beatings and cruel and violent acts; they have all suffered physical harm during their captivity, thereby permanently affecting their health; they have all suffered from traumatic experiences and still suffer nowadays from different types of traumas resulting from such experiences; they all gave birth to children born in the bush, children who in turn suffered from the difficult conditions in the bush during their essential first years of life; they have all faced critical issues back home in rein-

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order for the reconciliation to work. Such was not possible in Kony's Acholi, leaving many culturally confused, frustrated and dismayed."

41 See the Decision on the confirmation of charges against Dominic Ongwen, Pre-Trial Chamber II, No. ICC-02/04-01/15-422-Red, 23 March 2016, parrs. 109, 111, 114, 116, 118, 121, 123, 136-140; See.: Trial Judgment, Trial Chamber IX, No. ICC-02/04-01/15-1762-Red, 4 February 2021, par. 2741 ff.

42 Article 16 of the Universal Declaration of Human Rights.

tegrating into their respective families and communities, in making a living to support their children and their own daily subsistence, and in returning to their lives and starting to rebuild a new life for themselves and their children[43].

In light of the factual findings, the Trial Chamber correctly convicted Mr. Ongwen for forced marriage as another inhuman act under article 7(1)(k) of the Rome Statute, recognising that forcing another person to serve as a conjugal partner may, *per se*, amount to an act of a similar character to those explicitly enumerated by article 7(1) of the Statute, intentionally causing great suffering or serious injury to body or to mental or physical health; and that the crime of forced marriage is not subsumed by the crime of sexual slavery[44].

According to the judges of Trial Chamber IX:

> The central element, and underlying act of forced marriage is the imposition of this status on the victim, [i.e., the imposition,] regardless of the will of the victim, of duties that are associated with marriage – including in terms of exclusivity of the (forced) conjugal union imposed on the victim – as well as the consequent social stigma […] Accordingly, the harm suffered from forced marriage can consist of being ostracised from the community, mental trauma, the serious attack on the victim's dignity, and the deprivation of the victim's fundamental rights to choose his or her spouse[45].

The Trial Chamber went another step forward as regards the definition of the notion of coercion. While both the Extraordinary

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43 See the description of the facts in the Trial Judgment, parrs. 205 ff.

44 See the Trial Judgment, para. 2741 ff. In the Al Hassan case, a similar finding was entered by the Pre-Trial Chamber and confirmed by the Appeals Chamber. See the "Decision on the Defence Request for Leave to Appeal the Decision on the Confirmation of Charges" (Pre-trial Chamber I), No. ICC-01/12-01/18-342-Red, parrs. 33-39. See also the "*Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* " (Pre-Trial Chamber I), No. ICC-01/12-01/18-461-Corr-Red, 13 November 2019, paras. 552-582, 638 and 647-651; and the "Judgment on the Appeal of Mr. Al Hassan against the decision of Pre-Trial Chamber I entitled '*Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense*" (Appeals Chamber), No. ICC-01/12-01/18-601-Red, 19 February 2020, parrs. 121-123.

45 See the Judgement, parrs. 2748-2749.

Chambers of the Courts of Cambodia[46] and the Special Court for Sierra Leone[47] considered as forced marriage the situation where the victim is forced to marry another person through the threat or use of physical violence, in the Ongwen case the Trial Chamber considered that mental abuse - which may also consist of taking advantage of a coercive environment - equally amounts to a form of coercion.

This interpretation recognises the specific elements of the crime, namely restrictions on the freedom of movement, repeated sexual abuses, forced pregnancies, forced labour, in particular, the forced performance of domestic duties; and the central element of the crime which is the imposition of marriage on the victims, against their will, with the consequent social stigma attached to it.

4.4. Consequences of the crimes

The consequences of the status of "wife" upon girls abducted into the LRA are complex and the practice often has a profound impact on the victims and their children.

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46 See ECCC, Case 002 Closing Order, 15 September 2010, paras. 1442-1445. In the closing order of case 002, the Co-Investigating Judges qualified forced marriage as the crime against humanity of an 'other inhumane act', following the definition set out by the SCSL Appeals Chamber. They determined that acts of forced marriage practised under the Khmer Rouge satisfied the elements of this definition since they were part of a widespread attack against the civilian population and entailed the forced imposition of a marital status on the victims, which resulted in severe physical or mental suffering of a degree of gravity comparable to the other listed crimes against humanity. The applicability of the SCSL Appeals Chamber definition to situations as different as the 'bush wives' phenomenon in African armed conflicts and the Khmer Rouge policy of forced marriage seems to confirm the viability of this crime as a separate crime against humanity distinct from sexual slavery.

47 See Prosecutor v. Brima, Kamara and Kanu ('the AFRC case'), Appeals Judgment, Case no SCSL-04-16-A, 22 February 2008, paras. 190-199. See also Prosecutor v. Sesay, Kallon and Gbao, Appeals Judgment, Case no SCSL-04-15-A, 26 October 2009, para. 736.

What happened to the abducted girls in the LRA is not only criminal, but runs astray of their cultural landmarks. What these girls went through while in captivity remains a taboo in the families and communities. Their ambiguous status once back, carries the stamps of having been forcibly married in the bush, while no official marriage had in fact occurred according to Acholi traditions, which creates various difficulties, from identity to their daily subsistence and land issues. In the Acholi culture, when a woman is married, she is given a land which she never owns but she nonetheless has the right to use to cultivate food and feed the family. When a mother comes back with children born in the bush, she will not receive the land to grow crops to feed her family.

A significant number of girls, who were abducted and raped in the bush, came back to their communities with their children born in captivity. Many of them were - and still are - stigmatised and rejected by their community of origin. Not only do these children suffer from the complexity of their familial situation, but they also suffer from health issues due to the circumstances of their birth. As Prof. Musisi stated:

> Children born of war waged by the LRA were not accepted readily in Acholi society as they were considered a product of pre-marital sex with no marriage and no bride price as is demanded by Acholi custom. […] Incest and premarital sex is taboo. […] The activities of Kony and the LRA which included the rape and defilement of women and girls as well as rampant sex during raids went against traditional Acholi sexual practices and customs. Such acts as the public rape of women, gang rape or their forced disrobing (nakedification) of women were highly condemned by the Acholi people as immoral, sinful and criminal[48].

When they come back, children born in the bush cannot have like opportunities to those born in the community precisely because they have no lineage in the patriarchal or patrilineal society, which also implies no land. Even after coming back from the bush, children – and young adults - are not able to adhere to the Acholi cul-

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[48] See the Public redacted version of Common Legal Representative of Victims Closing Brief, ICC-02/04-01/15-1720-Conf, No. ICC-02/04-01/15, 28 February 2020, para. 89.

ture because they were not raised by the community. The traditional Acholi society is family oriented; children grow up with their whole extended family. They eventually become independent, get married, get their own land and have their own homestead. Children born in the bush lack knowledge of social behaviours; may not be respectful of the traditions and could behave aggressively because of the massive traumas they have faced from the time they were born. As a result, many resort to drugs, alcohol and violence.

Prof. Reicherter explained the consequences of forced pregnancy in the following terms:

> "Women who become pregnant following incidents of rape may face the scorn of their community. […] In Uganda, forced pregnancy causes the mother and child stigma in their communities. Children of forced pregnancies serve as a symbol and reminder of the history of atrocities committed by the LRA, and are therefore subjects of blame, scorn, and rejection in their communities, often being automatically labelled as a criminal, rebel, or murderer. […] [C]hildren born of LRA-forced pregnancies are deeply affected by their biological origins and subsequent treatment by society. […] [C]hildren's status as "war babies" may foster direct and indirect forms of violence by individuals, families and communities including stigma, exclusion, abandonment, and infanticide. […] [I]nequities [are noted] in relation to children's access to health, education, and employment. Questions on the legal citizenship and ethnic identities of these children have also been raised, particularly if families and communities refuse to accept these children or acknowledge their heritage"[49].

Reicherter also added that:

> An additional form of stigmatization observed in the children of victims of those abducted is the naming of their children. In one study, results from a study conducted in a reception center in Gulu showed that 71 % of their sample had names that had negative connotations. […] [T]hese children received names with negative connotation because their names were a reminder of the suffering and their captivity. Although many reception centers changed these children's names, they carry

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[49] See the Public redacted version of Common Legal Representative of Victims, Closing Brief, ICC-02/04-01/15-1720-Conf, No. ICC-02/04-01/15, 28 February 2020, para. 105.

> the stigma of their name into their reintegration. The children end up isolated from other children because of their upbringing[50].

In addition, as Reicherter explained:

> An important factor in understanding the impact of experiences of trauma, rape, and sexual assault is the developmental stage of the individual at the time of insult. […] As a result, trauma and rape experienced during childhood or adolescence have been shown to have more pervasive and severe consequences than adult exposure due to the negative impact on the development of cognitive and intellectual capacities, executive functioning, emotion regulation, and interpersonal skills. […] The injuries to cognitive, emotional, and behavioral regulatory capacities lead to lasting impairment in self-care, as well as academic and vocational performance, among other areas of difficulty. Difficulties stemming from exposure to trauma and sexual assault in childhood also correspond with lasting alterations in individuals' sense of self, as well as relationships with others. […] [C]hildhood exposure to abuse (including sexual abuse) has been linked with disrupted attachment, poor social skills, social isolation, difficulties with trust and security in relationships, poor interpersonal effectiveness, and heightened risk for future trauma or victimization[51].

The decision in the Ongwen case has contributed to settling the view that forced marriage, when forming part of a widespread or systematic attack against a civilian population, may amount to the crime against humanity of an 'other inhumane act' if the conduct satisfies two elements: (a) the imposition of marriage without the victim's consent; and (b) the infliction of severe physical or mental suffering on the victim due to the forced conjugal association. This definition is, on the one hand, wide enough to adequately capture the main features of the crime as committed in very different contexts and, on the other hand, narrow enough to distinguish it from the often-analogous crime of sexual slavery.

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50 Idem, para. 106.

51 Idem, para. 108.

PART I
THE PEDAGOGICAL APPROACH

1. Reflections on a civic culture of forgiveness as the philosophical-educational foundation upon which the International Law Clinic is built

HÉCTOR OLASOLO*

1. Introduction: the striking contrast between the high degree of technological sophistication and the absence of ethical-material evolution in 21st century international society

One of the most remarkable aspects of the current stage to which the international community has developed is that the evolution of its ethical-material standards has not followed the same process as its technological advancement. Today we are capable of creating robots so technologically advanced that they can travel for practically a de-

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cade to land on comets that are more than five hundred million light years distant. However, we continue to structure our international community around criteria of social, political and economic organization that have remained unchanged for centuries, such as those related to the maximization of profit and production rates, and the escalation of political and military control.

For a reasonable observer, it is shocking to note that, despite the sophistication of their technological development, 53% of human beings continued to live in poverty a decade ago, with a daily income of less than 3 dollars, which they received in the absence of any labor contract (but through informality or the black market)[1]. That same observer would also be perplexed to observe that two thirds of the remaining 47% spent their days struggling to not fall into the pit of poverty[2]. This situation was largely the result of the following factors characteristic of international society: (a) the marked tendency of its main actors to go to war together with the development of military technology; (b) the enormous disparity in the socio-economic development of its members, which is fostered by a constant "financialization" of the economy; (c) the profound physical degradation of the environment; and (d) the notable spiritual degradation resulting from our ethical-material criteria for action[3].

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1 *Banco Mundial*, 2014, Povcal Net; This information may be consulted at the following link: http://iresearch.worldbank.org/PovcalNet/index.htm?1,0. On opening the page statistics will be found for the following years; (2011, 2010, 2008, 2005, 2002, 1999, 1996, 1993, 1990, 1987, 1984, 1981) based upon the extreme poverty line of $1.25. To change to a poverty line of $3.00, change the space on the right in the table called: Replicate the World Bank's regional aggregation, after the words: "Second, input your poverty line".

2 Idem.

3 Allott, P., 2002, The Health of Nations: Society and Law beyond the State, Cambridge, England: Cambridge University Press.To these factors, authors such as Philip Allott also add government oppression in the service of the ruling classes, understanding that in the best of cases, citizens have to make real efforts to control the tendency towards corruption and the abuse of power by their leaders, although the most frequent situation is that the latter use the violence of the State itself against its citizens, which would ex-

Since then, particularly as a result of the intensification of armed conflicts in various regions of the world and new regional and global pandemics (particularly damaging was the Covid-19 pandemic, which began in 2020, but whose effects were strongly felt until at least 2022), the situation in global terms has not only not improved but has suffered certain setbacks.

2. Theoretical framework: the prevailing concept of transitional justice responds to the utilitarian conception of "possible justice" and has a symbolic-formal nature

The symbolic-formal concept of "transitional justice" responds to a utilitarian notion of justice, according to which the transition from a situation of autocracy to one of democracy, or from a situation of armed conflict to one of peace, must be carried out in such a way that the greatest number of people obtain the greatest possible utility.

Now, in Jeremy Bentham's conception of "possible justice", relative utilities were comparable amongst the various members of a society, while the distribution of resources should be transferred from one population group to another depending on where it could generate greater utility[4].

Applying this to our context, if the attribution to victims of sufficient resources for a restorative reparation which would allow them to recover the state of dignified life in which they lived before being victimized (or of a transformative reparation that allows them to leave the situation of poverty (or misery) in which it is very likely that they found themselves before their victimization) generates greater utility for the victims than the utility produced by said resources for those who have had a good socio-economic condition during the dictatorship or armed conflict in question, then the latter will have to

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plain why crimes against humanity, torture, or forced disappearances were initially defined as State crimes.

4 Bentham, J., 2008, *Introducción a los Principios de Moral y Legislación,* Buenos Aires, Argentina: Claridad.

hand them over through tax measures on the basis that this increases the overall utility for all members of society.

However, as Bentham himself pointed out, a system of reallocation of resources that takes such resources from those for whom they generate a lower relative utility, and to transfer them to those who obtain a greater relative utility from them, generates, if taken to its ultimate consequences, an egalitarian redistribution, which the better positioned socio-economic sectors will not be willing to tolerate[5]. Consequently, in order to avoid repression and violence, it is necessary, according to Bentham, to establish limitations to the redistribution of resources that maximize social utility, by distinguishing between "absolute maximization" and "possible maximization" of social utility[6].

Transferring these ideas to transition processes, this means that the redistribution of resources from those who have progressed socio-economically in situations of dictatorship or conflict, to those who have been victims of repression and violence, is only possible to the extent that the former accept such redistribution, which normally means depriving reparation of its restorative and/or transformative character, as well as distancing it from its normative duty of integrality[7].

It is precisely in this context that the frequent debates that take place recurrently about the amount of resources "necessary" versus those "available" to handle the transition or "pay" for the post-conflict should be circumscribed. Furthermore, it is worth remembering that redistribution in favour of those who have been victimized by

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5 Idem.

6 Idem.

7 Ferrer, E. & Pelayo, C., 2012, *La obligación de "respetar" y "garantizar" los derechos humanos a la luz de la jurisprudencia de la corte interamericana. Análisis del artículo 1º del pacto de San José como fuente convencional del derecho procesal constitucional mexicano*, *Revista del Centro de Estudios Constitucionales* 10(2), 141-192. DOI: 10.4067/S0718-52002012000200004; Evans, C., 2012, Human rights jurisprudence on reparations, international and regional. En D. Evans, The Right to Reparation in International Law for Victims of Armed Conflict, pp. 44-82, Cambridge, England: Cambridge University Press.

repression or armed violence does not, however, mean addressing the causes of social, political and economic exclusion that have generated it.

It is occasionally possible that certain actors in international society, who have generally played an important role in bringing the parties involved closer together, decide to provide additional resources to address in greater depth the problems facing a society in transition. The resources that came to Germany through the Marshall Plan after World War II, or to Spain following its entry into NATO and the European Union, are two good examples, which undoubtedly constitute the main reason why both transition processes did not result in complete failures. However, in most of these types of processes, the resources offered by international society are limited, at most, to technical cooperation or very specific programs with small groups of victims.

Bentham's utilitarianism not only explains the nature of reparation, but also the nature of the other measures included in the symbolic-formal concept of transitional justice. In terms of truth, the "truth" generally offered by the Truth and Reconciliation Commissions, and by the judicial processes themselves, is of a partial and fragmented nature, which deviates from its normative duty, by not providing and in-depth analysis of issues such as those related to: (a) the role played by external actors (state and non-state); (b) the function performed by different sectors of civil society close to the regime (which are generally those that have progressed socio-economically during the regime); and (c) the socio-economic effects of violence and its "legalization" through transition processes that relegate such effects to be hidden in the background[8].

Applying Bentham's terminology, it can be said that the transition processes employed in today's international society are limited to showing society a "possible truth," the greater or lesser depth of which will depend upon on: (a) the distribution of forces between

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[8] Ibañez, J. E., 2014, *Justicia de Transición y las Comisiones de la Verdad*, Bogotá D.C.; Otzenhausen; Madrid: Berg Institut.

the different actors involved in the transition; and (b) the level of influence that external third parties have over them.

Bentham's utilitarianism also explains the nature of the measures adopted in the investigation and criminal punishment of those responsible for international crimes committed during autocratic regimes or situations of armed conflict. The concepts coined by the Prosecutor's Office of the International Criminal Court (ICC) of "those most responsible" and "representative acts" of the criminal operations of state institutions and non-state actors involved are nothing more than utilitarian approximations in response to the high volume of international crimes and responsible persons in the situations under preliminary examination and investigation before the ICC[9]. As Alain Norrie states, Karl Jaspers himself adopted a utilitarian approach when he distinguished between four levels of guilt (moral and collective vis-à-vis oneself, and legal and political vis-à-vis the outside world), in order to allow, after the fall of the Nazi regime, the transition in Germany through: (a) the criminal punishment of a small group of those most responsible; and (b) the imposition on all German citizens of the responsibility for delivery of resources for reparation[10].

Furthermore, even if it is true that, at a national level, judicial actions have been carried out on certain occasions that exceed this framework (Argentina, Bosnia Herzegovina and even Colombia), it is no less true that, as has been highlighted by the negotiation process of the Colombian government with the FARC (2012-2016), the pressure from the leaders of the institutions and groups involved in the negotiation, together with the wide range of civil-military authorities and private actors who have colluded in the commission of international crimes, has even led to the political utility of complying with

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9 Prosecutor of the International Criminal Court, 2003, Paper on some policy issues before the Office of the Prosecutor, ICC-OTP 2003; Prosecutor of the International Criminal Court, 2006, Report on Prosecutorial Strategy; Prosecutor of the International Criminal Court, 2007, Policy Paper on the Interests of Justice; Prosecutor of the International Criminal Court, 2013, Policy Paper on Preliminary Examinations.

10 Norrie, A., 2015, *La justicia en la mesa de sacrificios de la historia: la culpa de la guerra en Arendt y Jaspers,* Trad. Galaín y Rojas, Bogotá: Universidad Libre.

the legal obligation to pursue and punish those most responsible for such crimes being questioned.

Therefore, transition processes in the current state of development of the international community declare international criminal responsibility arising from the commission of international crimes and execute the penalties provided for them, only to the extent that this is "possible" without giving rise to new situations of repression and armed violence (which in the end depends on the distribution of forces between the different actors involved in the transition, and the level of influence that external third parties have over them).

In addition, it should also be stressed that the level of tolerance of the institutions and groups involved with an uncomfortable "truth" is, in general, higher than the level of tolerance for criminal investigation and punishment (in particular of those most responsible), so the level of political pressure to avoid the application of legal obligations in this last area is very high.

Finally, Bentham's utilitarianism also explains the content of the measures adopted as guarantees of non-repetition. As we well know, training agents of the State in respect for civil and political rights (a measure that would fall within the realm of the "possible") has a limited effect if socio-political exclusion and economic poverty, which are the objective causes underlying repression and armed violence, are not addressed.

However, as soon as attempts are made to adopt other, additional, measures aimed at avoiding the repetition of international crimes, and in particular the administrative disengagement of those who, from the various State institutions at local, regional and national levels (army, police, intelligence services, ministries, mayors, councils, notaries, property registries, prosecutors or even courts of justice, to give some examples), have directly committed serious human rights violations, have ordered them, have favoured them, have connived with them or have guaranteed their outcomes, such resistance is gen-

erated that the adoption of such measures is no longer within the realm of the "possible"[11].

I light of the foregoing, one cannot but conclude that the prevailing concept of transitional justice has a symbolic-formal nature, since it limits its content to "possible" aspects of truth, justice, reparation and guarantees of non-repetition that are highly symbolic, and expressly excludes any measure of social, political and/or economic reform (justice?) that addresses the authentic roots of the tensions underlying repression and armed violence.

3. The importance of the so-called "citizen culture of forgiveness" within the "possible justice" model of the symbolic-formal concept of transitional justice: the warnings in the Book of Jonah against undue social pressure on victims to renounce their right not to forgive in order to promote transitional processes

As we have seen, the utilitarian concept of "possible justice" does not structurally address the objective factors (social, political, and economic exclusion) that generate repression and armed violence, and is limited to adopting symbolic measures of truth, justice, reparation and guarantees of non-repetition. Given this situation, the urgency of promoting what has been called the citizen culture of

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11 Prosecutor of the International Criminal Court, 2013, Report on Preliminary Examinations Activities 2013; Prosecutor of the International Criminal Court, 2014, Report on Preliminary Examinations Activities 2014; A good example of this phenomenon is the recent approval in 2015 of the extension of the military criminal forum for the armed conflict situations in Colombia despite the ineffectiveness that this forum has shown over decades in actively fighting against the impunity of members of the armed forces involved in the commission of international crimes. This approval was carried out without taking into account the repeated expressions of concern by the Prosecutor of the International Criminal Court in this regard.

forgiveness "as a powerful vaccine and remedy against that perverse and eternal return of revenge" is amplified[12].

Thus, forgiveness is seen in this context as "the heroic exercise of overcoming retaliation to assume kindness and compassion" for the sake of the dignity of the other, being described as "an evolutionary leap" to overcome the eternal return of the memory of the past and to build new narratives, to the point of affirming, together with, Nobel Peace Prize winner Desmond Tutu, that "without forgiveness there is no future".

However, the question arises as to what the true sociological function played by this civic culture of forgiveness is, if it occurs within processes marked by a utilitarian conception of justice, having a high degree of symbolism, and in which, for fear of the reaction of the most socially, politically and economically influential sectors of the population, avoids the adoption of structural measures that initiate real processes of inclusion for large, powerless, sectors of society. Is it not, in essence, about putting pressure on broad sectors of society to perform an act of forgiveness towards those who are not prepared to stop depriving them of a full, if not symbolic, exercise of their rights?

Added to this question is the degree of voluntariness with which this civic culture of forgiveness is promoted in society, since it is one thing to invite victims to forgive on the basis of the liberating psychological/spiritual effect that it may have had on other victims of international crimes, and quite another thing to put pressure on them, directly or indirectly, to forgive.

In the latter case, what is happening is that, rather than putting pressure on the better-positioned classes to accept the adoption of structural measures that address the social, political and economic causes of repression and armed violence, what is being done is "re-victimizing" the victims. This is done by centering the success of the transitions on the use of different pressure mechanisms to get the victims to renounce their right not to forgive, and to grant a formal pardon to their victimizers (a pardon thus obtained cannot have a

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[12] Inter-Ecclesiastical Conference of Colombia, 2015, *Las armas son el fracaso de las palabras.*

material nature, since it does not originate in respect for the freedom of the victims).

This problem, which calls into question the alleged benefits of education for a civic culture of forgiveness, was described with great mastery almost two thousand five hundred years ago in the Old Testament Book of Jonah[13]. According to this book, Jonah was called by *Yahweh* to go to the capital of the Kingdom of Assyria (Nineveh) and preach conversion among the Assyrians, so that they could eventually be saved from eternal damnation. However, Jonah had no intention of carrying out *Yahweh's* request because Assyria had destroyed the Northern Kingdom of Israel and had forcibly displaced its population. For this reason, Jonah took a ship to the Western Mediterranean, in the direction opposite to Nineveh.

As they set sail, a great storm broke out that threatened to sink the boat in which Jonah was sailing. Faced with this situation, the ship's sailors wondered who was indebted to God, for such a punishment to be imposed on them. Jonah recognized his situation and asked to be thrown overboard to prevent the ship from sinking. It was then that Jonah was swallowed by a whale, and after three days inside the whale, he was "spat out" onto the coast. Only after this extraordinary event did Jonah agree to go to Nineveh to fulfill *Yahweh*'s mission.

Upon arriving in Nineveh, Jonah preached salvation for barely one day in a small part of Nineveh, in an attempt to fulfill *Yahweh's* command in the least way possible, and hoping that the Assyrian perpetrators would not convert to *Yahweh* and not be able to achieve salvation. However, to Jonah's surprise, the king of Assyria, upon hearing of Jonah's preaching, suddenly converted, covered himself in sackcloth, sat in ashes, repented of his terrible crimes, and ordered the rest of the Assyrians to do the same.

Faced with this situation, Jonah, was disappointed and resentful of *Yahweh* because the perpetrators could be saved by his sudden and totally unexpected conversion. He left Nineveh and built a hut on its outskirts, where the sun's rays were very intense. At night, *Yahweh*

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[13] The considerations that follow are based upon the four chapters of the Book of Jonah.

made a large plant grow, which the next day gave shade to Jonah, who for the first time in the entire story was happy. However, Jonah's joy was short-lived, because *Yahweh* caused the plant to wither.

Faced with this new setback, Jonah protested emphatically. *Yahweh* then explained to Jonah that if he was so upset that a plant had withered for which he had done nothing, how could *Yahweh* himself not care about the fate of the hundred thousand inhabitants of Nineveh that he himself had created?

Confronted with this reflection, Jonah turned away from *Yahweh* in anger, because, although *Yahweh* could do whatever he wanted (that is what God was for), he was not willing to forgive the Assyrian victimizers who had destroyed his people.

Through this brief narrative, the Book of Jonah underlines the inalienable character of the individual freedom of every victim to forgive, or not forgive, his victimizer. Even if *Yahweh*, in his omnipotence, decides to forgive the Assyrian perpetrators of Nineveh, he leaves his prophet Jonah free to act otherwise. This undoubtedly sends a serious warning against exerting undue social pressure on victims to renounce their right to not forgive in order to promote transitional processes[14].

4. Conclusion: towards an education aimed at reducing the striking contrast between the high degree of technological sophistication and the absence of ethical-material evolution in the international society of the 21st century

The concept of transitional justice does not necessarily have to adopt a utilitarian approach, nor does it have to assume a merely symbolic-formal nature. On the contrary, it is possible to define it in a much less restrictive way from a material perspective. This would be based on the establishment of the material conditions of possibility for each and every human being to have the opportunity to

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[14] De Wit, H., 2008, *Camino de un día, Jonás 3,4: Jonás y la memoria social de los pequeños, Theologia Xaveriana, 58*(165), 87-126.

develop their own capacities through social, political, and economic inclusion. This would require, however, a profound evolution in the ethical-material criteria that inform the actions of our current international community (and our respective national societies).

It is common in the natural world that when faced with particularly difficult situations, members of a given animal community act according to the principle of cooperation to preserve the lives of its members. Ants, termites, bees, and beavers, to cite just a few examples, behave according to these parameters. Even at the most basic levels of human society, particularly among mothers and children, and within communities hit by unexpected natural and social disasters, it is possible to observe this same type of behaviour.

However, as we approach the decision-making centres of the social, political and economic organization of the different national societies and of international community, these examples gradually disappear. They are replaced by behavioral criteria based upon the maximization of economic benefit and the extension of political and military power, which reveal the enormous disparity between our high degree of technological development and our ethical-material "primitivism".

This is why the condition of possibility for the adoption of a material concept of transitional justice, passes through a profound evolution of the ethical-material criteria of action in the decision-making bodies. This would allow that their actions begin to be governed by the principles of cooperation, participation of those affected in decision-making, sustainable economic development, preservation of the environment and promotion of a dignified life for all.

It is in this direction that our efforts in the educational field must be directed because experience in the natural world tells us that the window of opportunity for an evolution of this nature opens especially under conditions of serious difficulty for the survival of a species, such as those that future human generations are expected to have to face in terms of population, energy, the environment or socio-economic exclusion, to give just a few examples.

Likewise, in developing our task we must be fully aware that, if this window of opportunity is not taken advantage of and we continue,

therefore, to widen the current gap between the high degree of technological evolution and the undetectable ethical-material development, human civilization will soon be remembered as just another chapter in universal history.

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2. The pedagogical proposal of the International Law Clinic: the comprehensive training of the human being

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1. Introduction: Is self-reflection about the educational process offered by higher education necessary?

The 21st century has been described as the era of "globalization," characterized by an unprecedented interconnectivity amongst the

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political, social and economic situations of the various regions of the world. This phenomenon is the result of the great development of communications technology, which allows the transmission in real-time of large flows of information, and the transfer to any part of the world in a matter of hours.

It is important not to forget, however, that the term "globalized society" dates back more than a hundred years, to the dawn of the 20th century, when new technological discoveries (radio, television, cinema, telegraph, telephone, automobile, submarine and aircraft) revealed a much more interconnected world than had not, until then, ever been imagined.

In facing current challenges, it is therefore important to bear in mind the strategies adopted to deal with the difficulties experienced during the first stage of the so-called "era of globalization." This is particularly relevant if one takes into account that these strategies (directed, to a large extent, towards the consolidation of democratic systems, the recognition of human rights, the extension of the market economy, the elimination of obstacles to trade and capital movements, and the strengthening of cultural ties between nations) have, however, been accompanied by very significant damage to the development of humanity. This is attested to by the following factors, among others:

> 1. The high levels of violence generated, with two world wars that left seventy million dead between 1914 and 1945, a universal cold war between 1950 and 1990, and almost two hundred armed conflicts between 1990 and 2000.
> 2. Levels of inequality never before reached, so that while 1% of the world's population has an average wealth of 120 billion dollars, almost half of the population (about 3 billion people) lives on barely three dollars a day.

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preparation of this chapter. The chapter is a revised and updated version of the text published in the book "The Public Interest in Latin America: Reflections from Clinical Legal Education and Pro Bono Work," coordinated by Beatriz Londoño and published in 2015 by *Universidad del Rosario*.

> 3. A level of environmental degradation that, for the first time in history, endangers the very viability of the planet and its ability to continue to shelter the human species[1].
> 4. Endemic corruption among the political and economic elites of the (new and old) democratic systems, which during the 20th century and the first decade of the 21st century have shown themselves incapable of taking effective measures to contain the problems identified. This is the consequence of having assumed as their own the "special interests", which instrumentalize democracy and economic growth to maximize their wealth.

The confirmation of the practices of systemic corruption, incurred by those who have been exposed to university education over many years, together with the absolute indifference to the suffering caused to "others" by violence, economic marginalization and environmental degradation, should lead us to a deep reflection on what is not working in our models of higher education. And this is not only happening in Colombia or Latin America, but in other latitudes such as Germany, Spain, the United States or the Netherlands, to cite just a few examples, where extensive episodes of corruption and/or systemic indifference towards the suffering of those who were thought to be close to them have recently become public knowledge (because they had been known unofficially for some time).

It is a certainty that educational action is not directed towards the comprehensive training of human beings who are aware of their own emotional, social and intellectual activity, who can contribute to their respective societies with critical thinking resulting from the understanding of the dynamics of the political and economic interests that govern them. On the contrary, we continue to "produce" huge numbers of professionals without any critical capacity that would allow them to grow from within themselves and contribute to a freer, more equal and more supportive society.

Consequently, the question arises regarding what is causing this to happen more than one hundred years after the so-called "era of

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[1] This is the result from, among other things, a notable reduction in the Ozone layer the increase in contaminating gases, the progressive melting of ice in the polar regions and continuous deforestation and the loss of flora and fauna.

globalization" began: Is this really what the families of our students and those who direct the destiny of our societies expect? Or is it that the training process we offer at the University does not develop the capacities that our students of today, and political, social, social, social, union and business leaders of tomorrow, require so as to work for a freer, more just and more supportive society?

In the following sections, we will analyze the pedagogical proposal of the International Law Clinic (ILC), which aims to answer this last question. As for the other questions, it is not up to us to develop them, since we are not their recipients, which does not prevent us from having pointed them out in any case.

2. First approach to the proposal of the International Law Clinic

In response to a work requested on February 25, 2014 on the foundations of the ILC in which they had participated for a year, the members of the 2013 cohort (Daniela Suárez Vargas, Lorena Herrera Santamaría, María Paula López Velásquez, Juan Camilo Serrano Uribe and Juan Sebastián Urrea Rodríguez), with the collaboration of the instructor Camila Suárez Ángel, stated the following:

> However, beyond the academic subject of the Law Clinic, its objective exceeds all that; above all, it exceeds its own members. It is a space not only for academic learning, but for human growth, where one reaches the understanding that law, and in this case International Criminal and Humanitarian Law, has no meaning if its essence cannot be applied in the reality of society and equally in personal life.
> As a teaching methodology, the Law Clinic not only allows students to expand their knowledge in different fields of the practice of law and to expand their capabilities in terms of the construction of briefs and the adaptation of concepts to complex legal problems, but its essential purpose is to seek that, through teamwork, basic foundations are found in the interrelation with people, such as solidarity, understanding, tolerance and respect.
> Although it may not sound like a great challenge, working in a group makes you change your perspective, not only at work, but in life. Taking into account the other, appreciating and valuing what they say, but, above all, understanding that if you do it together it will be better than if one stands out or does it alone.
> Understanding that Law, and in this case International Criminal Law, is not limited to facts, conduct, States or the Rome Statute is something

> that no jurisprudence or doctrine can teach; it is to understand that, in order to achieve change, it is first necessary to change in everyday life, to see the other as an equal, to understand their value and to learn to assert what they propose, seeking to materialize human rights in the common and ordinary life of all people. Only in this way will it be possible to reach the reason for international institutions such as the International Criminal Court, which must be ready to protect these principles, this idea of justice, which is much broader than the four crimes under its jurisdiction (Herrera, et. al., 2014).

In their response, the members of the 2013 cohort reveal the profound meaning of the ICC in its multiple dimensions. But what are its pedagogical foundations and its central elements? The following sections are dedicated to answering these questions.

3. Comprehensive training in critical thinking

If we analyze the pedagogical objectives of universities such as Harvard or Oxford, which are considered by many (although not by all) as the main references of our time, we realize that they are primarily aimed at strengthening the capacity of the human person to: (a) develop critical and effective thinking, in which one can induce, deduce, synthesize and adequately manage the mother tongue; (b) interact socially, being assertive in one's own approaches; and (c) issue moral judgments, which apply in practice an idea of good and evil[2].

Despite a certain disparity in the means[3], the fact is that there is evidence of a commitment to comprehensive training aimed at making the human person aware of the political, social and economic dynamics, both current and historical, that inform the functioning of

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2 Orozco Silva, L.E., 2002, *Responsabilidad del Docente en la Formación Integral*, Bogotá, Colombia: *Universidad Santo Tomás*.

3 While Harvard places greater emphasis on the fundamentals of mathematics and physics, and an introduction to sociology, and reading classical literature, Oxford proposes a model of encounters with the professor insofar as he possesses values and qualities admired by the student, which makes him want to acquire them through assimilation.

their national and international society. In the end, it is about promoting the development of conscious individuals, capable of autonomously analyzing these dynamics, and of contributing to the society of their time by assertively expressing the results of their own evaluation.

The comprehensive formation of critical thinking, complemented, as will be seen in the following section, with the necessary formation of the unconscious, constitutes the foundation on which the ILC has been developing its pedagogical proposal since 2011 in order to face the challenges of the 21st century.

In the field of the development of critical thinking, the pedagogical proposal is comprised of four main elements. Firstly, unlike what is usual in the traditional conception of pedagogy[4], it is recognized that it is not possible to transmit to the human being an absolute vision of things.

Consequently, it is necessary to familiarize him with the relativity of paradigms, understanding that they are either the product of the limited scope of knowledge at a certain historical-temporal moment, or they arise from arbitrary constructions of networks of intellectuals who impose them by repeating them *ad infinitum*. As Morín points out, this situation is the result of the fact that human beings do not have an instrument of knowledge by virtue of which we can obtain the truth and certainty about natural and cultural human phenomena[5].

Given this situation, the need arises to confront the human person with the concepts of uncertainty and complexity. The relativization of paradigms, and the distrust of absolute truths, means that knowledge can no longer be placed on the pedestal of simple certainty, and must be understood as a complex phenomenon, full of uncertainties, which requires assuming a risk for its exploration. It is a matter, as in

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4 Pérez, M., 2000, *La investigación-acción como tendencia pedagógica, En Colectivo de Autores Cepes* (Ed.), *Tendencias pedagógicas en la realidad educativa actual,* pp. 77-82, Tarijá, Bolivia: *Editorial Universidad* "Juan Misael Saracho".

5 Morin, E., 1999, *Los siete saberes necesarios para la educación del futuro.* Paris, France: UNESCO.

almost all other aspects of human life, of accepting that, even though we follow a procedure that complies with the generally accepted conditions for the validation of our conclusions as knowledge, the latter will always be relative, since it is conditioned by the information that we have in our historical-temporal context, the sociological, political and ethical interests that govern science, and an element of subjectivity inherent to our research activity.

In this context, it is important to be aware of the non-neutrality of human knowledge and the interests of scientific practice, which allows us to understand that science has to do with politics, sociology and the interests that drive history. Hence, we see the importance of the teacher highlighting the cultural, ideological and ethical significance of his discipline, for which he has to go beyond it, in order to carry out a self-reflection on his own scientific practice[6].

The comprehensive formation of critical thinking requires, therefore, moving away from a pedagogical conception based on the conception of the professor as a mere transmitter of knowledge[7] to passive subjects having little room to actively engage with and process the content they receive[8]. The adoption of this option is supported by the psychology of cognitive processes that explains how the latter cannot be conceived of as acts of mere external transmission, nor as an inherent quality of the mind that originates from within[9]. On the contrary, they are processes developed through the search and real action of the student in his environment, in order to unravel the essential characteristics of knowledge at a specific historical mo-

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6 Orozco Silva, L.E., 2002, *Responsabilidad del Docente en la Formación Integral*, Bogotá, Colombia: *Universidad Santo Tomás.*

7 Canfux, V., 2000, *La pedagogía Tradicional, En Colectivo de Autores Cepes* (Ed.), *Tendencias pedagógicas en la realidad educativa actual*, pp. 5-10, Tarija, Bolivia: *Editorial Universidad* "Juan Misael Saracho"; Whether it is based on the discipline, rigidity and absolute order of the Jesuits, or if it revolves around the more liberal models that see the figure of the teacher as the center of the teaching process.

8 Ibid.

9 Corral, R., 2000, *La perspectiva cognoscitiva, En Colectivo de Autores Cepes* (Ed.), *Tendencias pedagógicas en la realidad educativa actual*, pp. 77-82, Tarija, Bolivia: *Editorial Universidad* "Juan Misael Saracho".

ment. Hence, learning based on closed and imposed solutions is completely ineffective, because it is neither an object of interest for its assimilation by the student, nor, therefore, will it be an object of appropriation by the same.

Consequently, the student becomes the central figure in the comprehensive training process, which means paying greater attention to his or her evolution process in order to build on the progress that the student shows over time[10]. Following Vygotsky's terminology, the aim is to strengthen the "zone of proximal development", composed of those capacities that are in the process of maturation, because although the student cannot yet use them to independently solve a problem, he or she can use them to confront the same problem with the cooperation of a teacher or another more advanced classmate[11].

The second element of the ILC pedagogical proposal affirms that, since knowledge is the result of the search and real action of the human person on his environment, it is the fundamental task of the teacher to make the student understand that, beyond his classes and the consultation of books and articles, knowledge is obtained mainly through observation, experimentation and the combination of reasoning. Hence, the importance of understanding the interrelation between research, as a process of knowledge production, and action as an intentional modification of a reality. In this manner, while research guides action, the latter reverts to the former, and ends up configuring itself as an essential part of it, following a methodology of planning, action, observation and reflection[12].

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10 In this evolutionary process, it is not possible to try to jump several steps, because otherwise, the experiences that the student is confronted with become ineffective, as they cannot be integrated into their intellectual structures.

11 Vigotsky, L.S., 1995, *Interacción entre enseñanza y desarrollo*, En Kraftchenko, O. & Cruz, L., (Ed.), *Selección de Lecturas de Psicología Infantil y del Adolescente*, Pueblo y Educación: La Habana.

12 Pérez, M., 2000, *La investigación-acción como tendencia pedagógica, En Colectivo de Autores Cepes* (Ed.), *Tendencias pedagógicas en la realidad educativa actual*, pp. 77-82, Tarijá, Bolivia: *Editorial Universidad* "Juan Misael Saracho".

The third element consists of the non-directive nature of the function that corresponds to the teacher, so that his participation is mainly focused on raising problems and proposing various possible alternatives to them. As well as generating lasting motivations for knowledge in students, such as a taste for knowledge, the pleasure of discovery or the future use of what has been learned[13]. All these activities are developed through a cooperative attitude between the teacher and the student, who become co-participants in a mobile learning process and in the action planning strategies, which are put into practice and jointly subjected to observation, reflection and change[14].

Teamwork appears at this point to be of capital importance. Problems are the responsibility of the entire group, which on the one hand reduces the tension they generate, and on the other hand favours creativity and the contrasting of different points of view. Cordial meetings between teacher and students not only make the process more pleasant, but also awaken new motivations[15]. In addition, they offer the teacher the opportunity to enrich his horizon by learning from the observations of his students, and to become an authentic witness for them, so that the students can identify in their teacher values that they admire, and that they can then imitate by assimilation[16].

In short, it is about promoting an active method that allows the human being to be critical, through group debate of existential situations, prepared specifically for this purpose. The teacher has, as his

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13 González Maura, V., 2000, *La pedagogía no directiva: La enseñanza centrada en el estudiante, En Colectivo de Autores Cepes* (Ed.), *Tendencias pedagógicas en la realidad educativa actual,* pp. 57-65, Tarija, Bolivia: *Editorial Universidad* "Juan Misael Saracho".

14 Pérez, M., 2000, *La investigación-acción como tendencia pedagógica, En Colectivo de Autores Cepes* (Ed.), *Tendencias pedagógicas en la realidad educativa actual,* pp. 77-82, Tarijá, Bolivia: *Editorial Universidad* "Juan Misael Saracho".

15 Viñas, G., 2000, *La pedagogía liberadora, En Colectivo de Autores Cepes* (Ed.), *Tendencias pedagógicas en la realidad educativa actual*, pp. 66-76, Tarija, Bolivia: *Editorial Universidad* "Juan Misael Saracho".

16 Morin, E., 1999, *Los siete saberes necesarios para la educación del futuro.* Paris, France: UNESCO.

main responsibility, to help the student obtain a critical point of view of his reality[17].

The fourth and final element of the ILC pedagogical proposal requires that the teacher be able to use imagination to take advantage of situations, and to create and use means that encourage activity and dialogue with the students. In particular, the teacher must take into account that new technologies offer students access to global information channels, allowing them to be part of a global learning community through social networks and virtual electronic libraries[18].

Therefore, the teacher, within the framework of the cooperative efforts that he develops with students in research projects, must focus his efforts on guiding them in their process of experimentation in navigation through the global network. To do this, he needs a more flexible learning model, which is not carried out simultaneously in the same space and time.

4. The comprehensive formation of the unconscious: the formation of the human being as a whole requires not compartmentalizing consciousness and unconscious

The proposal for the comprehensive formation of critical thinking seen in the previous section constitutes, in our opinion, an important step forward in the field of cognition. However, it continues to be based on a notable compartmentalization between the process of formation of the activities that take place in the plane of consciousness (perception and thought), and those others that take place in the field of unconsciousness (feeling, intuition and imagination)[19].

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17 Viñas, G., 2000, *La pedagogía liberadora, En Colectivo de Autores Cepes* (Ed.), *Tendencias pedagógicas en la realidad educativa actual*, pp. 66-76, Tarija, Bolivia: *Editorial Universidad* "Juan Misael Saracho".

18 Rojas, A.R, Corral, R., Ileana, A., & Ojalvo, V., 2000, *La tecnología educativa, El uso de las NTIC en la Educación*, pp. 21-42, Tarija, Bolivia: *Editorial Universidad* "Juan Misael Saracho".

19 Idem.

The favoring of the objective or conscious dimension of the human person, to the detriment of its subjective or unconscious dimension, hinders an authentic comprehensive formation directed at the human being as a whole, in order to allow him to articulate a coherent way of being and understanding the world[20]. Hence the importance of the ILC's pedagogical proposal to promote discussion on values and human and social problems, as well as the fostering of imagination and dreams for a different world, which give meaning to life for students.

For this reason, the ILC's pedagogical proposal understands that the comprehensive training process, in addition to fostering the development of critical thinking, must also be aimed at generating a context free of fear of feelings, intuitions and imagination, so that their expression and confidence in them is facilitated and promoted[21].

To this end, the ILC resorts to a broad concept of the notion of play, which is developed through group work dynamics, as well as through forms of artistic and literary production, and experimental incursions into multiple disciplines.

In short, it is about abandoning the classic concept of "civilization" of feelings, so that students develop a responsibility not only towards the ideals of how they should not feel, but also towards their own feelings, intuitions and symbols through which they express their imagination.

Only in this way, complementing critical thinking with the cultivation of the subjective dimension of the student, is it possible to address within the framework of the ILC a truly comprehensive training process, in which the frequent contradiction between the truth of thought and the truth of feeling can be addressed. This is demonstrated, for example, by the tension between the rational principle of justice and the feeling of compassion[22].

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20 Sanz O., 1997, *Hacia una pedagogía de la subjetivización, En Revista de Educación y Pedagogía, Universidad de Antioquia*, Nos., 19-20, pp. 113-135.

21 Idem.

22 Idem.

The ILC promotes addressing this contradiction because, if the student is condemned to a situation of ignorance and helplessness in the face of the activities of his unconscious, it is more than likely that throughout his life the censorship of his rational thought will end up breaking at some point, causing him a serious identity crisis.

5. Conclusion

Throughout this chapter, we have attempted to present the pedagogical proposal that the ILC has been implementing since its creation in August 2011. Its foundation is the comprehensive training of the human being, so that, by acquiring awareness of his own emotional, social and intellectual activity, he is able to contribute to society with critical thinking.

The pedagogical proposal of the ILC is aimed at ensuring that the student's comprehensive training process makes him grow in humanity, through the deployment of his affective, social and intellectual spheres. With this, and once he understands that there is no perfect way of life, we intend to empower the student so that, through his own experimentation, he decides for himself what way of life he considers desirable.

Finally, it is important to emphasize that the ILC is only just celebrating its 15th anniversary and is therefore at the beginning of what is expected to be a long journey, which must be traveled hand in hand with a pedagogical proposal characterized by the fact that its foundation and its elements constitute nothing more than a guide, always adjustable along the way in order to achieve a genuine comprehensive training of its members.

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3. The value of cooperating with the International Law Clinic for the work of the Office of Public Counsel for Victims of the International Criminal Court

PAOLINA MASSIDDA

1. The role of the Office of Public Counsel for Victims

The Office of Public Counsel for Victims (OPCV) is an independent office within the International Criminal Court (ICC) established in 2005 to assist victims, either directly by providing legal assistance and legal representation in the proceedings, or indirectly by providing support to external lawyers representing victims. The assistance provided to victims covers the early stages of the proceedings, including the preliminary examination and the investigation when victims may wish to provide information to the Prosecutor.

Regulation 81 of the Regulations of the Court, read jointly with Regulation 80, provides for establishing the Office and defines its mandate as follows:

> The tasks of the Office of Public Counsel for victims shall include: (a) Providing general support and assistance to the legal representative of victims and to victims, including legal research and advice and, on the instruction or with the leave of the Chamber, advising on and assisting with the detailed factual circumstances of the case; (b) Appearing, on the instruction or with the leave of the Chamber, in respect of specific issues; (c) Advancing submissions, on the instruction or with the leave of the Chamber, in particular prior to the submission of victims' ap-

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* The views expressed in this article are solely the ones of the author and should in no way be attributed to the International Criminal Court.

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> plications to participate in the proceedings, when applications pursuant to rule 89 are pending, or when a legal representative has not yet been appointed; (d) Acting when appointed under regulation 73 or regulation 80; and (e) Representing a victim or victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice.

In accordance with Regulation 81(2) of the Regulations of the Court, the Office functions "as a wholly independent office". Its independence is a prerequisite for carrying out its mandate of assisting legal representatives of victims and/or representing victims, and preserves the privileged relationship between victims and counsel.

The Office can be asked to provide victims and lawyers representing victims with technical assistance and expertise on any matter related to the participation of victims in the proceedings before the ICC. This may include providing factual background documents on the situation or case, research papers and advice on selected aspects of international criminal law - in particular on law relevant to victims' participation and reparations and on any substantive and procedural matters pertaining to the proceedings. When appointed to represent victims in the proceedings or when appearing before Chambers, Counsel of the Office are often confronted with novel and complex legal issues which require extensive research and legal analysis.

2. The cooperation between the Office and the International Law Clinic: a two-way learning experience

It is in this framework that, in 2013, the Office accepted the proposal from the *Universidad del Rosario* (Colombia) to start a cooperation with its International Law Clinic.

The idea to form a group of students focused on international criminal law offered several compelling benefits, including providing them with an opportunity to study the subject in depth, and also to apply international criminal law to concrete cases. First, the Office could request research on issues related to the protection of victims' rights and receive actionable findings to support its judicial work. Second, the partnership provided an opportunity for creative input

on complex legal issues through the exchange between students and members of the Office. This exchange would contribute to a deeper understanding of victim-related matters in international criminal law, while enhancing victims' rights before the ICC. Third, members of the Office could improve skills in explaining complex legal concepts, guiding students and supervising their work.

Each year, the Office provides the students with a list of two or three legal issues arising from ongoing cases or situations before the Court, accompanied by an explanation of how these issues may impact victims' rights. This allows students to examine legal concepts and challenges within the context of a specific case or situation, enabling them to understand the practical effects of applying relevant legal provisions. In other words, students have the opportunity to apply the law to real-world cases and propose concrete solutions with a victim-centred approach.

Under the guidance of their Professor, the students select the topics they consider more compelling. Working in groups of three to six, students have several months to draft a legal memorandum that analyses the chosen issues. Often, the students employ a comparative approach, reviewing relevant national practices that may inform their analysis of the legal question. This comparative approach is particularly valuable to the Office, as Article 21 of the Statute provides that the Court can apply general principles of law derived by national legal texts, when its primary legal texts do not address a particular matter. In fact, some queries are deliberately formulated by the Office to encourage such comparative analysis, acknowledging that the interpretation and application of victims' rights before the ICC is an evolving field.

Throughout the memorandum drafting process, the Office is available to address any questions or provide guidance. Once completed, the memorandum - prepared in both English and Spanish - is submitted to the Office for feedback before finalisation.

During the Ibero-American Week of International Justice, students are invited to present their work at the Court, where they have the opportunity to share their findings with Office members and engage in discussions. This is a great opportunity for the students to

receive recognition for their contribution while developing their presentation and advocacy skills. It also allows the Office to further engage in dialogue about victims' rights before the ICC and to deepen the debate on critical issues.

The legal questions addressed through the years include:

- Evidence of facts underlying the contextual elements of crimes against humanity in ICC decisions on the confirmation of charges.
- Content and scope of the war crime of ordering an act of displacement of the civilian population under article (8)(2)(e)(viii) of the ICC Statute.
- Are girls under the age of 15, who are taken as wives or partners by members of an armed group participating in a non-international armed conflict, protected from sexual violence perpetrated against them by their partners or by other members of the armed group to which they belong?
- Are insanity and duress applicable in the Ongwen case before the International Criminal Court?
- Does the practice by the Lord's Resistance Army of abduction of children constitute the crime against humanity of torture, persecution or other inhuman acts under the Statute of the International Criminal Court?
- Are the nature and extent of victimization, the acts of violence that constitute the contextual elements of crimes against humanity and the special gravity of some international crimes' relevant factors in the determination of sentences by the International Criminal Court?
- Procedural issues concerning Trial Chamber I's no case to answers decision in the Gbagbo and Blé Goudé case.
- Is being a former child soldier a relevant circumstance for sentencing? Special attention to the Ongwen case before the International Criminal Court.
- Criminal responsibility under national law of current and former under-fifteen-child-soldiers who were forcibly recruited.

- Forced marriage and its legal characterization as a crime against humanity: sexual slavery, other inhumane acts, or both?
- On the power of victims to trigger judicial review by the Pre-Trial Chamber of the International Criminal Court: special attention to the judicial review of the Prosecutor's decision to close the preliminary examination on the grounds that it would not be in the interests of justice to open an investigation.
- Reparations to victims in the Bemba case through the Trust Fund for Victims of the International Criminal Court.
- Notion of transgenerational and intergenerational harm.
- What are the existing methods of establishing transgenerational and intergenerational harm (genetic, clinical, psycho-social, etc.), and which ones of these methods are most compatible with the standard of a balance of probabilities (more likely than not) as opposed to any higher standards?
- Scope and limitations of reparation measures for minors who are victims of serious crimes: a comparative study between national and international jurisdictions.
- Genocide by the deliberate imposition of conditions of existence on a group calculated to bring about its physical destruction in whole or in part: the situation in the Gaza Strip.

Over the years, the memorandum produced by the International Law Clinic have been instrumental in supporting the Office's submissions before the Chambers of the Court or in serving as the foundation for developing arguments on behalf of victims. For instance, the research on sexual violence perpetrated by members of the armed groups against individuals of the same armed group contributed to the Office's submissions in the Bosco Ntaganda case. This ultimately led to the confirmation of the ICC's jurisdiction over the war crimes of rape and sexual slavery committed by members of an armed group against other members of the same group - a landmark decision that significantly advanced the legal discourse on sexual violence. Similarly, the research on transgenerational and intergenerational harm informed the submission in the Ongwen case about the extent of

the recognition of such harm within the context of ICC reparations proceedings.

In 2019, the collaboration between the Office and the International Law Clinic was further strengthened with the creation of the International Criminal Law Reports. The series aimed to include all the students' memoranda from the Law Clinic alongside articles by practitioners in the field of international criminal law. The first two volumes were published in 2020, followed by two additional volumes in 2022 and in 2023. The collection, co-published by the Editorial de la *Universidad del Rosario* (Bogotá, Colombia) and the Ibero-American Institute in The Hague, in collaboration with the Office of Public Counsel for Victims, compiles research from the students since 2013. The volumes have been enriched by contributions from Spanish academics and practitioners, including former and current ICC judges. This initiative not only recognize the students' contributions but also enhances legal research, shedding light on the legal challenges faced by victims. Furthermore, it promotes awareness of victims' rights in international criminal law. The bilingual nature of the reports (in both English and Spanish) broadens their accessibility and impact, allowing them to reach a wider audience.

3. Taking stock of the cooperation between the Office and the International Law Clinic

For law students, the distinction between studying law and practicing law is often vast. Many law schools still emphasize theoretical education, primarily focusing on academic literature, national legislation and case law, leaving students unprepared for the practical application of the law. This gap between theory and practice can be bridged through clinical legal education.

By engaging in hands-on experiences, students have the opportunity to apply the law to real-world situations, which offers numerous benefits. This practical exposure not only facilitates a smoother transition into the profession, but also helps students determine whether international criminal law is truly the field they wish to pursue.

In this context, the International Law Clinic is an important educational reality, offering students the opportunity to deepen their knowledge of international criminal law while improving their skills in legal research and analysis, and problem solving. Moreover, participating in the Clinic helps students develop essential oral presentation, communication, and organisation skills. Considering that the Office is involved in several cases and situations, students have the unique possibility to gain first-hand experience on a number of innovative issues. They are also confronted with questions of ethics and professional responsibility, which allows them to apply abstract notions into a practical setting and prepares them for their professional career. In addition, undertaking research that directly supports the work and cause of victims motivates students to excel and fosters a sense of ownership over the results they achieve. After the experience with the International Law Clinic, many students have gone on to serve as interns or visiting professionals with the Office or other organs of the Court. Some of them have embarked on a career in international criminal law.

The Law Clinic is also an opportunity to bring young people closer to international criminal justice, helping them discover talents that can be applied in the field of human rights, international humanitarian law, or international criminal law. It encourages the exchange of ideas and opinions in an environment that fosters diversity, preparing the students to work effectively in a multi-cultural setting.

The Law Clinic's comprehensive training project places its members at the heart of the learning process, which is based on the understanding that knowledge is gained primarily through observation, experimentation, and critical reasoning. In this non-directive approach, the teacher's main role is to present problems and offer multiple potential solutions, which are then collaboratively addressed by the Clinic members through teamwork. Finally, the Clinic plays a key role in training new generations of professionals.

From the Office's perspective, its involvement in multiple situations and cases simultaneously, has resulted in a substantial workload for a small team of 12 individuals. Therefore, the possibility to request legal research from the students is a valuable asset. It also provides an opportunity to view legal concepts from a fresh perspective,

as junior individuals often bring creativity and challenge established viewpoints by offering new insights. In fact, the work produced by the Law Clinic has significantly contributed to the analysis of complex legal issues and to the interpretation of provisions in a victim-centred perspective.

In conclusion, the partnership between the Office and the International Law Clinic is a shining example of how academia and legal practice can come together to bring about positive change. Their collaboration promotes human rights and the rights of victims. Together, they embody the transformative power of cooperation and serve as an inspiration for future efforts in legal education and victim advocacy.

4. The value of the cooperation of the International Law Clinic with the Chamber for the Examination of Cases in the Specialized Jurisdiction of Justice and Peace of the Superior Court of Bogotá

ULDI TERESA JIMÉNEZ LÓPEZ*

The demobilization of paramilitary groups, organized under United Self-Defence Forces of Colombia (AUC for its Spanish initials) required a special justice system. This was the first peace mechanism developed in Colombia following the adoption of the Rome Statute, suitable for prosecuting and convicting serious violations of human rights and international humanitarian law, which had rarely been applied in the country. In 2005, therefore, the Congress of the Republic issued Law 975, whose purpose is "to facilitate peace processes and the individual or collective reintegration into civilian life of members of illegal armed groups, guaranteeing the victims' rights to truth, justice and reparation".

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The legal regime of the Justice and Peace programs was less influenced by international law in comparison to the Special Jurisdiction for Peace (JEP), which was established subsequently after the peace negotiations with the Revolutionary Armed Forces of Colombia (FARC-EP for its Spanish initials). While the JEP was conceived as an independent jurisdiction within the Colombian constitutional system, the Justice and Peace judges were integrated into the permanent ordinary criminal justice system, functioning as specialized chambers in the courts of Bogotá, Medellín and Barranquilla. However, in the second half of the first decade of the 21st century, international law began to have a growing influence on transitional justice systems.

Despite this new regulatory framework, the Justice and Peace courts faced technical difficulties related to the understanding of transitional justice, international humanitarian law and international criminal law. The legalistic tradition of Colombian justice, despite the ratification of multiple international conventions and treaties, made international law alien to national criminal law. At that time, there were no elements of positive law that differentiated war crimes from ordinary crimes, and even today, Colombian criminal law lacks specific regulation for crimes against humanity.

1. The contribution of working in a constructive justice environment to the International Legal Clinic

The participation of the Clinic in the Tribunal was a two-way construction: it benefited not only the Tribunal, but also the students who participated. They had the opportunity to integrate into the reality of transitional justice, attend hearings and carry out practices in Justice and Peace, learning directly from the judiciary. This unique experience strengthened their professional training and allowed them to research international law topics that are rarely applied in Colombia. In addition, their participation marked a milestone in their professional development, by acquiring knowledge that was more useful for transitional justice than national criminal law, which has had an impact on their careers to this day.

In this context, the participation of the Clinic not only provided the students with practical learning, but also strengthened the work of the Tribunal. The constant interaction between students and judges allowed the exchange of knowledge and the construction of more comprehensive approaches to the application of international law. This collaborative learning was key to ensuring that these contributions were not limited to academic training but had a direct impact on judicial decision-making.

2. Contribution of the Law Clinic to specific cases of Justice and Peace

The Law Clinic's research was fundamental for the Justice and Peace Tribunal to incorporate into its decisions a greater development of International Humanitarian Law and International Criminal Law, especially in relation to international crimes, a concept that until then had not been addressed in depth.

Although the integration of these legal frameworks promoted a more holistic analysis of situations of violence, the work of the 2012 cohort, which studied the legal consequences of deaths caused by disciplinary actions within the AUC, was particularly noteworthy. The development of criminal responsibility for crimes committed within the paramilitary ranks, particularly by commanders exercising disciplinary or military control, was a topic that had been scarcely addressed in international criminal law until the Ntaganda and Ongwen cases[1].

In four specific cases (Guillermo Pérez Alzate et. al.[2], Armando Madriaga Picón/Jesús Noraldo Basto León[3], Rodrigo Pérez Alzate[4], and John Fredy Rubio Sierra et. al.[5]), the Tribunal had to determine

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1 Despite some initial considerations within the framework of the Lubanga case.

2 *Radicado* No. 110016000253200680450, pág. 471 et. seq.

3 *Radicado* No. 110016000253 - 200782862 y 200680082, pág. 173 et. seq

4 *Radicado* No. 110016000253200680012, pág. 473 et. seq

5 *Radicado* No. 110016000253 – 200883167, pág. 273.

whether the defendants were criminally responsible for homicides or forced disappearances within their own ranks as a result of disciplinary sanctions. These cases raised questions about the legitimacy of such deaths under IHL, the definition of who is a combatant; when a non-combatant loses protection under IHL; and, in particular, whether violence within the armed group could be considered violence in the context of armed conflict.

The Clinic then carried out an advanced study on the scope of the legal concept of the loss of protected status in armed conflict. Its analysis enabled it to compile norms and jurisprudence so as to determine whether a person could be considered a direct combatant in hostilities and, therefore, a legitimate military target. As a result of its intervention, it was concluded that the AUC members subject to these internal sanctions could be considered legitimate combatants in the context of hostilities, thereby losing the protection of IHL:

> The aforementioned victims were linked to organized armed groups outside the law who participated in the armed conflict and their performance within the structures was the cause of their death, which is why, in light of the International Humanitarian Law norms stated above, they did not have the status of protected persons, a circumstance that allows the facts to be legalized in the manner mentioned above[6].

This was decisive at the point of dealing with the legal charge for the crimes that were pursued in these four cases: in the cases it was decided to treat these events as forced disappearances and normal homicides, and not within the context of homicide of a protected person. When carrying out its study, the Clinic proposed the use of a 'test' that allows, case by case, to determine the loss of protection in International Humanitarian Law:

> The proposed test is divided into two parts. The first part analyses whether the person was a de facto or de jure member of any of the parties to the conflict (which would automatically mean the person not having the status of protected person).
> The second part is based on the prior verification that the victim was not a member of any of the parties to the conflict (so that in principle he had the status of protected person). On this basis, the factors that allow determining whether at the time of his death he maintained his

6 Ibíd., p. 479.

> protection, or on the contrary had lost it as a consequence of his direct participation in the hostilities, are analyzed[7].

It is interesting to see the change in the attribution of responsibility for this type of conduct in Colombian transitional justice. The determination of who constitutes a protected person or is a direct participant in the hostilities has evolved in the different transitional justice systems. This is following the requirements of International Humanitarian Law that demand norms for judicial prosecution by entities participating in organized armed conflicts. In the Special Jurisdiction for Peace, extrajudicial executions of certain combatants have been established as a serious violation of IHL. However, at the time, the inclusion of IHL and *ius in bello* criteria for determining victims as protected persons was an innovative step for Colombian justice, made possible, among others, by the theoretical contribution of elements of international law made by the Clinic.

The Clinic's research had fundamental effects in resolving doubts of interpretation regarding the nature of a protected person at a time when this concept had only recently been integrated into Colombian criminal law.

3. The importance of interdisciplinary dialogue

For the Tribunal and the students, it was essential to have a network of participation and communication that allowed them to share diverse perspectives and information.

For the students of the International Law Clinic, participation in the Justice and Peace processes was an enriching experience. They were able to attend proceedings and hearings, conduct research for the taking of decisions, and closely observe the functioning of transitional justice. This work provided them with invaluable practical

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7 International Law Clinic, 2012, *La pérdida de la condición de persona protegida durante los conflictos armados*, Memorial written by Sergio Castillo Forero, Francois Lozano Pradere, Laura Mateus Ramirez and Andrea Molano Araque, under the supervision of Professor Héctor Olasolo.

knowledge, complementing their academic training in the administration of justice, and thus broadening their education.

Many of the members of the International Law Clinic cohorts have continued their work in the Special Jurisdiction for Peace, which performs the functions of the Justice and Peace courts for demobilized FARC-EP members and state agents. Although the JEP has had limited interaction with decisions made by Justice and Peace, leading to sometimes repetitive processes and difficulties in determining legal elements that had already been resolved years previously, the experience of the students in Justice and Peace has helped to reduce the impact of this lack of communication, thus allowing judicial operators to act with the knowledge they have acquired of international humanitarian law and international criminal law to ensure that decisions are consistent. Therefore, it must be stated that the Clinic has become a mechanism for inter-institutional cooperation, legal certainty, and continuation of the hard work of the Justice and Peace courts.

For example, the first of the Clinic's memorials[8] dealt with the context of accusations of indirect authorship in the context of sexual violence and gender-based violence. At the time of writing, there were strong doubts within the framework of Colombian criminal law regarding the concept of indirect authorship within organized power structures, derived from article 25 of the Rome Statute, and which had substantial differences with respect to the concepts of indirect authorship in Colombian criminal law. This is an issue that continues to be debated before the Jurisdiction, and the presence of members of the Clinic has allowed a more complex approach to the issue than would normally have occurred.

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8 Written by Mariana De La Roche, David Delgado, Daniela Escallón Vicaria, Carlos Fonseca Sánchez, Héctor León Hernández, Julián Jaccard, and Joel Ramírez Mendoza, under the supervision of Professor Héctor Olasolo, with the collaboration of Professors Mauricio Vanegas and Andrea Mateus and of the researcher Andrés Contreras.

Likewise, the elements present in the second memorial, on the elements of proof in sexual violence[9], and in the fourth memorial relating in general to the proof of the contextual elements of crimes against humanity [10], are seen in the records of the determination of facts and conduct of different macro-cases prioritized by the JEP, in the process of attributing responsibility for massive conduct of serious violations of IHL and IHRL.

In general, the Clinic has contributed important contexts of international law to a legal system that, when it began its research, used to limit its contributions to those international treaties that were included in the block of constitutionality, and which were not widely known by legal operators of the national criminal system.

4. Conclusions

The cooperation between the International Law Clinic and the Justice and Peace Chambers is a valuable example of how academia can significantly contribute to strengthening justice in Colombia. Through its research and participation in specific cases, the Clinic has facilitated the incorporation of International Humanitarian Law and International Criminal Law standards into national jurisprudence, which has allowed for a more comprehensive analysis of the serious human rights violations committed within the framework of the armed conflict. This has also led to the training of new generations of professionals with a deep understanding of transitional justice and its challenges, thus strengthening the capacity of the judicial system to address complex cases with a more holistic and specialized approach.

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9 Written by David Alejandro Delgado, Alejandro Jaramillo, Héctor-León Hernández, Víctor Miranda, Nicolás González Tamayo, Angélica Rodríguez, Antonio Jarne, María Carolina Fajardo Cano, and Carolina Olano, under the supervisión of Professor Héctor Olasolo.

10 Written by Lorena Herrera, María Paula López, Daniela Suarez, Juan Camilo Serrano and Sebastián Urrea, under the supervisión of Professor Héctor Olasolo, and with the support of Camila Suarez.

In this sense, the impact of the International Law Clinic is not only reflected in its influence on key judicial decisions, but also in the continuity of its legacy through professionals who have brought their experience to other instances, such as the Special Jurisdiction for Peace. Its contribution has made it possible to build bridges between different moments and mechanisms of transitional justice, promoting legal security and coherence in the application of international law in Colombia. The Clinic, therefore, has not only been a space for learning and academic construction, but also a key player in the advancement of justice in the country, consolidating an interdisciplinary dialogue that has enriched the work of judges, magistrates and other legal operators.

5. Brief remarks on the versatility of the International Law Clinic: Special attention to the research conducted in relation to the cases concerning Laurent Gbagbo, Charles Blé Goudé and Dominic Ongwen

RENÁN VILLACIS*

The International Law Clinic, which has been developed over the last fifteen years based on cooperation between the Office of Public Counsel for Victims (OPCV) of the ICC, the Faculty of Law of *Universidad del Rosario* (Colombia) and the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (The Netherlands), continues to generate research work of outstanding quality.

A good example of this is the analysis undertaken by the Clinic concerning several issues that have arisen within the framework of two cases of particular relevance to the ICC in recent years: (a) the case against Laurent Gbagbo and Charles Blé Goude, who, during the period in which the events for which they were accused took place, served, respectively, as President and Minister of Youth of Ivory Coast; and (b) the case against Dominic Ongwen, who, despite having been kidnapped as a child by the Lord's Resistance Army in Northern Uganda, progressively rose through the ranks of the organization, becoming one of its top commanders between 2002-2005 (the period in which the crimes for which he was convicted on February 4th, 2021 were committed).

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* Director (2009-2024) of the Secretariat of the Assembly of States Parties to the Rome Statute of the International Criminal Court.

Among the various issues addressed, the one relating to content and nature of the requirements set forth under Article 74 (5) of the ICC Statute stands out. The Clinic has paid particular attention to the question regarding the degree of bindingness of these requirements in relation to no case to answer decisions issued by ICC Chambers.

This is a particularly relevant issue for the Gbagbo and Blé Goudé case, if one considers that the case ended precisely through a no case to answer decision issued by Trial Chamber I on January 15th, 2019. This decision was later confirmed by the Appeals Chamber on March 31st, 2021.

The International Law Clinic has also addressed certain procedural issues that have arisen in relation to the aforementioned no case to answer decision in the Gbagbo and Blé Goudé case. Among the specific issues addressed, the following three especially stand out: (a) whether the TCs have the power to define the applicable standard of evidence after having issued their decisions; (b) whether the principles of fair trial and expeditiousness of the proceedings are only to the benefit of the accused; and (c) the determination of the instances in which a declaration of mistrial is appropriate.

To answer these questions, a broad analysis has been undertaken of the jurisprudence issued to date by the ICC, the ICTY, ICTR, several hybrid tribunals such as the ECCC, the STL and the SCSL, the HRC, the ECtHR and IACtHR.

The Clinic has also focused on the system for determining penalties contained in art. 78 of the ICC Statute and in rule 145 of the ICC Rules of Procedure and Evidence. In particular, it has addressed the question of whether being a former child soldier, as Dominic Ongwen, is a circumstance relevant to the determination of the sentence, because it constitutes one of the aggravating or mitigating circumstances provided for in Rule 145 (2), or because it is a condition to be considered in the individualization of the penalty. To address this issue, a detailed analysis is carried out of the main sentencing decisions issued to date by the ICC and the SCSL.

Finally, the research conducted by the International Law Clinic on national legal systems for the determination of sentence is also worth noting. It has especially studied the treatment that national

systems grant to those who were child soldier either at the time of the commission of the crimes for which they have been convicted, or prior to their commission (especially when, as in the Ongwen case, the crimes for which he has been convicted were committed years later, during adulthood).

The analysis carried out to address this last question includes several national jurisdictions of the Romano-Germanic and Common Law traditions on different continents, including Egypt, Kenya and South Africa in Africa, El Salvador, Peru and the United States in America and Germany, Hungary and Spain in Europe. In addition, particular attention is paid to the United Kingdom (given its strong ties with Uganda) and national jurisdictions, such as Colombia, Uganda and The Philippines, in which transitional justice systems have been established that provide for special measures for recruited minors.

For all the above reasons, and to conclude these brief remarks, one cannot but highlight the variety of thematic areas addressed by the International Law Clinic, which shows the versatility in its research, which constitutes, without a doubt, a truly significant contribution to the study of ICL.

6. Reflections on the value of legal clinics and research groups in research training at the Faculty of Law of the Universidad del Rosario: special reference to the International Law Clinic

LALY CATALINA PERALTA GONZÁLEZ*

1. Commitment to Research Training

The Research Department of the Faculty of Law has made a clear commitment to research training starting at the undergraduate level. The International Law Clinic (ILC), organized in partnership with the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (IIH) (The Netherlands) and the Office of Public Counsel for Victims of the International Criminal Court, possesses highly relevant experience for this training endeavor.

In light of the above, the purpose of this paper is to set out the reasons behind this commitment to research training, answering two fundamental questions: (a) why train for research? and (b) how to train for research?

The answer to these questions stems from the understanding that, in today's societies, knowledge and its production have the potential to be not only a source of wealth but also a cause of profound social transformation. Therefore, training for research is not a privilege for

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a few future scientists, but a responsibility owed to the citizens and professionals of the future.

Therefore, in this context, it is essential that the University, which previously taught and now also conducts research, trains its students for this purpose. Law clinics and research groups are privileged collective spaces for this purpose, as they seek to: (a) encourage curiosity and wonder; and (b) address specific problems that demand concrete solutions.

Thus, even though the quantitative empirical evidence to date is not conclusive regarding the impact of these training spaces on the academic and professional lives of those who participate in them, the case studies and ethnographies carried out demonstrate that the development of research skills allows for the acquisition of a critical attitude towards scientific evidence, the ability to implement methods to solve problems, the ability to write essays and articles, and the ability to present findings either through presentations or reports[1].

2. Why train for research?

While in industrial societies of the past, wealth was produced primarily through the mass production of material goods and the exploitation of natural resources, thanks to the technological development and mechanization that emerged during the Industrial Revolution (18th and 19th centuries), in today's knowledge societies, wealth is measured by the ability to create, share, manage, and apply knowledge. Indeed, knowledge has become the most important resource for wealth creation, well-being, and social transformation.

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1 Martínez-Daza, M.A., Guzmán, A., Castaño, J.A., Segovia-García, N. & Montilla, H.Y, 2021, *Multivariate Analysis of Attitudes, Knowledge and Use of ICT in Students Involved in Virtual Research Seedbeds*, *European Journal of Health, Psychology and Education*, Vol. 11, Núm. 1, Pp. 33-49, https://doi.org/10.3390/ejihpe11010004.

Thus, the production and use of knowledge has a particular impact on humanity: new ideas can result in technological, scientific, and social developments that can solve various problems.

In addition to its transformative power, knowledge provides evidence that facilitates decision-making in the public and private spheres: data and its rigorous analysis are essential for the development of public policies, business strategies, and social actions. Addressing social problems such as poverty, inequality, and human rights violations contributes to a better understanding of their causes and their potential transformation.

In this context, the knowledge society values intellectual skills, creativity, and the capacity for innovation more than it does manual labor.

However, it should be noted that this transition has not managed to eliminate the deep inequalities and injustices that exist and has even created new forms of exclusion, such as the digital divide. Some authors (including Boaventura de Sousa Santos) have even suggested that the knowledge society can deepen inequality if democratic access to knowledge is not guaranteed.

Based on the foregoing, it can be affirmed that university research in the knowledge society is essential today and can be: (a) basic, when it seeks to expand theoretical knowledge without immediate application; (b) applied, if it is oriented toward solving specific problems with a direct impact on society; (c) participatory, if it involves communities as co-creators of knowledge; and (d) socially innovative, if it generates solutions to transform the living conditions of vulnerable populations.

In this way, university research takes on a strategic dimension for human development, the strengthening of democracy, and the construction of more just societies. All of this is aimed at ensuring that universities cease to be solely producers of academic knowledge and become transformative agents that connect knowledge with social needs and collective well-being.

This necessarily accentuates the need to transition from a university primarily dedicated to teaching to one in which research constitutes an essential aspect of its activities. This ultimately means moving from being a professionalizing university that transmits knowledge to producing it and involving students in the process, assigning them a role that shifts being passively receptive to critically proactive.

All of this occurs at the same time that universities face the challenge of replacing an individualistic learning model for one that is collective and collaborative.

3. How to train for research?

Montessori, controversially for her time, had already asserted that education consisted of development, with the child as its protagonist[2].

In fact, as L'Ecuyer points out, the discussion at the time about child development centered on whether children learned from within or whether the learning process began from without. The question was: did the child have within themselves what was necessary to develop within a normal environment, or was the intervention of external stimuli necessary?

The american educational system of the time was mechanistic, assuming that the child was an externally driven entity and that it was from there that the learning process began. Thus, the American children's entertainment industry has been very successful in convincing parents to stimulate their children as much as possible, and as early as possible.

However, evidence confirms that the best cognitive preparation and healthy personality development lies in the quality of the relationships a child has with their primary caregiver during the first years of life and in the number of collaborative interpersonal interac-

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[2] Montessori, M., 1995, *Ideas generales sobre mi método*, Madrid (España), *Ciencias de la Educación Preescolar y Especial* (CEPE).

tions[3]. Human relationships, not excessive sensory stimulation, are the key to healthy development[4].

Consequently, a child's (and future university-aged) learning begins from within and is not only cognitive but also relational and emotional.

Furthermore, given the rapidly changing needs of the labor market, what is needed today more than ever are creative and resilient people, resourceful professionals capable of adapting to rapid changes. To achieve this, it is essential to stop inculcating and start educating since as L'Ecuyer argued, the paradigm of education that educates is to welcome, while the educator who inculcates is to give, or rather, to impose. To inculcate is to erase the child, replacing them. To welcome is to recognize that the child is the protagonist of their own biography[5].

As a result of this, university classrooms have long been dominated by mechanical approaches (from the outside), so that formative research was reduced to the teaching of theoretical courses on scientific research methodologies decontextualized from specific topics and concrete problems, with little space for observation, experimentation, critical analysis or innovation, where the leading role fell in privileged way on the teacher who was the only one who had the capacity to contribute and enrich the process[6].

The current challenge of research training processes is to generate in the students lasting motivations for knowledge, such as a love of knowledge, the pleasure of discovery together with an interest in the future use of what they have learned[7], and to do so by changing their perceptions and stereotypes:

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3 L'Ecuyer, C., 2012, *Educar en El Asombro, Barcelona: Plataforma Editorial*, S.L.

4 Ibid.

5 Ibid.

6 Castro-Rodríguez, Y., 2022, *Revisión sistemática sobre los semilleros de investigación universitarios como intervención formativa, Propósitos y Representaciones.*,Vol. 10. Núm. 2, https://doi.org/10.20511/pyr2022.v10n2.873.

7 Olasolo, H., 2016, *La propuesta pedagógica de la Clínica Jurídica Internacional: la formación integral del ser humano, en:* Olasolo, H., *(director académico), Derecho*

> For a long time, I kept in my memory the image of a researcher as a person almost on the verge of madness, with hair standing on end, grey and disheveled, wearing a white gown in the middle of a laboratory, and surrounded by countless vials of strange and dangerous substances on shelves. This was what the covers of natural science and chemistry textbooks almost always showed us at the beginning of a new school year. Perhaps this is why I thought that the only people who researched were people who looked like this and that I would never become one (Final Reflection, SdeI participant)[8].

In knowledge societies, those who research (who are not the exception, but the majority), far from being crazy people isolated in laboratories, are people called to understand and engage in dialogue with reality in order to transform it. Thus, regardless of whether those who train in research choose to pursue an academic career in the future or not, it is essential that professionals generally possess the skills and competencies for research.

Given this situation, legal clinics, as research incubators, seek to be an appropriate space for research training. Their development is more closely associated with what has occurred in Latin America since the late 1990s (precedents can be found in Chile, Colombia, Ecuador, Mexico, Peru, and Venezuela). The origin of clinics (based on the commitment to adopting aspects of pedagogical models implemented in medical training and thus also working in law based on real cases)6 dates back to the 1930s with Frank at Yale University (USA).

In both models (clinics and incubators), the dynamics of the training process are expected to be collective, never individual, so teamwork is of paramount importance. In this way, the problems are the responsibility of the entire group, which on the one hand reduces

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Internacional Penal y Humanitario. Estudios de la Clínica Jurídica Internacional de la Universidad del Rosario (Colombia) y del Instituto Ibero-Americano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional (Holanda) en su V Aniversario, Valencia: Tirant lo Blanch, *Instituto Ibero-Americano de La Haya & Universidad del Rosario, Capítulo* 1. Pp. 31-41.

8 Berrouet Marimón, F., 2009, *Los semilleros como espacio de iniciación en investigación*, *Uni-Pluriversida*, Vol. 8. Núm. 2. https://doi.org/10.17533/udea.unipluri.949. (informal translation)

the tension they generate, and on the other hand encourages creativity and the contrasting of different points of view[9]. In this process of formulating questions that concern them and proposing possible answers, they are always accompanied by someone with extensive experience and knowledge in the field addressed, as well as by other students who share their concerns.

Unfortunately, there is still insufficient empirical evidence to measure the personal and professional impact of participating in spaces such as clinics and incubators. It is still unclear, in quantitative terms, how this participation allows the development of competencies and skills. This means that the impact it has on student training and their professional practice remains unknown[10].

There is, however, an extensive qualitative bibliography that reviews ethnographies or case studies that highlight unique achievements[11]; most of these studies systematize interviews or review perceptions.

Thus, based on interviews with various professors and students associated with Law clinics in Latin America, Londoño affirms that it is evident how clinics provide students with capacities and skills in

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9 Olasolo, H., 2016, *La propuesta pedagógica de la Clínica Jurídica Internacional: la formación integral del ser humano, en:* Olasolo, H., *(director académico), Derecho Internacional Penal y Humanitario, Estudios de la Clínica Jurídica Internacional de la Universidad del Rosario (Colombia) y del Instituto Ibero-Americano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional (Holanda) en su V Aniversario*, Valencia: Tirant lo Blanch, *Instituto Ibero-Americano de La Haya & Universidad del Rosario, Capítulo* 1. Pp. 31-41.

10 Castro-Rodríguez, Y., 2022, *Revisión sistemática sobre los semilleros de investigación universitarios como intervención formativa, Propósitos Y Representaciones*, Vol. 10(2).

11 Twenty-two articles were found which implemented a research group and evaluated the outcomes of their intervention. Of these, 77.3% (n=17) were original articles, while 22.7% (n=5) were theses. The majority of the sources originated from Colombia (72.7%) and Peru (13.6%). The programs in which they were implemented included faculties of Administration, Psychology, Education, Electromechanical Engineering, Dentistry, Economic Sciences, Nursing, Physics, Statistics, and Social Work.

formative research, in addition to being one of the best pedagogical settings for strengthening litigation skills.

According to the study, the greatest achievements of the clinics have been: (a) the production of human rights reports and *amicus curiae* briefs in cases of great interest; (b) transformations in university teaching; (c) legislative impact on the emergence of new norms guaranteeing human rights or the rights of specially protected groups; and (d) generational change in universities, as many clinics are veritable schools for new teachers[12].

The commitment of the Faculty of Law to research training is successfully realized in spaces such as the ICJ, which incorporates several of the pedagogical aspects mentioned throughout this chapter.

At the ICC in particular, students' theoretical training is accompanied by practical work to address real-life cases and problems provided by the Office of Public Counsel for Victims of the International Criminal Court (and, until the COVID-19 pandemic in 2020, by the Justice and Peace Chamber of the Superior Court of Bogotá).

The students' role in their training is reflected in their autonomy and the degree of experimentation allowed in their learning. This autonomy does not occur in isolation; students are part of a collective process and are always guided by the Clinic's director, Professor Héctor Olasolo, and a team of instructors who have previously participated in the clinic, who are committed to providing them with both technical and human training.

In commemoration of the 15th Anniversary of the ICC (2011-2015), this collective work presents precisely its most relevant contributions to both the legal and human training of students at the Faculty of Law of the *Universidad del Rosario*, as well as to some of the main issues of international law that have been the subject of pro-

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12 Londoño, B., 2016, *Los cambios que requieren las clínicas jurídicas iberoamericanas. Estudio de caso en seis países de la región, Boletín Mexicano de Derecho Comparado*, Vol. 49. Núm. 146.

ceedings before the International Criminal Court and the Justice and Peace Chamber of the Superior Court of Bogotá since 2011.

PART II
THE RESEARCH

7. Genocide by the deliberate imposition of conditions of existence on a group calculated to bring about its physical destruction in whole or in part: the situation in the Gaza Strip

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1. Introduction

Gaza is a narrow strip of land 41 km long by 6–12 km wide, for a total of 360 square kilometers[1]. It is bordered by the Mediterranean Sea to the west, Egypt to the south, and Israel to the northwest[2]. As of October 2023, it had a population of approximately 2.2 million

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[*] Written under the supervision of Prof. Héctor Olasolo and with support from Valentina Ramírez Barrera and Pedro Montaño Vélez.

[*] International Law Clinic (2024-2025).

[*] International Law Clinic (2024-2025).

[*] International Law Clinic (2025-2026).

[*] International Law Clinic (2025-2026).

[*] International Law Clinic (2024-2025).

1 UNRWA, 2025, Working in the Gaza Strip, United Nations Relief and Works Agency for Palestine Refugees in the Near East, https://www.unrwa.org/careers/duty-stations-gaza.

2 Ibid.

people[3]. It is one of the most densely populated areas in the world, with more than 5,000 people per square kilometer[4].

Gaza, along with the West Bank (including East Jerusalem), is part of the territory of the State of Palestine (currently recognized by three-quarters of the Member States of the United Nations (UN)[5] which was granted non-member observer status by its General Assembly (UNGA) on November 29, 2012)[6] and which has been, according to the International Court of Justice (ICJ), under occupation by the State of Israel since the well-known Six-Day War of 1967[7].

On October 7, 2023, Hamas's military wing (the "Izz ad-Din al-Qassam Brigades") and Palestinian Islamic Jihad carried out "Operation Al Aqsa Flood." Under this operation, they launched a massive series of rockets into Israeli territory, breached the fence surrounding Gaza, and attacked Israeli military bases and civilian cities (including a music festival attended by thousands of young people). They took approximately 250 Israeli civilians and military personnel, as well as nationals of third countries, hostage.

In response, Israel has since launched a massive military assault by land, sea, and air against the entire population living in the Gaza

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3 UN Letter dated 6 December 2023 addressed to the President of the UN Security Council by the Secretary General United Nations. https://www.un.org/es/situation-in-occupied-palestine-and-israel/sg-sc-article99-06-dec-2023.

4 UN-Hábitat, 2017, *profile for the State of Palestine*. https://unhabitat.org/sites/default/files/documents/2019-05/profile_for_the_state_of_palestine.pdf.

5 By June 2024, the number of United Nations Member States that recognized the State of Palestine was 146. See.: OHCHR, 2024, UN experts urge all States to recognize State of Palestine.

6 In Resolution A/RES/67/19, adopted 29 November 2012, It was decided to grant Palestine the status of non-member observer State in the UN, without prejudice to the acquired rights, prerogatives and role of the Palestine Liberation Organization in the UN as the representative of the Palestinian people, in accordance with relevant resolutions and practice. See.: UNGA, 2012, Resolution A/RES/67/19, Status of Palestine at the United Nations.

7 See.: UNGA, 2004, Resolution A/ES-10/2004, Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

Strip, including, but not limited to, members of Hamas and Palestinian Islamic Jihad (a response that was later extended to the West Bank).

As a result, on December 19, 2023, South Africa filed a lawsuit against Israel for alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) due to its conduct in Gaza[8]. Since then, this claim has received: (a) the support of the African Union, the Arab League, the Organization of Islamic Cooperation, and the Non-Aligned Movement, as well as Algeria, Saudi Arabia, Bangladesh, Bolivia, Brazil, Qatar, Colombia, Comoros, Cuba, Chile, Egypt, the United Arab Emirates, Slovenia, Spain, Indonesia, Iran, Iraq, Ireland, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Mexico, Namibia, Nicaragua, Pakistan, Palestine, the Sahrawi Arab Democratic Republic, Saint Vincent and the Grenadines, Syria, Turkey, Venezuela, Djibouti, and Zimbabwe; (b) the opposition of Australia, Austria, Germany, the United States, Guatemala, Hungary, Italy, Paraguay, the Czech Republic, the United Kingdom, and the United States; and (c) the neutrality of Canada, Costa Rica, Denmark, Finland, France, Japan, and Norway[9].

During the first half of 2024, the International Court of Justice (ICJ) adopted two interim measures decisions and one emergency decision. Thus, on January 26, 2024, the ICJ issued its first interim measures decision, in which, at the request of South Africa, it provisionally ordered Israel, as a signatory to the Genocide Convention, to:

1. Take all measures at its disposal to "prevent" genocide in Gaza.
2. Take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts against members of the Palestinian population in Gaza (a pro-

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8 ICJ, 2023, Application instituting proceedings and request for the indication of provisional measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, South Africa v. Israel.

9 ICJ, 2025, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) – Intervention, https://www.icj-cij.org/case/192/intervention.

tected group) that are proscribed by Articles II and III of the Genocide Convention.

3. Take immediate and effective measures to enable the provision of basic services and humanitarian assistance in the face of the adverse living conditions faced by Palestinians in Gaza[10].

Two months later, on March 28, 2024, the ICJ issued a second interim measure decision, due to the significant worsening of the living conditions of the Palestinian population in Gaza as a result of the spread of famine and starvation. In this second decision, also issued at the request of South Africa, the ICJ extended its interim measures and ordered Israel to:

1. Take all necessary and effective measures to ensure, without delay or hindrance, and in full cooperation with the UN, the provision of basic services and humanitarian assistance required by Palestinians in Gaza (including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation needs, as well as medical supplies and healthcare), by increasing the number of land border crossings and keeping them open as long as necessary.
2. Ensure, with immediate effect, that its military refrain from committing acts that might violate any of the rights of Palestinians in Gaza as a group protected by the Genocide Convention[11].

Finally, on May 24, 2024, the ICJ issued an emergency decision, which was adopted based upon a new request filed by South Africa on May 16, and after noting that conditions in Gaza had continued to

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10 ICJ, 2023, Request for the indication of provisional measures of 28 December 2023. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, South Africa v. Israel, No. 192, pp. 30–32.

11 ICJ, 2024, Order of 28 March 2024, Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, South Africa v. Israel, No. 192, par. 45.

worsen since March 28. In this latest decision, the ICJ ordered Israel to[12]:

1. Halt the air and ground military offensive launched on May 7, 2024, against Rafah (a city in southern Gaza that had become a refuge for more than 1.5 million Palestinians displaced from other towns in the Strip to flee the bombardment), including the suspension of the evacuation orders that had forced more than 800,000 people to flee in search of a "new refuge," which was no longer available in Gaza.
2. Halt any other action that would intentionally subject the Palestinian group in Gaza to conditions of existence that could lead to its total or partial physical destruction.
3. Open the Rafah crossing with Egypt to allow the entry of humanitarian aid. This crossing must remain open for: (a) the sizable and unhindered supply of basic goods and services; and (b) the provision of all necessary humanitarian assistance.
4. Take effective measures to ensure unrestricted access to Gaza for any commission, mission, or investigative body mandated by the relevant UN bodies to investigate allegations of genocide.
5. Implement the emergency decision, in accordance with Israel's obligations under the Genocide Convention, given the continuing worsening living conditions faced by civilians in Rafah.

After more than half a year of investigation, and in the midst of the Israeli army's offensive against Rafah that had led South Africa to request the ICJ to adopt an emergency decision, the Office of the Prosecutor of the International Criminal Court (ICC) decided to file on May 20, 2024 before Pre-Trial Chamber (PTC) I a request for the issuance of arrest warrants, for the commission of various crimes against humanity and war crimes, against the Prime Minister of Isra-

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12 ICJ, 2024, Order of 24 May 2024, Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, South Africa v. Israel, No. 192, pp. 14–15.

el, Benjamin Netanyahu[13], his then Minister of Defense, Yoav Gallant (who was later removed from office)[14] and the military commander of Hamas, Mohamed Deif[15].

The Prosecutor's request, which would lead to the issuance of the three arrest warrants requested on November 21, 2024, did not, however, include any of the modalities of commission of the crime of genocide[16]. This is despite the fact that, according to the Prosecutor's Office (and PTC I itself), there are reasonable grounds to believe that Netanyahu and Gallant are responsible for the following conduct[17]:

1. The war crime of intentionally and knowingly depriving the civilian population of Gaza of objects indispensable to its survival, including food, water, medicines and medical supplies, as well as fuel and electricity, since October 8, 2023[18].

According to PTC I, Netanyahu and Gallant's responsibility is based on:

1.1. Their role in preventing the provision of humanitarian assistance in violation of international humanitarian law (IHL), including their failure to take the measures at their disposal to facilitate such

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13 ICC, 2024, Benjamin Netanyahu, Defendant Information, https://www.icc-cpi.int/defendant/netanyahu.

14 ICC, 2024, Yoav Gallant, Defendant Information, https://www.icc-cpi.int/defendant/gallant.

15 ICC, 2025, Mohammed Diab Ibrahim Al-Masri (Deif), Defendant Information, https://www.icc-cpi.int/defendant/deif.

16 ICC, 2024, Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant, Press Release from the International Criminal Court, https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges. See also: CPI, 2024, Situation in the State of Palestine: ICC Pre-Trial Chamber I issues warrant of arrest for Mohammed Diab Ibrahim Al-Masri (Deif), Press Release from the International Criminal Court, https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-issues-warrant-arrest-mohammed-diab-ibrahim.

17 Ibid.

18 Ibid.

assistance. Thus, its conduct disrupted the ability of humanitarian organizations to provide food and other essential goods to the Palestinian population in Gaza (the aforementioned restrictions, along with the cutoff of electricity and the reduction of fuel supplies, also had a serious impact on the availability of water and the ability of hospitals to provide medical care).

1.2. The fact that decisions to allow or increase humanitarian assistance in Gaza were often conditional because Israel did not take them to comply with its obligations under IHL or to ensure that the civilian population in Gaza received an adequate supply of the goods they needed. Rather, they were a response to pressure from the international community or requests from the United States (and not, in any case, sufficient to improve the civilian population's continued access to the essential goods they needed)[19].

2. The war crime of starvation as a method of combat because, according to PTC I, it is not possible to identify any clear military necessity, or other justification under IHL, for the restrictions imposed on humanitarian aid operations.

In fact, in spite of warnings about the extremely grave humanitarian situation that existed in Gaza, and the various calls made in this regard by the Security Council (UNSC), the Secretary-General (UNSG), and UN Member States, as well as by other governmental organizations and civil society itself, only minimal humanitarian assistance was authorized, taking into account: (a) the prolonged period of deprivation; and (b) the relationship between the interruption of essential goods and humanitarian aid, on the one hand, and the objectives of the Israeli government during the war, on the other[20].

3. The crime against humanity of murder, because, according to PTC I, the lack of food, water, electricity, and fuel, as well as specific medical supplies, created conditions of existence that led to the destruction of part of the civilian population of Gaza, resulting in the

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19 Ibid.

20 Ibid.

deaths of civilians (including children) from malnutrition and dehydration[21].

4. The crime against humanity of other inhumane acts by intentionally limiting or preventing the entry of medical supplies and medicines into Gaza, in particular anesthetics and anesthesia machines, thereby inflicting enormous suffering on people in need of treatment[22].

In particular, according to PTC I, doctors were forced to operate on injured people (including children) and perform amputations without anesthesia, and/or were forced to use inadequate and unsafe means to sedate patients, causing them extreme pain and suffering[23].

5. The crime against humanity of persecution because the aforementioned conduct deprived a significant portion of the civilian population of Gaza of their fundamental rights, including the rights to life and health, for political and/or nationality reasons[24].

In this context, the current relevance of properly understanding the content of the third objective modality of committing the crime of genocide, consisting of the "intentional subjection of a group to conditions of existence likely to bring about its physical destruction, in whole or in part," is undeniable.

This relevance becomes even greater if take into account the following two aspects:

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21 Ibid.; In any event, it is important to emphasize that, despite the above-noted, PTC I could not identify in the evidence provided by the Prosecutor's Office reasonable indications to believe that all the elements of the crime against humanity of extermination had occurred.

22 Ibid.

23 Ibid.; PTC I also charged Netanyahu and Gallant with the war crime of intentionally directing attacks against the civilian population of Gaza, based on their responsibility as civilian superiors, by failing to take the measures at their disposal to prevent, suppress or refer to the competent authorities the only two incidents constituting attacks intentionally directed against civilians which, according to PTC I, had been sufficiently substantiated by the evidentiary material presented by the Prosecutor's Office.

24 Ibid.

1. Article II of the Genocide Convention, as well as Arts. Articles 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), and 6 of the Statute of the International Criminal Court (ICCC) define "Genocide" as follows:

"Genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such: (a) Killing members of the group; (b) Serious bodily or mental injury to members of the group; (c) Intentionally inflicting on the group conditions of existence likely to bring about its physical destruction, in whole or in part; (d) Measures designed to prevent births within the group; (e) Forcible transfer of children of the group to another group[25].

2. In the foregoing provisions, the third modality of committing the crime of genocide is much less specific than the others (killing, serious bodily or mental injury, adoption of measures to prevent births, and forced transfer of children), for two main reasons:

2.1. The fact that it comprises all those conditions of existence that, given the circumstances of the case, are objectively suitable for causing the physical destruction, total or partial, of the protected group upon which they are imposed.

2.2. Its limited development in international doctrine and jurisprudence, which has hampered its application due to its low level of specificity (a situation that contrasts with what has been observed in relation to the other four forms of genocide).

For this reason, this paper, after briefly outlining in Section 2 how the situation in Gaza evolved in the second half of 2024, seeks to provide clarity on the content of this third modality of committing the crime of genocide, through the analysis of historical precedents (Section 3), the doctrinal approaches (Section 4), and the jurisprudential interpretations (Section 5) that address and develop this issue.

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[25] UN, 1948, Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2.

Furthermore, Section 6 complements the study with a brief analysis of the main elements common to the five forms of genocide, highlighting their most relevant consequences for their commission due to the subjection to harsh living conditions.

The work concludes with section 7, being conclusions, which summarizes the main findings reached, in order to offer the reader, as well as international courts and other competent entities, more precise criteria in order to determine the content of the type of genocide under study, thus leaving in their hands its application to situations such as that experienced by the Palestinian population of Gaza after October 2023.

2. Development of the situation in Gaza during the second half of 2024

2.1. The beginning of the second half of 2024: the International Court of Justice's advisory opinion of July 19th.

The second half of 2024 began with the issuance on July 19 of the ICJ's advisory opinion on the legal consequences of Israel's policies and practices in the Occupied Palestinian Territory, including East Jerusalem[26]. In its opinion, the ICJ emphasized the following aspects:

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[26] ICJ, 2024, Advisory Opinion of 19 July 2024, Case concerning Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, No. 186; The ICJ issued this Advisory Opinion in response to a request made on 30 December 2022 by the UNGA to answer the following questions: "(a) What are the legal consequences arising from Israel's continued violations of the right of the Palestinian people to self-determination, from its prolonged acts of occupation, settlement and annexation of the Occupied Palestinian Territory since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from Israel's adoption of related discriminatory legislation and measures? (b) How do Israel's policies and practices referred to in paragraph 18(a) affect the legal status of the occupation and what legal consequences flow from that status for all States and for the United Nations?". See: UNGA, 2022, Resolution 77/247, Israeli practices affecting the human rights of the Palestinian people in

1. The violation of fundamental principles of international law by the State of Israel's continued abuse of its position as the occupying Power through its annexation and assertion of permanent control over the Occupied Palestinian Territory and its continued violation of the Palestinian people's right to self-determination. This results in the illegality of Israel's continued presence as the occupying power.

The fact that an occupation (understood as the exercise of effective control over foreign territory) extends over time does not alter its legal status under IHL. This means that, to be permissible, such an exercise must be compatible with: (a) the rules relating to the prohibition of the threat or use of force (including the prohibition of any territorial acquisition resulting from such threat or use of force); and (b) the right to self-determination.

2. Israel's violation of the prohibition on the acquisition of territory by force as a result of its assertion of sovereignty and annexation of certain parts of occupied Palestine, which has led, in turn, to: (a) the fragmentation of the occupied Palestinian territory; (b) the impairment of its integrity; and (c) the deprivation of the Palestinian people of the enjoyment of the natural resources of their territory and of the right to pursue their economic, social, and cultural development.

3. Israel's commission of multiple and serious violations of international law against the Palestinian population of the Occupied Territory, which is responsible for systematic discrimination and apartheid.

In particular, the regime of restrictions imposed by Israel on the Palestinian population constitutes structural discrimination based, *inter alia*, on race, religion, or ethnic origin, in violation of Articles 2(1) and 26 of the International Covenant on Civil and Political Rights, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, and Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination.

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the Occupied Palestinian Territory, including East Jerusalem, Doc. No. A/RES/77/247, 30 December 2022.

4. Israel's obligation to: (a) end its illegal presence in Occupied Palestine as soon as possible; (b) immediately cease all activities aimed at promoting new settler settlements; (c) evacuate all settlers currently present in the Occupied Palestinian Territory; and (d) compensate for damages to all natural or legal persons affected by its violations of international law.

The modalities for ending Israel's presence in these territories, with the "evacuation of all settlers," are the responsibility of the UNGA and the UNSC. They must examine the precise modalities and further measures necessary to end the occupation as soon as possible.

5. There is an obligation on all UN Member States to not recognize the legitimacy of the situation arising from Israel's illegal presence in the Occupied Palestinian Territory and not to provide any aid or assistance in maintaining it.

2.2. The development of the living conditions of the Palestinian population of Gaza during the second half of 2024

As with the two precautionary measures decisions and the emergency decision adopted by the ICJ in the first half of 2024, the issuance of the ICJ's advisory opinion on July 19 did not, in practice, lead to any improvement in the living conditions of the Palestinian population of Gaza.

Thus, as indicated by multiple reports and testimonies from various UN bodies, departments, and agencies (material normally considered by the ICC and other international criminal and hybrid tribunals as having high evidentiary relevance), the living conditions of the Palestinian population in Gaza continued to worsen in the second half of 2024. This was particularly serious with regard to: (a) internal displacement; (b) deprivation of access to water and food; (c) deprivation of access to shelter, hygiene, sanitation, and clothing; and (d) the destruction of health infrastructure.

2.2.1. Internal displacement

According to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Israel continued its air, sea, and land bombardment campaign across Gaza in 2024[27]. Furthermore, as reported by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), deliberate attacks on: (a) internally displaced refugee camps[28]; and (b) civilian homes[29], streets[30] residential complexes[31] continued. All of this intensified the displacement of the Palestinian population of Gaza that had not yet been displaced by early 2024.

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27 OCHA, 2024, Reported impact snapshot, Gaza Strip, 29 October 2024.

28 Among those OCHA mentions, by way of example, among others, are the following: 1. The bombing of Jabalia camp, the largest in the Gaza Strip, which was attacked multiple times in October and November 2024, which was accompanied by shooting from the air at refugees trying to escape from the camp through the "Abu Sharakh" roundabout See: OCHA, 2024, Humanitarian Situation Update #229, Gaza Strip, 2. The bombardment of the camp in "Tal al-Sultan" located in "Rafah", notwithstanding the fact that it had been declared a safe zone by the UN (See.: OCHA, 2024, Gaza: The UN condemns the Israeli bombardment of a displaced persons camp in Rafah), 3. The July 2024 bombardments in the "Khan Younis" area, where shelters such as the "Rumaydah" area in "Bani Suhaila" were attacked, killing ten Palestinians (See.: OCHA, 2024, Humanitarian Situation Update #196, Gaza Strip), 4. The bombardment of the camps in the region of "Deir Al-Balah", including, among others, "Al Bureij", where a home was hit, killing eight Palestinians, "An Nuseirat" where a home was also hit, killing two, and the "Khadija" school where three children were killed (See.: OCHA, 2024, Humanitarian Situation Update #203, Gaza Strip).

29 As, for example, the bombing of a house in "Al Fajem" in "Bani Suheila" (Khan Younis area) with six fatalities. (See.: OCHA, 2024, Humanitarian Situation Update #196, Gaza Strip, and another house in Beit Lahiy (Gaza City) with 7 people killed (See.: OCHA, 2024, Humanitarian Situation Update #167, Gaza Strip).

30 As, for example "Al Jala" Street (Gaza City) where six people died (See: OCHA, 2024, Humanitarian Situation Update #167, Gaza Strip).

31 For example, the "Abu Iskandar" housing complex (Gaza City) where seven Palestinians took refuge (See.: OCHA, 2024, Humanitarian Situation Update #16, Gaza Strip).

As a result, the number of displaced Palestinians continued to increase from March to October, reaching, according to UNRWA, 1.9 million in July[32] and around two million (90% of the Palestinian population of Gaza) in October, the vast majority of whom were living in tents and makeshift homes[33]. Furthermore, throughout 2024, the displaced population remained in constant movement, so that, as UNRWA itself has pointed out, most of the inhabitants of Gaza had been displaced at least ten times[34].

2.2.2. Deprivation of access to food and water

With respect to the deprivation of access to food and water, the OPSP stated in October 2024 that the situation with respect to the entry of trucks had worsened. Only 37 trucks were being allowed in per day. This was the lowest number seen since October 2023[35]. Furthermore, restrictions imposed upon international workers' movement within the territory had increased by 100% compared to 2023, and ease of movement within the area had been reduced by 21%[36]. All this was accompanied by attacks by the Israeli army on the main humanitarian route in Gaza, which passed through Kerem Shalom, Khan Younis, and Deir Al Balah, where the OPSP had refugee camps that had been bombed[37].

Furthermore, according to OCHA, Israel had prohibited access to humanitarian aid destined for northern Gaza. This aid was trans-

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32 OOPS, 2024, UNRWA Situation Report #120 on the situation in the Gaza Strip and the West Bank, including East Jerusalem.

33 OCHA, 2024, Reported impact snapshot, Gaza Strip, 29 October 2024.

34 OOPS, 2024, UNRWA Situation Report #121 on the situation in the Gaza Strip and the West Bank, including East Jerusalem.

35 OOPS, 2024, UNRWA Situation Report #147 on the Humanitarian Crisis in the Gaza Strip and the West Bank, including East Jerusalem, https://www.unrwa.org/resources/reports/unrwa-situation-report-147-situation-gaza-strip-and-west-bank-including-east-jerusalem.

36 Ibid.

37 OCHA, 2024, Humanitarian Situation Update #224, Gaza Strip, https://www.unocha.org/publications/report/occupied-palestinian-territory/humanitarian-situation-update-224-gaza-strip-enarhe.

ported through the Jordan Passage, resulting in 100,000 tons of food and goods being blocked along this route since September 2024[38].

This limitation on access to supplies had also led to mobility restrictions within Gaza due to the lack of access to fuel in the area and the Israeli government's ban on its import. This, together with constant bombardment, hostilities, and disrupted communications, made it impossible for UN agencies and their allies to reach the majority of people in need.

As a result, in September 2024, OCHA warned that only 600,000 food rations could be distributed per day. Therefore, of the 1.9 million displaced Palestinians, 1.4 million were not receiving any food whatsoever[39].

The situation was even more dire, if possible, because attacks on agricultural production areas continued. Thus, an analysis of satellite imagery presented in September 2024 by the United Nations Institute for Training and Research (UNITAR)'s Operational Satellite Applications Programme (UNOSAT) showed how by then, 68% of cultivated land in Gaza, which used to support a variety of vegetables and fruits, had been lost[40].

Furthermore, not only had existing crops been lost, but also the capacity of the land to develop agriculture, as it no longer had sufficient health to produce food[41]. For example, through the analysis generated by UNOSAT, it was possible to observe how more than one million olive trees had been destroyed in 2024[42]. As a result, by the end of 2024, olive oil (a food that used to be native to the area) had been drastically reduced, so that only four of the 37 olive oil presses existing in Gaza were still operating[43].

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38 Ibid.
39 Ibid.
40 UNOSAT-FAO, 2024, Gaza Strip Cropland Damage Analysis, https://unosat.org/products/3985.
41 Ibid.
42 Ibid.
43 Ibid.

Added to all this is the serious impact on the fishing sector. As OCHA has pointed out, between October 2023 and September 2024, 87% of fishing boats in Gaza had been destroyed or damaged, including 96 motorized boats, 900 non-motorized boats, and most of the ports and fishing infrastructure. This drastically reduced the production process of this primary food source[44].

In addition, within this context, the Israeli government had launched a two-pronged strategy aimed at first weakening, and then ending, the presence of the UNWRA in Gaza and in the rest of the Occupied Palestinian Territory. To this end, it promoted, among other things, a legislative initiative aimed at: (a) revoking the 1967 agreement between Israel and the UNRWA (which has allowed it to operate in these territories ever since); and (b) adopt a zero-contact policy where the government would no longer issue entry permits to UNRWA workers[45].

As a consequence of all the foregoing, in the report submitted in September 2024 to the Human Rights Council by the Independent International Commission of Inquiry on the Occupied Palestinian Territory, the latter underlined that:

1. The Israeli authorities were using starvation as a method of warfare.
2. Starvation and famine had a particularly detrimental impact on women and girls (particularly pregnant and postpartum women), who faced particularly serious risks to their own health and that of their newborns[46] (in fact, as early as Janu-

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44 OCHA, 2024, Humanitarian Situation Update #224, Gaza Strip, https://www.unocha.org/publications/report/occupied-palestinian-territory/humanitarian-situation-update-224-gaza-strip-enarhe.

45 OOPS, 2024, UNRWA Situation Report #146 on the Humanitarian Crisis in the Gaza Strip and the West Bank, including East Jerusalem, https://www.unrwa.org/resources/reports/unrwa-situation-report-146-situation-gaza-strip-and-west-bank-including-east-jerusalem; ONU, 2024, News, Israeli laws blocking UNRWA – devastating humanitarian impact for Palestinians?, https://news.un.org/en/story/2024/11/1234567.

46 Pregnant and lactating women have faced specific risks to their own health and to that of their newborns due to starvation. As early as November 2023,

ary 2024, the UN Children's Fund (UNICEF) had expressed concern about the malnutrition of more than 155,000 pregnant and breastfeeding mothers, given their special nutritional needs and their vulnerability)[47].

2.2.3. The deprivation of access to shelter, hygiene, sanitation, and clothing

At the beginning of 2024, UNRWA reported that the majority of the Palestinian population in Gaza was trying to find shelter in their camps, whose facilities consisted mainly of schools or tents[48]. This was despite having experienced several Israeli army bombardments on these locations, which had resulted in the death or serious injury of internally displaced persons sheltering there[49].

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thousands of displaced women and newborns residing in UNRWA facilities were reportedly in need of medical care due to increased malnutrition, dehydration, and waterborne diseases. See.: CDH, 2025, More than a human can bear: Israel's systematic use of sexual, reproductive and other forms of gender-based violence since 7 October 2023, Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel.

47 Due to their specific nutritional needs and their vulnerability, by January 2024, UNICEF's primary concern was the nutrition of more than 155,000 pregnant and lactating women, as well as more than 135,000 children under two years of age. By this time, the deteriorating situation raised concerns that acute malnutrition and mortality would begin to exceed the thresholds established for famine. See.: UNICEF, 2024, The intensification of the conflict, malnutrition and disease in the Gaza Strip are creating a deadly cycle that threatens more than 1.1 million children.

48 OCHA, 2023, Hostilities in the Gaza Strip and Israel – Reported Impact, Day 82, https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-82. See also: UNRWA, 2023. Situation Report #56 on the Situation in the Gaza Strip and the West Bank, including East Jerusalem, https://www.unrwa.org/resources/reports/unrwa-situation-report-56-situation-gaza-strip-and-west-bank-including-east-Jerusalem.

49 UNRWA, 2023, Situation Report #56 on the Situation in the Gaza Strip and the West Bank, including East Jerusalem, https://www.unrwa.org/resources/reports/unrwa-situation-report-56-situation-gaza-strip-and-west-bank-including-east-Jerusalem.

Likewise, by then, the displaced population, which according to the WHO had far exceeded 1.5 million people (75% of whom were in overcrowded shelters), was facing:

1. Serious threats arising from the lack of access to adequate hygiene and sanitation[50].
2. A continued increase in infectious diseases resulting from certain living conditions for the Palestinian population in Gaza, including the availability of only one shower for every 4,500 people and one toilet for every 220[51].
3. The shortage of clean water and increasing levels of open defecation[52] (according to OCHA, Israel had cut off the water supply through the pipeline serving northern Gaza at the end of 2023 and, in turn, had bombed drinking water systems[53], making the spread of infectious diseases inevitable[54]).

But if the situation of the Palestinian population in Gaza was already dire at the beginning of 2024, it only worsened steadily and alarmingly over the following months. As a result, by the end of October 2024, OCHA reported that people were living in inhumane conditions, often surrounded by rodents, pests, garbage, solid waste, sewage, and human waste[55].

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50 WHO, 2023, Lethal Combination of Hunger and Disease to Lead to More Deaths in Gaza. https://www.who.int/news/item/21-12-2023-lethal-combination-of-hunger-and-disease-to-lead-to-more-deaths-in-gaza.

51 Ibid.

52 Ibid.

53 OCHA, 2023, Hostilities in the Gaza Strip and Israel – Reported Impact, Day #82, https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-82.

54 WHO, 2023, Lethal Combination of Hunger and Disease to Lead to More Deaths in Gaza, https://www.who.int/news/item/21-12-2023-lethal-combination-of-hunger-and-disease-to-lead-to-more-deaths-in-gaza.

55 UNRWA, 2024, UNRWA Situation Report #146 on the Humanitarian Crisis in the Gaza Strip and the West Bank, including East Jerusalem, https://www.unrwa.org/resources/reports/unrwa-situation-report-146-situation-gaza-strip-and-west-bank-including-east-jerusalem.

Furthermore, the continuing deterioration of water and sanitation conditions had led to a greater spread of contagious diseases such as polio. Acute diarrhea and skin infections became particularly common among children under five years of age[56].

Additionally, as OCHA reported in November 2024, due to the blockages to humanitarian assistance, families lacked access to clothing, blankets, or similar materials to protect themselves from the inclement weather. This particularly affected newborns, who could not survive in these conditions[57]. Just two months later, the International Organization for Migration (IOM) expressed its deep alarm at the devastating impact of winter rains and sub-zero temperatures on displaced Palestinians in Gaza, highlighting how deaths from hypothermia reflected the critical need for shelter and protection of the population[58].

Finally, in early 2025, OCHA reported that limited loading capacity at the crossings, lengthy coordination requirements imposed by the Israeli authorities to bring shelter items into Gaza and their frequent rejection, together with the high risk of armed looting, continued to severely hamper humanitarian assistance in Gaza to address the needs of the at least 945,000 people who urgently required thermal clothing, blankets, and tarpaulins to protect their shelters from the rain and cold[59].

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56 Ibid.

57 OCHA, 2024, Gaza Humanitarian Response Update, 27 October, https://www.unocha.org/publications/report/occupied-palestinian-territory/gaza-humanitarian-response-update-27-october-9-november-2024.

58 By January 2025, IOM Director General Amy Pope stated that "vulnerable people, including at least seven children, have died of hypothermia, and these tragic deaths underscore the urgent need for shelter and other assistance to reach the people of Gaza immediately." See IOM: IOM, 2025, Gaza Winter Deaths Are Preventable: Ceasefire, Access Needed for Shelter Aid.

59 OCHA, 2025, Humanitarian Situation Update #253, Gaza Strip, https://www.unocha.org/publications/report/occupied-palestinian-territory/humanitarian-situation-update-253-gaza-strip.

For OCHA, as long as this problem remains unresolved, heavy rains and flooding would continue to severely impact displacement camps and makeshift shelters[60].

2.2.4. The destruction of healthcare infrastructure with the resulting deprivation of adequate medical care

Finally, as regards the healthcare sector, the United Nations High Commissioner for Human Rights (OHCHR) reported that, at the beginning of 2024, medical infrastructure had been the most affected[61]. Thus, only 13 of 36 hospitals and 18 of 72 health centers remained open to the public (between October and early December 2023 alone, according to the WHO, more than 200 attacks against hospitals had been documented).

However, as the WHO pointed out, rather than actual "operations", this was more a situation of clandestine care because humanitarian aid blockades prevented these facilities from operating properly due to the lack of available resources[62].

Unfortunately, throughout 2024, the situation worsened significantly due to the continued attacks on healthcare infrastructure. The Al-Qusa[63] and Kamal Adwan hospitals were severely affected. The latter was not only bombed but also attacked on the ground (the Israeli army entered the facility and damaged, among other things, the oxy-

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60 Ibid.

61 OHCHR, 2023, Gaza: UN Expert Condemns 'Unrelenting War' on Health System Amid Airstrikes on Hospitals and Health Workers, https://www.ohchr.org/en/press-releases/2023/12/gaza-un-expert-condemns-unrelenting-war-health-system-amid-airstrikes.

62 WHO, 2023, oPt Emergency Situation Update Issue 17, https://www.un.org/unispal/document/opt-emergency-situation-update-issue-17-who-14dec23/.

63 OCHA, 2024, Attacks on hospitals in northern Gaza, https://www.unocha.org/publications/report/occupied-palestinian-territory/attacks-hospitals-northern-gaza-19-oct-2024-enarhe; UN, 2024, Middle East: The UN calls for an investigation into the Israeli attack on a residential building in Lebanon; in Gaza tighter restrictions on the entry of aid, UN News. https://news.un.org/es/story/2024/10/1533546.

gen tanks of hospitalized children, in addition to detaining doctors and patients)[64]. Furthermore, for the first time in 25 years, a case of polio appeared in a 10-month-old baby[65]. This necessitated the launch of a vaccination campaign. According to the WHO, this campaign was constantly interrupted by Israeli bombardment[66], which resulted in significant delays[67].

2.3. The end of the second half of 2024: the request submitted on December 19 by the United Nations General Assembly to the International Court of Justice for the urgent issuance of a new advisory opinion

In light of the serious deterioration in the living conditions of the Palestinian population of Gaza during the second half of 2024, the UNGA decided on December 19 to request the ICJ to issue, as a matter of priority and with the utmost urgency, a new advisory opinion on the following question:

> What are the obligations of Israel, as an occupying Power and as a member of the United Nations, in relation to the presence and activities of the United Nations, including its agencies and bodies, other international organizations and third States, in and in relation to the

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64 OCHA, 2024, Humanitarian Situation Update #241, Gaza Strip, https://www.unocha.org/publications/report/occupied-palestinian-territory/humanitarian-situation-update-241-gaza-strip.

65 UNRWA, 2024, UNRWA Situation Report #130 on the Humanitarian Crisis in the Gaza Strip and the West Bank, including East Jerusalem, https://www.unrwa.org/resources/reports/unrwa-situation-report-130-situation-gaza-strip-and-west-bank-including-east-Jerusalem.

66 WHO, 2024, First phase of polio campaign concludes successfully in Gaza, https://www.who.int/news/item/04-09-2024-first-phase-of-polio-campaign-concludes-successfully-in-gaza.

67 WHO, 2024, Second round of polio campaign in Gaza completed amid ongoing conflict and attacks: UNICEF and WHO, https://www.who.int/news/item/06-11-2024-second-round-of-polio-campaign-in-gaza-completed-amid-ongoing-conflict-and-attacks–unicef-and-who. See also: WHO, 2024, Polio vaccination campaign to resume in northern Gaza, https://www.who.int/news/item/01-11-2024-polio-vaccination-campaign-to-resume-in-northern-gaza.

> Occupied Palestinian Territory, including to ensure and facilitate the unhindered provision of urgently needed supplies essential to the survival of the Palestinian civilian population as well as of basic services and humanitarian and development assistance, for the benefit of the Palestinian civilian population, and in support of the Palestinian people's right to self-determination?[68].

3. The earliest precedents of the crime of genocide by subjection to conditions of existence and the negotiation process that culminated in the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide

Having completed the analysis of the situation in Gaza since October 2023, which has allowed us to introduce the subject of this work and reflect on its current relevance, the precedents and negotiation process of the Genocide Convention are addressed below, devoting particular attention to the development of the modality of subjecting a group to "conditions of life" as ultimately included in Article II(c) of the Convention.

Thus, between the 14th and 20th of October 1933 the Fifth Conference for the Unification of Criminal Law was held in Madrid[69]. At this

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68 See UNGA, 2024, Request for an advisory opinion from the International Court of Justice on Israel's obligations with regard to the presence and activities of the United Nations, other international organizations and third States, Doc. No. A/RES/79/232, 19 December 2024. In its Request, the UNGA expressly requested the ICJ to apply, in preparing its Advisory Opinion: "[…] the rules and principles of international law (in particular, the Charter of the United Nations), international humanitarian law, international human rights law, the privileges and immunities applicable under international law to international organizations and States, the relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, the Advisory Opinion of the Court of 9 July 2004 and the Advisory Opinion of the Court of 19 July 2024, in which the Court reaffirmed the duty of the Occupying Power to administer the occupied territory for the benefit of the local population and affirmed that Israel has no right to sovereignty over any part of the Palestinian Territory."

69 Alcoberro, Ramon., n. d., *Antes del genocidio: Lemkin, la ponencia de Madrid (1933) y el debate sobre terrorismo,* http://www.alcoberro.info/assets/lem-

conference, Raphael Lemkin, a Polish jurist and then Deputy Public Prosecutor of Warsaw, presented a paper entitled "Acts Constituting a General (Transnational) Danger Considered as Offences against the Law of Nations," in which he proposed the criminalization of certain acts classified into two groups: barbarism and vandalism[70].

However, it was not until 1944 that Lemkin formally introduced his concept of genocide in his work "Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposal for Redress"[71]. For Lemkin, genocide consisted of the destruction of a nation or ethnic group[72], distinguishing up to eight different types of genocide (political, social, cultural, economic, biological, physical, religious, and moral[73]), which could be committed through any of the following methods: (a) racial discrimination in food; (b) harm to health; and (c) mass murder[74] (according to Radhakrishnan, these modalities would later be framed within a broader definition defined as the "intentional subjection of a group to conditions of existence likely to bring about its physical destruction, in whole or in part")[75].

Barely a year later, the term "genocide" was taken into consideration during the process of the drafting of the Statute of the International Military Tribunal in 1945 at the end of World War II[76]. However, the final text preferred the expression "crimes against humanity" to refer to the persecution and physical extermination of national, ethnic, racial, and religious minorities[77].

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kin08_ponencia_madrid.pdf (last reviewed 7 May 2025).

70 Balakian, P., 2013, Raphael Lemkin, cultural destruction, and the Armenian genocide. Holocaust and Genocide Studies, 27(1), 57–89. https://doi.org/10.1093/hgs/dct001

71 Ibid.

72 Lemkin, R., 1944, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposal for Redress, Carnegie Endowment for International Peace.

73 Ibid.

74 Ibid.

75 Radhakrishnan, A., 2020, An Inherent Right to Health: Reviving Article II(c) of The Genocide Convention. Columbia Human Rights Law Review, 52.1.

76 Schabas, W., 2008, Drafting of the Genocide Convention.

77 Ibid.

Hence, this process is seen by some scholars as a precursor to the definition of the crime of genocide in international law. However, it is important to emphasize that, in this process, genocide never became more than a subcategory of crimes against humanity[78].

A year later, on November 2, 1946, the delegations of Cuba, India, and Panama presented the first draft resolution to the UNGA on the definition of the crime of genocide[79]. That same month, the delegation of Saudi Arabia presented a new draft resolution on the prevention and punishment of the crime of genocide[80], which was included the destruction of the essential life-promoting potential of a group, a group of persons, or a nation, or the intentional deprivation of the elementary necessities for the preservation of their health or existence[81].

In response, the UNGA referred this issue to its Sixth Committee (in charge of legal matters). It endorsed unanimously the declaration of genocide as a crime under international law and recommended that the UN Economic and Social Council (ECOSOC) draft a convention on its prevention and punishment[82].

Based on the foregoing, on December 11, 1946, the UNGA: (a) adopted in Resolution 96/1946 the definition of the crime of genocide as "a denial of the right of existence to entire human groups"[83]; and (b) mandated ECOSOC to draft the aforementioned draft Convention.

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78 Charter of the International Military Tribunal, Pub, L, No. 251, 1945. https://www.un.org/en/genocideprevention/documents/atrocitycrimes/Doc.2_Charter%20of%20IMT%201945.pdf

79 Schabas, W., 2008, Drafting of the Genocide Convention.

80 DeGuzman, M. M., & Amann, D. M., 2018, Arcs of global justice: Essays in honour of William A. Schabas, In Arcs of Global Justice: Essays in Honour of William A. Schabas. Oxford University Press. https://doi.org/10.1093/oso/9780190272654.001.0001

81 Schabas, W., 2009, Genocide in International Law: The Crime of Crimes, In Genocide: In International Law, 2nd ed., Cambridge.

82 Cárdenas, C., 2019, *El proceso de definición del delito de genocidio en la Convención de 1948, en La Evolución de la Definición y la Aplicación del Delito de Genocidio,* Vol. 9.

83 UNGA, 1946, Resolution 96, The Crime of Genocide, 128–128.

ECOSOC, following the instructions of Resolution 96, drafted Resolution 47/1947, in which it mandated the UNGA to conduct studies in collaboration with experts in international and criminal law, which led to the formulation of the first draft of the Convention[84], in which the subjection to certain conditions of existence was expressly considered as a form of genocide.

In particular, this first draft expressly stated that its scope of application included:

1. Subjection to conditions of existence which, through lack of adequate housing, clothing, food, hygiene, and adequate medical care, or excessive work or undue physical exertion, were likely to result in the debilitation or death of individuals.

2. Deprivation of all means of life through confiscation of property, plunder, labor restrictions, denial of housing, and deprivation of supplies available to the remaining inhabitants of the territory in question[85].

Furthermore, this first draft expressly stated that the impact on living conditions as a form of genocide had to be understood as equivalent to a "slow death"[86]. This initial approach demonstrates that, during the early stages of the Convention's drafting process, the crime of genocide was not understood to be limited to the immediate physical elimination of a protected group, but also encompassed strategies of gradual destruction through the systematic deterioration of their living conditions[87].

The draft was referred to the Committee on the Progressive Development of International Law and its Codification, and ECOSOC issued its Resolution 77 on August 6, 1947, urging all UN Member

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84 Ibid.

85 ECOSOC, 1947, Resolution 47 (IV).

86 Ibid.

87 Radhakrishnan, A., 2020, An Inherent Right to Health: Reviving Article II(c) of The Genocide Convention, Columbia Human Rights Law Review, 52.1.

States to comment on the draft[88]. However, two months later, the UNGA, in its Resolution 180/1947 of November 21, requested ECOSOC to continue its work without waiting for comments from all Member States[89].

Subsequently, by Resolution 170/1947, ECOSOC established an *ad hoc* Committee to follow up on UNGA Resolution 180[90]. This committee was composed of seven members (China, France, Lebanon, Poland, the Soviet Union, the United States, and Venezuela) who would be responsible for composing a new draft[91]. During the Committee's work, several aspects were debated relating to the modality of genocide committed through the intentional subjection to "conditions of existence".

In this vein, the Chinese representative proposed that the *actus reus* of the crime should include the destruction of group's physical existence and its subjection to conditions or measures that brought about the total or partial destruction of its physical existence[92]. Similarly, the Soviet delegation maintained that the concept of destruction should encompass the direct killing of specific groups, as well as the premeditated imposition on such groups of living conditions designed for their destruction[93].

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88 Cárdenas, C., 2019, *El proceso de definición del delito de genocidio en la Convención de 1948, en La Evolución de la Definición y la Aplicación del Delito de Genocidio,* (Vol. 9).

89 ECOSOC, 1947, Resolución 47 (IV); Cárdenas, C., 2019, *El proceso de definición del delito de genocidio en la Convención de 1948, en La Evolución de la Definición y la Aplicación del Delito de Genocidio,* (Vol. 9).

90 Cárdenas, C., 2019, *El proceso de definición del delito de genocidio en la Convención de 1948, en La Evolución de la Definición y la Aplicación del Delito de Genocidio* (Vol. 9).

91 Miaja La Muella, A., 1955, *Introducción al Derecho Internacional Público*, 2ed, Madrid: Atlas. See also: Ollé Sesé, M., 2015, *El crimen de genocidio (I): Génesis y evolución legislativa nacional e internacional.*

92 Schabas, W., 2009, Genocide in International Law: The Crime of Crimes. In Genocide: In International Law, 2nd ed., Cambridge.

93 Ibid.

For his part, the Polish delegate emphasized that certain measures could contribute to the destruction of a group without causing the death of any of its existing members[94].

The new draft was approved by the Committee on October 15, 1948[95], and included in Article II the commission of the crime of genocide by imposing on members of the group measures or conditions of existence designed to cause their death[96].

ECOSOC referred the Committee's draft to the UNGA, which, in turn, forwarded it to its Sixth Committee[97], which made four major modifications:

1. It deleted the word "deliberate" before "acts."
2. It clarified that genocide does not require the total destruction of a group but can occur in cases of partial destruction.
3. It added the term "ethnic," eliminating the term "political."
4. It replaced the reference to the motives of genocide with the expression "as such."[98]

In addition, it agreed to include a closed list of acts of genocide, which ultimately limited punishable acts to physical and biological genocide[99].

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94 Radhakrishnan, A., 2020, An Inherent Right to Health: Reviving Article II(c) of The Genocide Convention, Columbia Human Rights Law Review, 52.1.

95 Ollé Sesé, M., 2015, *El crimen de genocidio (I): Génesis y evolución legislativa nacional e internacional.*

96 Villavicencio, C., 2006, *El crimen de genocidio, Universidad de Chile.*

97 Cárdenas, C., 2019, *El proceso de definición del delito de genocidio en la Convención de 1948, en La Evolución de la Definición y la Aplicación del Delito de Genocidio,* (Vol. 9).

98 Schabas, W., 2009, Genocide in International Law: The Crime of Crimes, in Genocide: In International Law, 2nd ed., Cambridge.

99 Ibid.

The text was adopted unanimously and became the Genocide Convention, adopted on December 9, 1948, by UNGA Resolution 260 A (III)[100].

In its final version, Article II(c) of the Convention expressly recognized the modality of the commission of genocide by the "intentional subjection of the group to conditions of existence which are expected to bring about its physical destruction, in whole or in part."

This final formulation, which resulted from changes made between the second draft (which referred to "conditions of existence designed to bring about its death") and the third (which instead used the expression "conditions of existence which are expected to bring about its physical destruction, in whole or in part"), was ultimately the result of a proposal made by the delegation of the Soviet Union[101].

4. Doctrinal Approaches to the Specific Elements of the Modality of Committing Genocide through the Intentional Subjection of a Protected Group to Living Conditions That Will Bring About Its Total or Partial Destruction

4.1. Doctrinal Approaches from Non-Legal Disciplines

Since the adoption of the Genocide Convention, its third modality has been approached from various disciplines. Thus, Jones explains how in the 1960s, some researchers focused on peace studies, such as Galtung, began to explore the phenomenon of structural violence, understood as those destructive relationships embedded in social and economic systems[102].

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100 Cárdenas, C., 2019, *El proceso de definición del delito de genocidio en la Convención de 1948, en La Evolución de la Definición y la Aplicación del Delito de Genocidio*, Vol. 9.

101 Schabas, W., 2009, Genocide in International Law: The Crime of Crimes, in Genocide: In International Law, 2nd ed., Cambridge.

102 Jones, A., 2006, The Origins of Genocide, In: Jones, A. (Ed.), Genocide: A Comprehensive Introduction, New York: Taylor & Francis e-Library, 3-32.

Taking off from this approach, a whole series of doctrinal interpretations have developed that argue that certain forms of structural and institutional violence are, in a broad sense, genocidal in nature, because they intentionally subject a specific group to living conditions that will bring about its total or partial physical destruction[103].

For authors such as Shiva, this is the situation generated by the globalization of food and agricultural systems under neoliberal trade regimes, having led to a kind of "ethnic cleansing" of the poor, peasants, and small farmers of the so-called "Third World"[104]. Consequently, from this perspective, it can be argued that the globalization of agricultural trade has ultimately led to the materialization of genocide[105].

By way of contrast, another group of authors, most notably Holsti, whose work falls within the field of international relations, considers that a broad perspective on the concept of structural violence can create difficulties in attributing clear agency to phenomena such as racism, sexism, and other forms of discrimination[106]. Therefore, in their opinion, global systemic views of structural violence, such as Galtung's, are too diffuse and reflect, at a systemic level, a tendency to attribute responsibility to the "First World" for the challenges facing other countries[107].

Thus, for Holsti, it is necessary not to overlook the essential role played by many "Third World" leaders and elites in the suffering and violence experienced by their populations[108].

A middle ground between these two positions can be found in Jones, who argues, from a political science perspective, that genocide studies should incorporate a nuanced portrayal of structural and institutional violence as genocidal mechanisms[109].

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103 Ibid.
104 Ibid.
105 Ibid.
106 Ibid.
107 Ibid.
108 Ibid.
109 Ibid.

In addition, if the primary concern is to prevent avoidable death and suffering, it is necessary not to forget the so-called "holocaust of negligence," which results in the subjection of large sectors of humanity to living conditions based on malnutrition, poor health, and structural discrimination[110].

4.2. Doctrinal Approaches from International Law

With respect to the international legal framework itself, it should be noted that the definition contained in Articles II(c) of the Genocide Convention, 4(c) of the ICTY, 2(c) of the ICTR, and 6(c) of the SICC define the third modality of committing the crime of genocide as the "intentional subjection of a group to conditions of existence likely to bring about its physical destruction, in whole or in part," provided that it is carried out "with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such".

For its part, the "Elements of Crimes" (EC) of the SICC, "which will assist the Court in interpreting and applying Articles 6, 7, and 8 of this Statute" and "will be compatible" with it, develops the third form of genocide, requiring the following five elements to be present in order that the crime be completed:

1. That the perpetrator intentionally subjected one or more persons to certain conditions of existence.
2. That the person or persons belonged to a particular national, ethnic, racial, or religious group.
3. That the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial, or religious group as such.
4. That the conditions of existence were intended to bring about the physical destruction, in whole or in part, of that group.
5. That the conduct took place within the context of a manifest pattern of similar conduct directed against that group or was capable of itself of causing such destruction. Furthermore, at

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110 Ibid.

the end of the fourth element, a footnote is included that specifies the following:

> The term "conditions of existence" may include, among other things, depriving such people of resources essential for survival, such as food or medical services, or systematically expelling them from their homes.

Since the second, third, and fifth elements are common to all five objective forms of genocide, the analysis carried out in this section focuses on the different doctrinal approaches to the first and fourth elements, which are the only ones that specifically address the commission of the crime of genocide through the intentional imposition of conditions of life.

To this end, the analysis has been divided into five main aspects, which have generated the greatest controversy among the limited literature that has attempted to interpret the content of this particular form of genocide: (a) the minimum number of members of the protected group on whom the conditions of existence must be imposed; (b) the meaning of the term "physical destruction" of the protected group; (c) the capacity of the conditions imposed to generate such destruction; (d) the minimum period of subjection to such conditions; and (e) whether or not the physical destruction, in whole or in part, of the protected group is required.

1. Regarding the first question, Kreß analyzes the individual or collective nature of the form of subjection to living conditions based on a comparison between the definition contained in Article 6 of the SICC and the provisions of the first element contained in the EC.

In this way, he emphasizes that the EC only requires the imposition of certain living conditions on "one or more persons," which, in his view, exceeds the limits of a reasonable interpretation of the Genocide Convention and the SICC because they expressly refer to a group or a part thereof[111].

Therefore, since the genocidal conduct in question must entail the "total or partial" physical destruction of the protected group, Kreß considers that the concept of group must be understood in a

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111 Ibid.

collective sense, including cases in which conditions are imposed on part of the group, but not cases where they are imposed only on some of its members in isolation[112]. Accordingly, the definition of genocide in the Convention and in the SICC would exclude the completion of the crime in the latter case[113].

Consequently, for this author, while it is not enough to subject a single member of the group to malnutrition, expulsion from the home, and/or lack of healthcare, it may be sufficient to consummate genocide by killing or causing serious injury if this harm is inflicted on one of its members[114].

Furthermore, based on the above, Kreß concludes that the principal difference between the commission of genocide by intentionally subjecting one of its members to conditions of life and its commission by killing or causing serious injury is the fact that, in the former case, the conduct described must necessarily extend beyond one member of the protected group[115].

In this respect, Ambos emphasizes that, while there must be a clear and specific intention to destroy the protected group, it cannot be affirmed that there is unanimous agreement on the minimum number of affected members necessary for the consummation of genocide by subjection to conditions of life[116].

For Ambos this ambiguity is reflected in the tension that exists between Art. 6(c) of the SICC and the first element of the EC that develops it, which is why the latter must be interpreted in accordance with the primacy that Article 9 of the SICC attributes to Article 6(c).

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112 Kreß, C., 2015, The ICC's First Encounter with the Crime of Genocide: The Case against Al Bashir, In: Stahn, C. (Ed.), The Law and Practice of the International Criminal Court, Oxford: Oxford University Press, pp. 669–703.

113 Ibid.

114 Ibid.

115 Kreß, C., 2006, The Crime of Genocide under International Law. International Criminal Law Review, 6, 461–502, p. 480.

116 Ambos, K., 2014, Treatise on International Criminal Law, Volume II: The Crimes and Sentencing, Oxford: Oxford University Press.

2. In relation to what is meant by the expression "physical destruction," in whole or in part, of the protected group, Kreß argues that there is an interpretive controversy that oscillates between considering it equivalent to the disappearance of the group's members or understanding it as the dissolution of the group as a social entity[117].

In light of the foregoing, and based on the jurisprudence of the ICTR, the author himself maintains that the expression "physical destruction" must be interpreted as also including the imposition of conditions of existence that not only result in the physical elimination of at least some of the members of the protected group, but also ultimately aim at dissolving it, in whole or in part, as a social entity[118].

This approach: (a) expands the measures beyond "slow death" to measures capable of causing serious physical or mental harm; and (b) allows the outcome of the methods of killing, on the one hand, and serious physical or mental injury, on the other, to be the starting point for what constitutes the total or partial "physical destruction" of the protected group, in order to determine the type of living conditions to which intentional subjection is prohibited[119].

3. Regarding the question of the capacity of the living conditions imposed to bring about the total or partial physical destruction of the protected group, Kreß considers that, while the expression "calculated to bring about" (provided for in the English version of Article II(c) of the Genocide Convention and Article 6(c) of the SICC) might suggest that the perpetrator's mere intention to bring about the physical destruction of part of the group might be sufficient, it is more correct to interpret this expression from an objective perspective that requires the capacity to bring about the required level of destruction[120].

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117 Kreß, C., 2006, The Crime of Genocide under International Law. International Criminal Law Review, 6, 461–502, p. 480.

118 Kreß, C., 2006, The Crime of Genocide under International Law., International Criminal Law Review, 6, 461–502, citing Akayesu, supra n. 12, par. 502.

119 Ibid.

120 Kreß, C., 2006, The Crime of Genocide under International Law, International Criminal Law Review, 6, 461–502, p. 480.

This approach, which finds support in the expressions "*que hayan de acarrear*" ("that must bring about") and "*devant entraîner sa destruction physique*" ("before entailing physical destruction"), used, respectively, in the Spanish and French versions of these provisions, and which has also been adopted by German legislation[121], seems to better reflect the minimum requirements of genocidal conduct as an "objectively dangerous course of action"[122].

However, other authors, such as Ambos, disagree with this interpretation because, in their opinion, it is based on an incorrect translation of the English term "*calculated to bring about*" into the German expression "*geeignet*" which only requires acts that cause an abstract danger to the protected legal interests[123].

According to Ambos, consequently, the imposed conditions of existence do not need to immediately kill any member of the protected group, nor even have the capacity of achieving this result over time; rather, it is sufficient that those imposing them subjectively believe that they are suitable to bring about their physical destruction[124].

This second interpretation finds support in the Spanish version of the fourth element of the ECs that develop Article 6(c) of the SICC, which requires "that the conditions of existence have been intended to bring about the physical destruction, in whole or in part, of that group".

However, the aforementioned expressions "*que hayan de acarrear*" ("that have to cause") and "*devant entraîner sa destruction physique*" ("before entering physical destruction") used in the Spanish and French versions of Articles II(c) of the Convention and 6(c) of the SICC, seem rather to refer to the objective capacity of the living conditions imposed on the protected group to bring about its total or partial destruction.

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121 Ibid.

122 Ibid.

123 Ambos, K., 2014, Treatise on International Criminal Law, Volume II: The Crimes and Sentencing, Oxford: Oxford University Press, p. 13.

124 Ibid.

Furthermore, in this regard, the apparent contradiction in the Spanish version between the expressions "that have to cause" and "have been intended to cause," provided, respectively, in Article 6(c) of the SICC and the fourth element of the EC implementing this provision, is noteworthy. Consequently, this tension should be resolved, once again, by appealing to the primacy that Article 9 of the SCII attributes to Article 6(c).

4. Regarding the minimum period that the protected group must be subjected to the imposed living conditions, authors such as Schabas, based on the jurisprudence of the ICTR, affirm that there is no precise period of time during which such subjection must be maintained[125].

Therefore, in their opinion, it can be affirmed that this form of genocide is distinct from direct murder and the creation of circumstances conducive to a slow death[126].

5. Finally, regarding the question of whether or not a prohibited result, consisting of the total or partial physical destruction of the protected group as a consequence of the imposed living conditions, is required, Milisavljević, Palević & Spalević give an answer in the affirmative[127].

Thus, for these authors, this form of committing the crime of genocide includes a whole series of forms of destruction of the protected group that do not involve the immediate killing the members of the group, even if the ultimate objective is their physical destruction.

This includes, among other conditions of existence, causing starvation among its members, subjecting them to systematic expulsion from their homes and reducing their essential medical services below a minimum standard of living[128]. Authors such as Ambos add to the

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125 Schabas, W. A., 2009, Genocide in International Law: The Crime of Crimes, Cambridge: Cambridge University Press.

126 Ibid.

127 Milisavljević, B., Palević, M., & Spalević, Z., 2019, Actus reus of genocide and types of genocidal destruction, Vol. 65, Series 4, Belgrade.

128 Ibid.

list the deprivation of sufficient nutrition that denies access to adequate levels of food and drinking water, and the imposition of an excessive level of physical labor[129].

As a consequence, for Milisavljević, Palević & Spalević, the main difference between the commission of genocide by killing or seriously injuring (physically or mentally) members of the protected group, and its commission by subjecting them to living conditions such as those just mentioned, lies in the temporal dimension of the onset of the lethal consequences[130].

Thus, while in the first case the prohibited result (death or serious injury) occurs simultaneously with the actual act of execution (for example, shooting the victims), in the second case it occurs in a delayed manner because the total or partial destruction of the group occurs after it has been subjected to the conditions of existence in question[131].

It is on the basis of this distinction that Ambos asserts that this latter form of genocide involves the total or partial destruction of the protected group through a "slow death"[132].

In contrast, other authors such as Schabas maintain that the central element of this form of genocide is the capacity of the conditions of existence imposed to bring about at least the partial destruction of the protected group, regardless of whether or not in the end this is ultimately achieved[133].

This interpretation, which is without doubt more in line with the Spanish and French versions of Articles II(c) of the Convention and 6(c) of the SICC, means that the main difference between this form

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129 Ambos, K., 2014, Treatise on International Criminal Law, Volume II: The Crimes and Sentencing, Oxford: Oxford University Press, p. 13.

130 Milisavljević, B., Palević, M., & Spalević, Z., 2019, Actus reus of genocide and types of genocidal destruction, Vol. 65, Series 4, Belgrade.

131 Ibid.

132 Ambos, K., 2014, Treatise on International Criminal Law, Volume II: The Crimes and Sentencing. Oxford: Oxford University Press, p. 13.

133 Schabas, W. A., 2009, Genocide in International Law: The Crime of Crimes, Cambridge: Cambridge University Press.

of genocide and the others is that no result is required. Consequently, as Schabas points out, the imposition of the conditions of existence in question would be sufficient for its completion, provided that they have objectively the capacity of bringing about the total or partial destruction of the protected group[134].

Finally, based on some jurisprudential pronouncements, Schabas also states that when such destruction is reached, the most appropriate attribution would be through the forms of killing or serious bodily or mental injury to the members of the group, since, in his opinion, Articles II(c) of the Genocide Convention and 6(c) of the SICC provide for a residual form of commission[135].

5. Jurisprudential interpretation of the specific elements of the modality of genocide committed through the intentional subjection of the protected group to conditions of existence that will bring about its total or partial destruction

The commission of the crime of genocide by means of its third form has received little attention from international and hybrid criminal tribunals. In this regard, the jurisprudential interpretations carried out in the following cases stand out: (a) Mladić before the ICTY; (b) 002/02 (Noun Chea and Khieu Samphan) before the Extraordinary Chambers in the Tribunals of Cambodia (ECTC); and (c) Al Bashir before the ICC.

The analysis carried out shows how each of these cases has contributed, to a certain extent, to developing the content of this objective modality of genocide, by determining the threshold of capability and differentiating it from the crime against humanity of extermination.

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134 Ibid.

135 Ibid.

5.1. The Mladić Case Before the International Criminal Tribunal for the Former Yugoslavia (ICTY)

As Commander of the Army (VRS) of the self-proclaimed Serbian Republic of Bosnia (Republika Srpska) after May 12, 1992, Ratko Mladić participated in the commission of multiple international crimes during the armed conflict that took place in Bosnia and Herzegovina between 1992 and 1995[136].

Under his leadership, the VRS implemented a systematic plan targeting the Bosnian Muslim and Bosnian Croat populations, which included indiscriminate bombardment, forced displacement, mass executions, the prolonged siege of Sarajevo[137], and the use of UN soldiers as human shields to avoid NATO bombing.

In particular, Mladić was found responsible for the massacre that took place following the Bosnian Serb army's invasion of the town of Srebrenica in July 1995, which had been declared a safe area two years earlier by UNSC Resolution 819 (1993).

In this massacre, approximately 8,000 men (including minors) were killed, and the remaining Bosnian Muslim population (approximately 25,000 women, children, and the elderly) was forcibly expelled from the enclave[138].

For all these reasons, he was arrested in 2011, and six years later, Trial Chamber I (TC 1) of the ICTY found him guilty of the crimes of genocide and crimes against humanity[139].

What is unique about this case is that, unlike previous cases before the ICTY, the TC 1, in its decision on conviction, analyzed the commission of the crime of genocide under the modality of subjection to the conditions of life established in Article II(c) of the Genocide Convention and Article 4(2)(c) of the Statute of the ICTY.

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136 ICTY, 2017, Judgment of 22 November 2017, Ref. Case No. IT-09-92-T, Trial Chamber I. Prosecutor v. Ratko Mladić, Vol. IV, par. 5189.

137 Ibid., par. 5190.

138 Ibid.

139 Ibid., p. 2474.

Thus, the TC 1 recognized that certain acts, although not causing the immediate death of members of the group, may be genocidal in nature if they are objectively capable of generating an unviable existence or a slow death.

However, according to the TC 1 this form of genocide is of a residual nature compared to other more direct forms of genocide, such as killing or seriously injuring members of the protected group, and therefore requires a more complex analysis in terms of evidence and intent[140].

Consequently, according to the TC 1, the modality of Art. 4(2) (c) of the Statute of the ICTY should only be considered where, even though the facts of the case do not show the death or serious injury of members of the protected group, it can be established that systematically imposed living conditions exist which, taken together, are capable of destroying the group in whole or in part[141].

This means that, in addition to being deliberately imposed, the living conditions must, in any case, be systematic in nature and objectively capable of causing the physical destruction of the group, in whole or in part[142]. According to the examples given by TC 1 itself, this may occur when they include the denial of medical services, expulsion from the home without means of subsistence, destruction of essential infrastructure, forced labor, deprivation of water, food, or shelter, and subjection to untreated diseases[143].

According to TC 1, what is required in these cases is not the consummated result of the destruction, but rather that the imposed conditions objectively have the capacity to produce it[144]. This ultimately means that the criterion of capability becomes the central element for distinguishing between inhuman acts and genocide, considering the context, systematicity, and ultimate purpose of the conduct.

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140 ICTY, 2017, Judgment of 22 November 2017, Ref. Case No. IT-09-92-T, Trial Chamber I. Prosecutor v. Ratko Mladić, Volume III.

141 Ibid., parrs. 3567–3569.

142 Ibid., parrs. 3568–3570.

143 ICTY, 2017, Judgment of 22 November 2017, Ref. Case No. IT-09-92-T, Trial Chamber I. Prosecutor v. Ratko Mladić, Volume III.

144 Ibid., par. 3571.

Based on the foregoing, the TC 1 analyzed the violence carried out by the VRS against Bosnian Muslim and Bosnian Croat groups (protected groups) in several areas of Bosnia and Herzegovina. It highlighted, in particular, the case of the municipality of Foća, where the Bosnian Muslim population was subjected to murder, arbitrary detention, forced relocation, torture, rape, and mass destruction of property[145].

On the basis of the analysis carried out, the TC 1 concluded that it had not been possible to prove beyond a reasonable doubt the occurrence of this form of genocide because the violence that occurred in places such as schools that functioned as detention centers was mainly made up of acts of violence that, rather than causing the progressive physical weakening of the members of the protected groups, were aimed at causing them more direct forms of harm such as death or serious injuries[146].

5.2. Case 002/02 against Noun Chea and Khieu Samphan before the Extraordinary Chambers in the Courts of Cambodia (ECTC)

The ECTC, established in 2004 by an agreement between the UN and the Cambodian government, has prosecuted several authorities and senior government officials of the Democratic Republic of Kampuchea (DRK) which governed Cambodia between 1975 and 1979 (all were members of the Communist Party of Kampuchea (CPK)). These include Noun Chea (Deputy Secretary of the CPK, President of the Assembly of People's Representatives, and Acting Prime Minister of the DRK) and Khieu Samphan (President of the State *Presidium* of the DRK), both of whom were sentenced to life imprisonment by the TC in 2018 in Case 002/02[147].

The Closure Order issued by the investigating judges charged the defendants with, among other crimes, the crime against humanity of extermination, based on the large-scale deaths resulting from work-

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145 Ibid., parrs. 3222–3250.

146 Ibid., par. 3569.

147 ECTC (SETC for its Spanish initials), s. f., Case 002.

place conditions characterized by deprivation of food, shelter, medical care, and hygiene, as well as forced labor[148].

Consequently, according to the Closure Order, the *actus reus* for the crime against humanity of extermination was constituted in this case by the direct or indirect actions or omissions that had caused the deaths of a large number of people, including the imposition of living and working conditions that were expected to bring about the destruction of part of the population[149].

In its decision, the TC specifically analyzed the living and working conditions at the Kampong Chhnang Airfield Construction Site[150], the January 1st Dam[151] and the Trapeang Thma Dam Works[152], and concluded that workers faced extremely harsh conditions, which resulted in the deaths of many people.

In relation to the construction at the Trapeang Dam, the TC concluded that food was insufficient, the water that was accessible was unsafe to consume, and the shelter provided to the workers was inadequate[153].

As regards the January 1st Dam, at least six out of ten workers died as a result of forced labor, starvation rations, and inhospitable conditions, which, according to the SPI, exceeded the limits of what human beings could endure[154].

Finally, in relation to Kampong Chhnang Airfield, the TC concluded that unsafe working conditions, long hours, and insufficient

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148 ECTC, 2018, Judgment of 16 November 2018, Ref. Case File No. 002/19-09-2007/ECCC/TC, Case 002/02, para. 1383.

149 ECTC, 2010, Closing Order of 15 September 2010, para. 1382, Office of the Co-Investigating Judges.

150 ECTC, 2018, Judgment of 16 November 2018, Ref. Case File No. 002/19-09-2007/ECCC/TC, Case 002/02, pp. 664 – 712.

151 Ibid., pp. 823 – 841.

152 Ibid., pp. 883 – 904.

153 ECTC, 2018, Judgment of 16 November 2018, Ref. Case File No. 002/19-09-2007/ECCC/TC, Case 002/02, para. 1384.

154 Ibid., para. 1670.

food had been imposed, which, as in the previous cases, had led to the deaths of many workers[155].

However, according to the TC, the evidence presented did not support the conclusion that any of these three workplaces had intended to create the aforementioned living and working conditions with the aim of exterminating the workers (direct intent). This precluded a conviction for the crime against humanity of extermination, since, in its opinion, this does not allow for eventual intent[156]. Consequently, a conviction was only appropriate for the crime against humanity of murder[157].

Finally, regarding genocide, the TC emphasized that the Closure Order did not allege the crime of genocide due to the intentional subjection of the protected group to conditions of existence that would have resulted in its physical destruction, in whole or in part. This is why the TC did not analyze this possible legal classification of the events.

According to the TC, this was because the investigating judges in Case 002/02 had only identified the Cham and the Vietnamese as groups protected under the crime of genocide[158]. This excluded the majority national group, the Khmer, from such protection[159]. Thus, they had rejected the proposal made in 1998 by the UN Group of Experts on Cambodia, which raised the possibility of "[…] studying whether mass crimes against the majority national group, the Khmer, could be classified as genocide"[160].

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155 Ibid., par. 1800.

156 Ibid., par. 1671.

157 Ibid., parrs. 1384, 1672, 1801.

158 ECTC, 2010, Closing Order of 15 September 2010, paras. 1336–1342, Office of the Co-Investigating Judges. See also: ECTC, 2018, Judgment of 16 November 2018, Ref. Case File No. 002/19-09-2007/ECCC/TC, Case 002/02, parrs. 782 – 793.

159 Jarvis, H., 2017, *Juicios y penas: la larga búsqueda de justicia para el genocidio de Camboya, Revista de Estudios sobre Genocidio, Año 8, volumen 12, Buenos Aires, noviembre* de 2017, ISSN 1851-8184 / ISSN-e 2362-3985, Pp. 47.

160 UNGA, 1998, Report of the Group of Experts for Cambodia, Resolution 52/135, para. 65.

5.3. The Al-Bashir case before the International Criminal Court

Finally, in the case of Omar Al Bashir (former President of Sudan between 1989 and 2019) before the ICC, Pre-Trial Chamber (PTC) I specifically examined the criminal responsibility of the accused in the alleged commission of the crime of genocide by intentionally subjecting the Fur, Masalit and Zaghawa groups to conditions of existence that would bring about their physical destruction, in whole or in part.

PTC I addressed this issue both in its decision of March 4, 2009, regarding the Prosecutor's request to issue an arrest warrant for Al-Bashir (First Decision)[161], and in its subsequent decision of July 12, 2010, regarding the Prosecutor's request to include the crime of genocide in the arrest warrant issued against Al-Bashir (Second Decision)[162].

Thus, while in the First Decision, PTC I refused to include the crime of genocide in the arrest warrant issued against the accused, in the Second Decision, PTC I revised its initial position at the request of the Appeals Chamber and ultimately charged Al-Bashir with genocide as well.

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161 ICC, 2009, March 4, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir.

162 ICC, 2010, July 12, Second Decision on the Prosecution's Application for a Warrant of Arrest. In its initial decision of 4 March 2009; PTC I rejected the charge of genocide, finding that genocidal intent was not the only reasonable conclusion that could be drawn from the evidence presented. However, on 3 February 2010, the Appeals Chamber (AC) reversed the Order, stating that it was sufficient to demonstrate reasonable grounds to believe in the existence of genocidal intent, rather than requiring that this be the only reasonable conclusion. As a result, PTC I corrected this standard and determined that it was sufficient to demonstrate reasonable grounds to believe in the existence of genocidal intent. See. ICC, 2010, Judgment on the Prosecutor's appeal against the decision on the Prosecutor's request for an arrest warrant against Omar Hassan Ahmad Al Bashir. 3 February 2010.

Accordingly, for the purposes of this paper, attention has been focused on three key aspects of this Second Decision.

First, PTC I expressly stated that there were reasonable grounds to believe that Al-Bashir had instrumentalized the State apparatus (including the Army and the Janjaweed militias) to implement a policy of extermination directed against the Fur, Masalit, and Zaghawa ethnic groups[163].

These communities therefore appeared to have been attacked systematically and differentiated from other groups, which reinforced the conclusion that their persecution was not motivated by military reasons, but rather by a deliberate strategy of elimination[164].

Secondly, the PTC I also specified that the material element of genocide includes the death of one or more persons[165], confirming that, while genocide is defined in terms of the destruction of a group, it is sufficient for the perpetrator to cause the death of a single member of the protected group to constitute, from an objective perspective, the first form of the crime[166].

However, the PTC I itself emphasized that this does not apply when genocide is committed through the intentional subjection of a protected group to conditions of existence that are likely to bring about its physical destruction, in whole or in part[167], since, in these cases, it is not sufficient to impose certain living conditions on any one of its members in isolation. However, despite this distinction, the Second Decision did not address this issue in depth[168].

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163 ICC, 2010, July 12, Second Decision on the Prosecution's Application for a Warrant of Arrest, par. 4.

164 Ibid., p. 24.

165 Ibid., par. 33.

166 Kreß, C., 2015, The ICC's First Encounter with the Crime of Genocide: The Case against Al Bashir.

167 ICC, 2010, July 12, Second Decision on the Prosecution's Application for a Warrant of Arrest, par. 33.

168 Kreß, C., 2015, The ICC's First Encounter with the Crime of Genocide: The Case against Al Bashir.

Finally, with specific regard to the types of living conditions that can lead to genocide, PTC I found that there were reasonable grounds to believe that the acts of pollution of water pumps and the forcible transfer of members of the Fur, Masalit, and Zaghawa ethnic groups, along with the resettlement of members of other tribes to their territories, constituted a genocidal policy capable of bringing about the physical destruction of a substantial portion of them[169].

In this regard, PTC I emphasized that genocide does not require a prohibited outcome in terms of direct and immediate deaths, and that, therefore, it is sufficient to demonstrate that the conditions imposed are capable of causing the progressive disappearance of the group. This, in the present case, could be considered proven in light of the standard set forth in Article 58 of the SICC which, for the issuance of an arrest warrant for the crime of genocide, only requires the existence of reasonable grounds for such capability[170].

6. Elements Common to the Different Forms of Genocide

Having analyzed the specific elements of the commission of the crime of genocide by subjection to conditions of existence, this section complements their study with a brief analysis of the three elements common to all forms of genocide, of which, according to the EC:

1. Two are objective in nature: (a) "that the person or persons [affected] belonged to a particular national, ethnic, racial, or religious group"; and (b) "that the conduct took place within the context of a manifest pattern of similar conduct directed against that group or could in itself have caused such destruction."

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169 ICC, 2010, July 12, Second Decision on the Prosecution's Application for a Warrant of Arrest, p. 24.

170 Ibid., p. 24.

2. One is subjective in nature: "that the perpetrator intended to destroy, in whole or in part, that national, ethnic, racial, or religious group as such."

Understanding the content of these elements is undoubtedly also important for an adequate application of the third form of genocide.

6.1. Common Objective Elements

6.1.1. The Definition of Protected Groups and the Affected Person(s)'s Membership in One of Them

Articles II of the Genocide Convention, 4 of the Statute of the ICTY (SICTY), 3 of the Statute of the ICTR (SICTR), and 6 of the SICC specify that the only groups protected under the crime of genocide are national, ethnic, racial, and religious groups, which have been defined by doctrine as follows:

1. National groups are comprised of groups of people who recognize each other by their historical connection to a State or Nation[171].

2. Ethnic groups are those whose members share a common identity in relation to their culture, customs, and traditions, although their social identification as a group is often marked by the subjectivity of those who attack them, because they are normally subject to social stigmas that differentiate them from others[172].

3. Racial groups are made up of groups of people who share physical and biological characteristics, which, from the perspective of the aggressors, attribute to them particular characteristics

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171 Cassese, A., 2013, International Criminal Law, Oxford: Oxford University Press, pp. 119-123.

172 Schabas, W., 2000, Genocide in International Law: The Crime of Crimes, Cambridge: Cambridge University Press, pp. 114-130.

that differentiate them from other groups within a given society[173].

4. Religious groups are characterized by the shared practice of a religion or spiritual affiliation[174]. As with ethnic and racial groups, the subjectivity of the aggressors is important because there are often diverse religions with notable similarities (for example, Catholic and Lutheran Christians), which, however, can be perceived as a single group, which does not deprive them of the status of a protected group[175].

The jurisprudence of the ICTY and the ICTR has also offered certain criteria for distinguishing the four types of groups protected by the crime of genocide, among which those relating to stability, the value of subjectivity, and the delimitation of the group's dimensions stand out.

1. The criterion of stability, whose roots go back to the ICTR's attempt to differentiate between Hutus and Tutsis[176], considers the group as a stable and permanent differentiating element as compared to the rest of the population, to which are attributed the traits of permanence, membership by birth (therefore, the absence of voluntary membership), and great difficulty in leaving the group (which ultimately means that membership is difficult to change)[177].

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173 Kreß, C., 2007, Elements of Genocide, in Gaeta, P., (Ed.), The UN Genocide Convention: A Commentary, Oxford: Oxford University Press, pp. 567-568.

174 Schabas, W., 2000, Genocide in International Law: The Crime of Crimes, Cambridge: Cambridge University Press, pp. 114-130.

175 Ibid.

176 The problem arose because the ICTR defined ethnic groups as people who share a common language and culture, making it impossible to differentiate Hutus and Tutsis as two ethnic groups. Therefore, measures were adopted, such as analyzing the existence of national identifiers, such as identity cards that established each citizen's status as Hutu or Tutsi. This demonstrated that the Tutsi were indeed a stable and distinct group in Rwanda.

177 ICTR, 1998, Jean Paul Akayesu case. ICTR-96-4-T; ICTR, 1999, Georges Anderson Nderubumwe Rutaganda case, ICTR-96-3-T, para. 57. See also: ICTY, 1999, Goran Jelisic case, IT-95-10-T.

2. The criterion of the value of subjectivity refers to the importance of the perspective of the aggressors, who are ultimately the ones who differentiate the group from the rest of the population through stigma. Consequently, understanding the existence of a group under solely "objective" standards such as language ignores the fact that in practice there may exist communities that, although they share certain common characteristics, are considered distinct groups, as is the case with the Hutus and Tutsis in Rwanda[178].

However, the fact that subjective perception is relevant in this area does not imply that certain objective indications should not be taken into account. This is what the first element common to the five forms of genocide provided for in the EC refers to, as it requires "that the person or persons [affected] have belonged to a specific national, ethnic, racial, or religious group." Therefore, the subjective criterion must always be accompanied by objective indications[179], that is to say, there must be a differentiating criterion that allows the perpetrators of the crime to distinguish a group from the rest of the population[180].

3. The criterion of delimiting its dimensions seeks to determine the composition of the protected group through aspects such as the geographical location of its members, such as occurs, for example, when defining the Bosnian Muslims located in eastern Bosnia and Herzegovina. All this takes into account that there are certain groups that, as a whole, are spread across different parts of the world.

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178 Fernández, C., 2019, *La Definición de Grupo Protegido en el delito de Genocidio, en La Evolución de la Definición y Aplicación del delito de Genocidio Coord. Olásolo & De Prada, Valencia*, p. 501.

179 ICTY, 2004, Radoslav Brđanin case, IT-99-36-T, par. 683.

180 ICJ, 2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia y Herzegovina v. Serbia y Montenegro), para. 191; ICTR, 2006, Tharcisse Muvunyi case, ICTR-00-55A-T, par. 484; ICTY, 2004, Radoslav Brđanin case, IT-99-36-T, para.. 683; ICTR, 2004, Sylvestre Gacumbitsi case, ICTR-2001-64-T, par. 254; ICTR, 2003, Juvénal Kajelijeli case, ICTR-98-44A-T, para. 811; ICTR, 2003, Laurent Semanza case, ICTR-97-20-T, para. 317.

Thus, while the TC III[181] and the AC[182] of the ICTY have rejected this criterion in the Krstić case, stating that it does not allow for the constitution of an autonomous group in and of itself, the TC itself has stressed that: (a) this would be possible when its members perceive themselves and behave as a different and independent group (for example, European Jews, because, beyond their geographical location, they had, before being attacked, a different culture from that of Jews in other parts of the world)[183]; and (b) this situation can occur both before experiencing violence and as a result of it[184].

6.1.2. The Objective Contextual Element

As we have seen, the EC establishes an objective contextual element for the five forms of genocide provided for in Article 6 of the SICC. It requires "that the conduct has taken place in the context of a manifest pattern of similar conduct directed against that group or has been capable of itself of causing such destruction." As Olasolo, Suárez & López state, this element is comprised of two alternative circumstances: (a) the systematic nature of the dynamics of violence against the protected group; or (b) the capacity of said dynamics of violence to destroy it in whole or in part[185].

However, its existence has been the subject of intense debate between:

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181 ICTY, 2001, Radislav Krstić case, IT-98-33-T.

182 ICTY, 2004, Radislav Krstić case, IT-98-33-A.

183 ICTY, 2001, Radislav Krstić case, IT-98-33-T.

184 Ibid.

185 Olásolo, Suárez & López, 2019, *El principio nullum crimen sine iure y el elemento contextual del delito de genocidio, en La Evolución de la definición y la aplicación del delito de genocidio Ed. Olásolo & De Prada, Valencia.*

1. Those who affirm, like the SA of the ICTY in the Jelisić[186], Krstić[187], Popović et. al[188], Tolimir[189] y Mladić[190], that this contextual element is not necessary for the configuration of the crime of genocide, because: (a) it represents an addition by the EC which is not included in its definition in Articles 2 of the Genocide Convention, 4 of the SICTY, 2 of the SICTR and 6 of the SICC; and (b) its objective is to prevent isolated conduct from constituting genocide.

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186 ICTY, 2001, Goran Jelisić case, IT-95-10-A, parrs. 66-101; In this case, the AC considered that the existence of a policy or plan justifying the total or partial destruction of the protected group under attack does not constitute a contextual element of the crime of genocide and should therefore be considered only as evidence of genocidal intent.

187 ICTY, 2001, Radislav Krstić case, IT-98-33-T; In this case, while the PTC affirmed the existence of a requirement that prevents isolated or random acts from being considered genocide, the AC again rejected this position because, in its opinion, the contextual element is not part of customary international law. Thus the gravity and scale of the acts of violence can only be considered as evidence of special intent.

188 ICTY, 2010, Vujadin Popović et. al. case, IT-05-88-T; In this case, the defense argued that the jurisprudence of the ICTY ran counter to the Genocide Convention's definition because the requirement for a contextual element was clearly part of the essence of the crime. Furthermore, the fact that it was expressly provided for in the EC proved its existence in international custom. However, both the PTC and the AC considered this position erroneous, as the incorporation of this element was discussed in the Convention's preparatory work, with several state representatives expressing reservations about it. Furthermore, the fact that it is included in the EC is not binding on the ICTY, especially when there is consistent jurisprudence stating that the policy is not a required element for the consummation of genocide.

189 ICTY, 2015, Tolimir case; In the Tolimir case, the AC stated that when genocidal intent cannot be proven directly, it is possible to prove it through contextual facts.

190 ICTY, 2017, Ratko Mladić case, IT-09-92-T; In this case, the AC stated that the existence of an agreed plan has no legal value apart from that of being a fact from which the existence of genocidal intent can be inferred.

2. Those such as the PTC I of the ICC, in its First Decision in the Al-Bashir case[191], as well as authors such as Liñán[192], who are of the view that, although the typical description of genocide does not expressly require the existence of a generalized or systematic context of violence against members of the protected group, this is implicitly included in its definition, and also constitutes the main common element between the crimes of genocide and crimes against humanity.

Furthermore, for the ICC's PTC I, the existence of an objective contextual element, which makes context something more than merely evidence of genocidal intent, presents a number of positive aspects for the definition of genocide, among which the following stand out[193]:

1. It clarifies the legal nature of the crime by requiring that the violence exercised against the protected group under attack (in our case, the imposition of living conditions that are objectively capable of causing the total or partial destruction of the group) be of such dimensions that it can be demonstrated that there is a real and concrete threat to its total or partial existence.

2. It justifies the classification of genocide as the most serious crime in international law (the "crime of crimes") based not only on its subjective elements, but also on its objective elements, including a minimum threshold of violence necessary for its consummation in all its forms.

3. It does not affect the rights of the defense, as it applies the principle of *in dubio pro reo* in relation to the doubts that the definition of genocide provided for in Articles 2 of the Genocide Convention, 4 of the SICTY, 2 of the SICTR, and 6 of the SICC may generate regarding

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191 ICC, 2009, Situation in Darfur, Sudan. Pre-Trial Chamber I, Decision on the Prosecution´s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Doc. ICC-02/05-01/09, parrs. 128-133.

192 Liñán, A., 2019, *Similitudes y diferencias entre el delito de genocidio y el crimen contra la humanidad. Volumen 9 de la serie Perspectivas Iberoamericanas sobre la Justicia, Valencia*: Tirant lo Blanch.

193 ICC, 2009, Situation in Darfur, Sudan. Pre-Trial Chamber I. Decision on the Prosecution´s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Doc. ICC-02/05-01/09, parrs. 128-133.

its existence. Thus, the contextual element requires a higher objective threshold of violence than what could be deduced from a strict interpretation of some of its individual modes of commission, such as killing or causing serious injury to any of the group's members.

4. It allows the protection afforded by the crime of genocide to be understood as a response to the existence of a real and concrete threat to the continued existence of the group as such, or of a substantial part of it.

Based on the foregoing, PTC I found reasonable indications of systematic and general nature in the attacks on the Fur, Masalit, and Zaghawa populations. Furthermore, for PTC I, the systematic and widespread attacks committed against these groups by multiple perpetrators (such as bombardments that destroyed villages, mass murders, mass rapes, forced displacements, and deprivation of access to basic resources such as water and food) constituted a manifest pattern of conduct, because they were not staggered behaviors over time, but occurred exclusively during the development of said attacks[194].

However, although the interpretation of PTC I reaffirms the nature of genocide as a last resort mechanism to guarantee the existence of protected groups [195], and appears to fit with its early historical precedents as a form of crime against humanity, authors such as Kreß argue that the definition of "real and concrete threat" adopted by PTC I is not entirely clear[196].

Furthermore, Judge Ušacka, in her dissenting opinion to the First Decision of PTC I in the Al-Bashir case, questions this interpretation, considering that the requirement of a "real and concrete threat" introduces a requirement based on a specific result, which gives the impression of altering the configuration of the crime of genocide[197].

In any case, and apart from this controversy, what is important to emphasize for the purposes of this work is that, even though the ob-

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194 Ibid., para. 198.

195 Ibid.

196 Kreß, C., 2015, The ICC's First Encounter with the Crime of Genocide: The Case against Al Bashir.

197 Ibid.

jective contextual element of genocide could eventually be rejected by the SA of the ICC for violating Article 6 of the SICC, this would still not affect the collective nature of its third form because, as noted, it cannot be achieved by imposing the conditions of life in question on only one of its members in isolation.

Furthermore, it does not appear that accepting or rejecting the contextual element of genocide can require a harmful result that goes beyond the mere objective capability of the imposed conditions of life to cause the destruction of at least a substantial part of the protected group.

This is due to the collective nature of this form, which appears to fully meet the requirement introduced by said contextual element that "the conduct took place within the context of a manifest pattern of similar conduct directed against that group".

6.2. Subjective Elements

6.2.1. The General Subjective Element

Genocide can be formally considered consummated, even if the total or partial destruction of the targeted group does not occur, so long as there is a specific intention aimed at that objective. Thus, as Gil points out, deaths, serious injuries, forced sterilizations, the forced transfer of children, and the conditions of life imposed on group members are seen as steps aimed at ending the existence of the group as such, or a substantial part of it[198].

As a result, it is necessary to distinguish between: (a) the general subjective element applicable to each of the modalities of committing genocide, as well as its objective contextual element (which is set out in Article 30 of the SICC); and (b) special intent or genocidal intent (*dolus especialis* or ulterior intent), understood as the specific

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198 Gil, A., 2019, *El tipo subjetivo del delito de genocidio: especial atención a la figura del dolo eventual, en La evolución de la definición y la aplicación del delito de genocidio, Tirant lo Blanch: Perspectivas iberoamericanas sobre la justicia.*

will to carry out acts of violence "with the intention of destroying, in whole or in part, a national, ethnic, racial or religious group as such."

This means that the presence of the general subjective element does not necessarily mean the existence of genocidal intent, because, as the First Decision of the PTC I of the ICC in the Bashir case shows, there may be scenarios where one or more of the modalities of genocide are sought to be committed, but the crime is not consummated because there is no genocidal intent, since the violence is directed towards obtaining a result other than the total or partial destruction of the protected group.

In any case, it is important to emphasize that, as Ollé explains[199], the general subjective element refers to the intention and knowledge which is required to engage in one of the five objective modalities of genocide. This includes the intention to cause the prohibited result (or, at least, the awareness that it will occur in the normal course of events) when, as in the case of killing or causing serious injury, the modality in question so requires[200].

This ultimately means that, when genocide is committed through the intentional subjection of members of the protected group to conditions of life that are objectively capable of bringing about their total or partial destruction, what is required is the voluntary adoption of such measures with knowledge of their capability of bringing about such destruction.

6.2.2. Special intent or genocidal intent to destroy, in whole or in part, a national, ethnic, racial, or religious group

The special intent required by the crime of genocide (also known as "genocidal intent") refers to the purpose of destroying, in whole or in part, the protected group.

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199 Ollé, M., 2019, *¿Qué significa intentar destruir una "parte" de un grupo? Particular atención al genocidio cometido a traves del ataque a la dirigencia del grupo, in La evolución de la definición y la aplicación del delito de genocidio, Tirant lo Blanch: Perspectivas iberoamericanas sobre la justicia,* p. 542.

200 See: art. 30 del SICC.

This means that victims are not chosen for their personal characteristics, but rather for their membership in the protected group attacked, since the group as such constitutes the true objective of the attack, with the specific intent being the destruction of at least a substantial part of it[201].

Given the difficulties in obtaining direct evidence of genocidal intent, the jurisprudence of the ICTY, the ICTR, and the ICC has emphasized the importance of circumstantial evidence, which can lead to the inference of genocidal intent when there is no other reasonable explanation for the evidence found.

Among the elements of circumstantial evidence accepted by these tribunals, the following stand out:

1. The general context, including the commission of other international crimes systematically directed against the same group[202].
2. The scale of the atrocities committed[203].
3. The systematic harassment of members of the protected group[204].
4. The repetition of discriminatory and destructive acts[205].
5. The planning and execution of attacks directed against a substantial part of the protected group[206].

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201 ICTY, 2003, Milomir Stakić case, IT-97-24-T, par. 521

202 ICTY, 2001, Goran Jelisic case. IT-95-10-A, parrs. 47-48; In the Second Decision in the Bashir case, context was considered both as an objective element and as circumstantial evidence to find "reasonable grounds" to believe in the existence of genocidal intent. See. ICC, 2010, July 12, Second Decision on the Prosecution's Application for a Warrant of Arrest.

203 ICTR, 1998, Jean Paul Akayesu case, ICTR-96-4-T, parrs. 523-524.

204 ICTR, 2003, Laurent Semanza case, ICTR-97-20-T, par. 313 et seq.

205 ICTR, 1999, Georges Anderson Nderubumwe Rutaganda case, ICTR-96-3-T, par. 61.

206 ICTY, 2001, Radislav Krstić case, IT-98-33-T, parrs. 572, 592-595.

6. Physical attacks, material damage, and insults directed at members of the group, as well as the weapons used, the severity of the injuries, and the existence of systematic killings[207].
7. Sexual assaults and the targeting of victims based on their membership in a particular protected group[208].
8. The rape of women, acts of humiliation and terror inflicted on members of the protected group, and the destruction of mosques, Catholic churches, or cultural centers[209].
9. The treatment of the bodies of members of the protected group, such as burying them in remote areas or disregarding their religious or ethnic customs, thereby causing greater pain to the survivors[210].

7. Conclusions

Although the situation experienced by the Palestinian population of Gaza since October 2023 reflects the current importance of a proper understanding of the commission of the crime of genocide through the intentional subjection of a protected group to conditions of existence that are likely to lead to its total or partial physical destruction, the truth is that, to date, this modality has received little attention in international doctrine and jurisprudence. This has rendered its application difficult because, unlike the other four forms of genocide, it suffers from a notable lack of specificity.

This problem is aggravated by:

1. Its traditional consideration as a residual form of genocide, resulting in the underestimation of its seriousness in comparison with other more obvious forms of genocidal violence.

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207 ICTR, 1999, Clément Kayishema and Obed Ruzindana case, ICTR-95-1-T, par. 93.

208 ICTR, 1998, Jean Paul Akayesu case, ICTR-96-4-T, parrs. 505-506, 731.

209 ICTY, 1996, Radovan Karadžić and Ratko Mladić, case, IT-95-5/18-R61, para. 94; TPIY, 2001, Radislav Krstić case, IT-98-33-T, par. 580.

210 Ibid., par. 596.

2. The diversity of existing doctrinal and jurisprudential positions regarding the interpretation of its elements, although these have only been analyzed in depth by a few authors and judicial decisions.

However, despite this situation, exemplified by the tension between those who understand this modality as a kind of "slow death" of the protected group and those who understand it based on the objective suitability of the living conditions imposed to cause its total or partial physical destruction, ignoring it is equivalent to rendering invisible systematic forms of collective annihilation that, while not producing immediate lethal effects, violate the right to existence of ethnic, racial, national, and religious groups, while seriously compromising international peace and security.

It is, therefore, evident that, despite the inherent complexity of the concept, more precise criteria are needed so that it can more effectively fulfill its preventive and punitive functions.

In this regard, it is important to bear in mind that the commission of the crime of genocide involves countless dynamics that are deeply painful for those affected by the violence of the context. Therefore, studying this modality from a historical, doctrinal, and jurisprudential perspective not only avoids forgetting the imposition of terrible living conditions on members of certain protected groups, but also contributes to a better understanding of the collective dynamics of genocidal violence that characterize it.

For this reason, there is nothing better than to begin by underscoring the fact that the inclusion of this modality in the definition of genocide has been a central part of the debate since the first drafts of the Convention.

Thus, from Lemkin's initial proposal in 1933 to the final draft of the Convention in 1948, it was recognized that genocide is not limited solely to the immediate destruction of a group through the extermination of its members, but also encompasses mechanisms of gradual destruction through the imposition of conditions of life that are objectively capable of this purpose.

With respect to the doctrinal analysis, this has been approached with a twofold objective. On the one hand, an objective was to iden-

tify the main specific elements of the type of genocide under study that generate the greatest controversy within the limited legal doctrine that has undertaken analysis of it in any detail. On the other hand, there was the aim of presenting the different existing doctrinal positions on the matter and offering, where possible, clear criteria for application on the following aspects:

1. The collective nature of this type of genocide means that, unlike other types, it is not possible to carry it out by imposing, in and isolated way, the relevant living conditions on some of the members of the protected group.

2. The "physical destruction," total or partial, of the protected group (for which the living conditions imposed on its members must be capable) has as much to do with the disappearance of its members as with the dissolution of the group as a social entity, since otherwise, the type of serious injuries would lose its *raison d'être*.

3. The central aspect of the third form of genocide is the objective capability of the imposed living conditions to generate the required total or partial destruction of the protected group (physical disappearance or dissolution as a social entity).

4. There is no minimum period of subjection of the members of the protected group to the imposed living conditions, so it can be stated that this form of genocide is distinct from direct murder and the creation of circumstances conducive to a slow death.

5. The consummation of the crime of genocide through subjection to conditions of life does not require the production of any result; the mere imposition of the conditions of life that are objectively capable of bringing about the total or partial destruction of the protected group is sufficient.

Upon completion of the doctrinal analysis, a jurisprudential analysis was undertaken regarding the treatment of the form of genocide under study in the only existing cases on the subject to date that have so far addressed its specific elements in some detail (Mladić before the ICTY, 002/02 before the SETC, and Al Bashir before the ICC). The following conclusions were reached:

1. Although the ICTY's First Judgment recognized the legal existence of this form of genocide in the Mladić case and stated that certain acts that do not cause immediate death may have genocidal effects if they generate an unviable existence or a "slow death," it has at the same time established a rather restrictive framework for its application because, according to the Judgment itself: (a) it constitutes a residual form applicable only when genocide by killing or serious physical or mental injury does not occur; and (b) requires that the conditions of existence be deliberately imposed, systematic in nature, and objectively capable of causing the total or partial destruction of the protected group.

2. In Case 002/02 (Noun Chea and Khieu Samphan), the TC of the SETC analyzed the living and working conditions imposed by the DRK government on workers at the Kampong Chhnang Airfield, the January 1st Dam, and the Trapeang Thma Dam. It did so based on the crime against humanity of extermination because the investigating judges refused to include the crime of genocide due to the subjection to harsh living conditions in the Closure Order. This was in consideration that the Khmer group did not constitute a protected group under the 1948 Convention. Furthermore, considering that the evidence presented did not allow for the conclusion that in any of the three aforementioned centers there was an intention to impose such conditions with the aim of exterminating the workers, the TC reclassified the events as a crime against humanity of murder.

3. Although the ICC has formally recognized the third form of genocide (and has clarified the evidentiary standard applicable to issuing an arrest warrant), the Second Decision of the TC in the Al Bashir case undoubtedly reflects the interpretive difficulties that persist regarding the threshold of suitability of the conditions imposed and the need, or lack thereof, for concrete results. This continues to be an obstacle to its effective implementation.

Consequently, this jurisprudential analysis shows the profound ineffectiveness that the third form of genocide has had thus far in fulfilling its functions of prevention and punishment.

Finally, the analysis was completed with a brief study of the three elements common to all forms of genocide: (a) the definition of the

protected groups and the affiliation of the affected person or persons to one of them; (b) the objective contextual element; and (c) the special intent or genocidal intention to destroy, in whole or in part, a national, ethnic, racial, or religious group. Thus, based on the study conducted, the following can be stated:

1. Although the subjective perception of the aggressors is relevant when determining the protected national, ethnic, racial, or religious group, this does not mean that certain objective indications should not be taken into account. This is what the first element common to all five forms of genocide provided for in the EC refers to, since it requires "that the affected person or persons have belonged to a specific national, ethnic, racial, or religious group." The subjective criterion must, therefore, always be accompanied by objective indications.

2. The controversial nature of the objective contextual element of genocide does not affect: (a) the collective nature of its third form, because the imposition, in isolation, of the living conditions in question on any member of the protected group is not sufficient for the completion of the crime of genocide; and (b) the absence of a prohibited result in this form of genocide, which makes its central element the objective capability of the living conditions imposed to bring about the destruction of at least a substantial part of the protected group.

This is ultimately due to the collective nature of this form, which, as noted, appears to fully meet the requirement of said contextual element that "the conduct must have taken place within the context of a manifest pattern of similar conduct directed against that group."

3. In all forms of genocide, it is necessary to distinguish between: (a) the general subjective element (applicable to the specific elements of each of the forms of genocide and its objective contextual element); and (b) special intent or genocidal intent, understood as the specific will to carry out acts of violence "with the intention of destroying, in whole or in part, a national, ethnic, racial, or religious group as such."

This means that the victims are not chosen for their personal characteristics, but for their membership in the protected group at-

tacked, since the group as such constitutes the true objective of the attack, the specific intent being the destruction of at least a substantial part of that group.

4. When genocide is committed through the intentional subjection of members of the protected group to conditions of life that are objectively capable of bringing about its total or partial destruction, the general subjective element requires the voluntary adoption of such measures with knowledge of their capability of bringing about such destruction.

5. Given the difficulties in obtaining direct evidence of genocidal intent, existing international jurisprudence on the subject has underscored the importance of circumstantial evidence, which allows the existence of genocidal intent to be inferred when no other reasonable explanation is possible based upon the evidence found.

In the end this work has sought to provide clarity to the nature of the method of committing the crime of genocide by intentionally subjecting the protected group to conditions of existence that will lead to its physical destruction, in whole or in part, in order to offer the reader, as well as international tribunals and other competent bodies, more precise criteria for their application.

Now, the application of these criteria to situations such as the one experienced by the Palestinian population of Gaza since October 2023, and which has allowed us to introduce the subject of this work and reflect its current relevance, rests in your hands.

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8. The role of the International Criminal Court from the perspective of the special reparation needs of minors and elderly

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1. Introduction

One of the areas in which the different instruments of international criminal justice (ICJ) and international criminal law (ICL) have experienced the greatest evolution has been the treatment provided to the victims. Thus, although international criminal tribunals were initially designed in an exclusively retributive manner, without any focus on victims, this has been changing over time. In this way, while the *ad hoc* tribunals for the situations in former Yugoslavia (1993) and Rwanda (1994) did not consider either the participation or reparation of the victims, both aspects are expressly developed in the Statute of the International Criminal Court (ICC Statute) (2002) and in the regulations of some hybrid tribunals, such as the Extraordinary Chambers of the Courts of Cambodia (ECCC) (2004).

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The systematic and/or generalized violence is a characteristic of international crimes that affect various communities in several ways. It has a special impact on those who present more vulnerabilities due to their age, as is the case with minors and elderly. Nevertheless, despite the formal recognition of age as an objective factor of vulnerability, it has not necessarily resulted in a differential treatment in the judicial practice of the application of ICJ and ICL. On the contrary, as reflected, for example, by the experience of hybrid tribunals established in the first decade of the 21st century (Special Court for Sierra Leone (SCSL) (2002), ECCC and Special Tribunal for Lebanon (STL) (2007)), the limitations and challenges in the implementation of specific reparation measures for age-vulnerable groups remain highly significant.

In this context, it is important to analyze the role of the ICC from the perspective of the special needs of minors and elderly persons who have been victims of genocide, crimes against humanity, war crimes or aggression. To this end, we have focused our analysis on the area of reparations measures, due to its particular importance for addressing these needs (leaving, therefore, for future work the questions related to their participation in ICC proceedings and their effective protection against new acts of violence). All this, in order to reflect the progress achieved, identify existing gaps and highlight pending challenges in the shaping of the ICC's role from the perspective of the special reparation needs of minors and the elderly.

2. Age as an essential factor of vulnerability

The vulnerability of minors and the elderly due to age has been a recurring problem, whose protection, although widely recognized internationally, continues to be insufficiently implemented in practice.

Thus, the United Nations Convention on the Rights of the Child (1989), highlights the need for special protection for minors, due to their physical and mental immaturity and recognizes that "in every country of the world there are children who live in exceptionally difficult conditions" and who need special attention. Furthermore, it establishes that it is the responsibility of States to adopt protection and prevention measures against all forms of child abuse, as well as

to support parents in the exercise of their parenting responsibilities thorough the development of appropriate institutions, facilities, and services.

The Organization for Economic Cooperation and Development (OECD) has also recognized the vulnerability of minors. Moreover, the verification that in the majority of member countries the policies directed to minors are developed in a fragmented manner without adequate consideration of how various factors that influence children's well-being interact with each other, has underlined the need for children and adolescents to receive constant, coherent, and coordinated support throughout their entire growth process.

Thus, the OECD has placed special emphasis, for example, on the impact that poor mental health has on school performance and level of commitment, as well as the way in which poor quality housing affects both children´s health and their family relationships. In fact, it is unlikely that isolated approaches that focus solely on exceptional aspects of the well-being of children are effective if other barriers to a healthy development are not also addressed.

Furthermore, as explained by the OECD, inequality in childhood means inequality throughout the entire life cycle, in a way that children who grow up in families with scarce resources have less access to a quality education and healthcare and are highly likely to enter the labor market at an early age in low-skilled jobs that offer far fewer opportunities to improve their skills. The situation is of such gravity that it is estimated that it would take between four to five generations for a child born in a family with scarce resources to reach the average income level.

As for the elderly, they also face a marked situation of vulnerability, as a consequence of: (a) the economic inequality and opportunities to which they are exposed to due to their low social coverage and the low income offered by pensions (especially in the case of women)[1]; (b) their insufficient access to the health system, to hous-

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1 ECLAC, 2022, *Infancias y adolescencias en América Latina y el Caribe: Deudas de derechos y brechas en las políticas.* https://repositorio.cepal.org/server/api/core/bitstreams/e345daf3-2e35-4569-a2f8-4e22db139a02/content

ing with minimum habitable conditions and to the justice system; and (c) the multiple situations of discrimination to which they are subjected.

As a result, the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) has indicated that urgent actions are required in order to address the diverse situations of vulnerability faced by the elderly, including specifically their job insecurity (not being able to live from their pensions) their health problems (reflected on a high prevalence of non-communicable diseases, premature death and disability) and the frequent situations of abandonment by their families and by the State.

3. The lack of interest of international criminal justice regarding the special reparation needs of minors and the elderly who are victims of international crimes: the cases of the hybrid tribunals established in the first decade of the XX century

3.1. Minors

Armed conflict situations in which children and adolescents are forcibly recruited to participate in hostilities are very frequent, which is why some hybrid tribunals have sought to identify reparation measures that could be specifically implemented within the framework of the reintegration processes of former child soldiers into civil society. Above all, it has to be considered that, once demobilized, ex-combatants, including child soldiers, suffer serious situations of stigmatization[2].

Among the situations for which the three main hybrid tribunals born in the first decade of the 21st century (the SCSL, the ECCC y STL) were created, the phenomenon of forced recruitment of minors has been especially serious in Sierra Leone. For this reason, the

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[2] Coulter, C., 2009, *Bush wives and girl soldiers: Women's lives through war and peace in Sierra Leone, Cornell University Press,* pp. 132, 208.

Final Agreement signed between the Government of Sierra Leone and the Revolutionary United Front (RUF) expressly recognizes in its preamble:

> […] the imperative that the children of Sierra Leone, especially those affected by armed conflict, in view of their vulnerability, are entitled to special care and the protection of their inherent right to life, survival and development, in accordance with the provisions of the International Convention on the Rights of the Child.

The same is reiterated in Article XXX of the Agreement, which provides that it is the duty of the State:

> [to] accord particular attention to the issue of child soldiers. It shall, accordingly, mobilize resources, both within the country and from the International Community, and especially through the Office of the UN Special Representative for Children in Armed Conflict, UNICEF and other agencies, to address the special needs of these children in the existing disarmament, demobilization and reintegration processes.

Most of the child soldiers' recruitment in Sierra Leone was carried out by the RUF[3], constituting a very important part of its combatants. However, other organized armed groups involved in said armed conflict, such as the Armed Forces Revolutionary Council (AFRC) or the Civil Defense Forces (CDF), also resorted to this practice, which made the use of child soldiers, in the end, becoming one of their main strategies for maintaining their numerical superiority[4].

In this context, the role of the SCSL was unfortunately limited to the investigation, prosecution and punishment of those most responsible for international crimes, and thus reparation to victims (including former child soldiers) did not comprise part of its role.

In contrast, other institutions established in the Lomé Peace Agreement (in particular, the Truth and Reconciliation Commission (TRC)) have had a reparative role. In carrying out this role, the TRC:

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3 Mazurana, D., & Carlson, K., 2004, From combat to community: Women and girls of Sierra Leone, Refugees International, p. 3.

4 Langmack, A., 2023, Reparation in transitional justice: A global perspective, SSOAR, p. 98; Langmack, F. J., 2023, Reparation in transitional justice: A normative framework, Nomos Verlagsgesellschaft, p. 110.

(a) has asserted that minors, along with amputees or injured persons and victims of sexual violence, constituted special categories of victims and, therefore, primarily deserved direct reparation; and (b) has asserted that the following groups were deserving of specific reparation measures, as long as they were 18 years old of age or younger by 1 March 2002: (a) children who suffered from physical injury, such as amputees, other war-wounded or victims of sexual violence; (b) children whose parents were killed as a consequence of any abuse or violation as described in this report; (c) children born out of an act of sexual violence and whose mother is single; (d) children who suffer from psychological harm; and (e) war-wounded children.

For those who were part of these groups, there have been adopted, amongst other steps, health measures of reparation, including those aimed at eliminating scars, and measures for protecting victims of sexual and gender-based violence. However, the Sierra Leone Reparations Program as a whole has only allowed for the reparation of approximately 32.000 persons[5]. This means that the vast majority of the victims have not received any reparation because the requirements to be able to access them, and the evidentiary standards applied, have been high, which has limited the measures to those who have suffered the most serious harm. Hence, the measures that have had the most widespread reach have been those that consist of regulatory changes, and in particular the adoption of new national regulations for the protection of minors.

For its part, in the ECCCs it is notable that the process of recognition of reparations included in its statute has taken place after the completion of the investigations, which, in turn, have been carried out more than thirty years after the Fall of Phnom Penh (Cambodia) at the hands of Khmer Rouge in 1975 (the starting point of the Cambodian genocide). In consequence, none of the children affected by the violence exerted by Khmer Rouge were still minors when the ECCC began operating in 2004.

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5 IOM, s. f., Support to the implementation of the Sierra Leone Reparations Programme (SLRP), International Organization for Migration.

Finally, with regard to the STL, and as is the case with the SCSL, its regulatory instruments do not attribute to it any type of reparation mandate for the victims of the assassination of the former Lebanese Prime Minister, Rafiq Hariri, and its related crimes[6].

As a result of the above, it can be stated that the experiences of the hybrid tribunals established during the first decade of the 21st century, such as SCSL, and the ECCC and the STL, are showcases for the systematic limitations in the treatment of the minors who are victims of international crimes. Despite recognizing their vulnerability, some tribunals, such as the SCSL or the STL, do not even have a reparative and/or restorative function. Furthermore, those who lack this function, such as the ECCC, have not gone beyond the merely declaratory level which has prevented the adoption of material reparation measures aimed specifically at minors.

Even where extrajudicial bodies have been established with a reparatory mandate, such as the TRC in Sierra Leone, they have gone no further than establishing certain specific categories of children who should have been subject to reparation (such as children with physical injuries, orphans or victims of sexual violence). In this way, in the best cases, only a small number of minors have been able to realistically have access to reparatory measures, which demonstrates a very important gap between the normative principles of child protection and their practical implementation through ICJ and ICL enforcement mechanisms.

3.2. The elderly

Although the ICJ has moves towards a more restorative model of justice (from a starting point limited to retributive justice), as well as a certain express recognition of the relevance to consider the elderly as victims of armed conflicts, no development is observed in

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6 Morrison, H., & Pountney, E., 2014, Victim participation at the Special Tribunal for Lebanon., en: A. Alamuddin, N. N. Jurdi & D. Tolbert (Eds.), The Special Tribunal for Lebanon: Law and practice, Oxford University Press, pp. 153–176.

the practice of these statements (apart from intersectional measures that have been adopted where the elderly are also victims of sexual violence). A good example of this situation is the three main hybrid courts established in the first decade of the 21st century: the SCSL, the ECCC and STL.

As we have seen, the SCSL has had an essentially retributive nature, so it has not played any role in the matter of reparation[7] (the participation of the victims in the SCSL has also been minimal)[8]. In fact, after the civil war in Sierra Leone, reparations were understood as an area of public policy (alien to ICJ), which had to be assumed by the State through the adoption of the necessary measures to apply the recommendations given by the TRC in its Final Report[9].

In this regard, the report exposes the serious situations of vulnerability of elderly women, highlighting that the collapse during armed conflict of the support networks that historically had been available to them, had led to a situation of absolute lack of protection: society had "abandoned" them and they now lived within its margins [10]. Volume 3b-3 of the TRC Final Report, relating to women, also highlights the extensive sexual violence suffered by elderly women[11].

Despite this situation, volume 4 of the TRC Final Report, relating to reparations proposals, does not mention measures specifically aimed at the elderly. Furthermore, Sierra Leone has not provided the information on the status of elderly women that has been requested of it by the Committee established by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

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7 Evans, C., 2012, Case study: Reparations in Sierra Leone, en: The right to reparation in international law for victims of armed conflict, Cambridge University Press, pp. 164–184. https://doi.org/10.1017/CBO9781139096171.010

8 Schulz, P., & Kreft, A.K., 2022, Accountability for conflict-related sexual violence, United Nations. https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/03/report/accountability-for-conflict-related-sexual-violence/20220224-CRSV-Philipp-Schultz.pdf

9 Langmack, F.J., 2020, *3 de febrero*, Reparations in Sierra Leone: News from the periphery of transitional justice, JusticeInfo.net.

10 See: https://www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents

11 Ibidem.

To all the above, the absence of resources that has characterized the reparation process in Sierra Leone must be added, which ultimately has meant that:

> Sierra Leone's reparation program did not manage to fulfill the expectations the SLTRC created. It offered much fewer benefits in a piecemeal fashion depending on the funds available at any given moment. Severe delay pervaded the entire program. It started only four years after the government accepted the SLTRC reparation recommendations. Most survivors waited several more years before they received their grant. Survivors of sexualized violence and war widows found themselves at the end of a long queue. They waited 14 years from the point the SLTRC promised them reparation until they finally received them. The delay coupled with almost no survivor participation and a non-transparent process sent a fatal signal of neglect to survivors[12].

As a result, it can be asserted that, despite the concern about the damages caused to elderly women and the situation of risk in which they found themselves as a consequence of armed conflict, there cannot be seen, in Sierra Leone, an emphasis on the rights of such people much less on the rights of the elderly as a whole. On the contrary, what has happened is that the elderly have been blamed for the conflict, due to the traditional authority they had over the communities' marginalized minors[13]. Consequently, during the post-conflict, the elderly have had to face social reintegration and peace-building obligations, without having any access to reparation measures for the damage suffered.

Regarding the situation in Cambodia, the adoption of a legal regime for the protection of civilians within the transition´s framework constitutes a relevant example of: (a) government articulation of a program aimed at repairing the damage of systematic and/or generalized violence caused by a previous political regime[14]; and (b) the

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12 Langmack, A., 2023, Reparation in transitional justice: A global perspective, SSOAR, p. 98; Langmack, F. J., 2023, Reparation in transitional justice: A normative framework, Nomos Verlagsgesellschaft, p. 110.

13 Vázquez Aranda, D., 2023, The hopeful transformative potential of engaging youth voices in transitional justice processes: A case study of Sierra Leone, Tesis de maestría, Universidad de Utrecht.

14 Phan, H. D., 2009, Reparations to victims of gross human rights violations: The case of Cambodia, East Asia Law Review, 4(2), pp. 277–297.

search for a transformative justice system aimed at resolving situations of inequality and social pressure caused by violence[15] (although, ultimately, its application has been very limited).

The development of this justice system that led to the creation of the ECCC was marked by the debates on the draft ICC Statute that took place in the UN International Law Commission during the 1990s[16], which favored the inclusion of a system of reparation for victims, although its scope was very limited[17]. In this way, unlike what happened in other hybrid tribunals, the ECCC Statute ascribes to them a reparative role[18].

However, despite the above, neither the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (2004), nor the Law on the Establishment of the ECCC (2004), contain provisions relating to the determination of reparation measures (let alone specific regulations for the elderly). In this way, it was not until the adoption of the ECCC Internal Rules (2007) that its reparative role was regulated. In particular, it was rule 23 that established the right of victims, constituted in the civil part, to request the determination by the ECCC of the moral and collective damages suffered, which should be the object of reparation.

Based on the above, in the three cases completed up to the present day, reparation measures have been requested for, *inter alia,* the collective damages suffered. However, only in case 002/01 have the elderly been recognized as victims of specific harm as a result of the

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15 Williams, S., & Palmer, E., 2016, Transformative reparations for women and girls at the Extraordinary Chambers in the Courts of Cambodia, The International Journal of Transitional Justice, 10(2), 311–331.

16 Sperfeldt, C., 2012, Collective reparations at the Extraordinary Chambers in the Courts of Cambodia, International Criminal Law Review, 12(3), 457–490.

17 UN, 1999, Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, p. 61.

18 Killean, R., & Moffett, L., 2020, What's in a name? 'Reparations' at the Extraordinary Chambers in the Courts of Cambodia, Melbourne Journal of International Law, 21, 1–27.

policies implemented by the *Khmer Rouge* between 1975 and 1979, which has not ultimately translated into material reparation measures.

However, despite this recognition, the final result has not been very different from what can be observed in Sierra Leone because, ultimately, reparation to the elderly in the Cambodian peace process has also fallen practically exclusively on public policies, specifically through the pension system for ex-combatants (ICTJ, 2009). This has been due, in large part, to the fact that the ECCC has not shown any interest in meeting the special needs derived from the special vulnerability of the elderly who were victims of the international crimes committed by the *Khmer Rouge*.

The same conclusion is also applicable to the STL, as its statute or its complementary instruments do not attribute a reparative role to it. As we have already pointed out in relation to minors, this situation only shows once again that reparation to victims is not a relevant issue for hybrid tribunals[19], even when, as is the case with minors and the elderly, they present special needs due to their particular situation of vulnerability due to age.

4. The role of the International Criminal Court concerning the special reparation needs of minors and the elderly

4.1. Introduction

Unlike the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the afore-mentioned hybrid tribunals (the ECCC being the only exception), reparation for the harm suffered by victims does constitute a central element of the role of the ICC. Thus, according to art. 75(1) of the ICC Statute:

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[19] Morrison, H., & Pountney, E., 2014, Victim participation at the Special Tribunal for Lebanon., en: A. Alamuddin, N. N. Jurdi & D. Tolbert (Eds.), The Special Tribunal for Lebanon: Law and practice, Oxford University Press, pp. 153–176.

> The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

Although the only forms of reparation mentioned are restitution, compensation and rehabilitation, this list is not exhaustive, because according to art. 75(2) of the ICC Statute, "[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".

However, despite the above, neither the ICC Statute, nor ICC Rules of Procedure and Evidence (ICC RPE), draw any distinction between the various types of victims or establish any sort of differential treatment with respect to the adoption of certain reparation measures[20]. The above does not vary by age, because there is no com-

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[20] The situation is different regarding participation in the proceedings and protection of victims and witnesses, since the ICC Statute and its complementary instruments expressly attribute in this area a certain relevance to age as a specific differentiating factor. Thus, art. 68 (1) of the ICC Statute (2002) expressly states the following: "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". In development of this disposition, Rule 86 of the ICC Rules of Procedure and Evidence (ICC RPE) provide that "[a] Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence". This is specifically the case of the Victims and Witnesses Unit which, in accordance with rule 17 (3) indicates the following: "In performing its functions, the Unit shall give due regard to the par-

prehensive reparation system focused on minors or the elderly due to their situation of special vulnerability.

In terms of jurisprudence, the ICC, since its first decision on the principles of reparation in the Lubanga case (2012), has adopted a comprehensive approach that includes psychosocial assistance, medical treatment and specific assistance measures for certain groups of victims, including minors, but not the elderly.

4.2. The treatment of the special needs of minors in reparation orders issued by the International Criminal Court and in the exercise by the Trust Fund for Victims of its assistance mandate

4.2.1. First approach

As we have seen in relation to Sierra Leone, in situations of armed conflict the forced recruitment of children and adolescents to participate in hostilities is usual. This dynamic was, in fact, the epicenter of the Lubanga case, reason for which in its decision on principles of reparation (2012), the ICC Trial Chamber (TC) I, citing the UN Convention on the Rights of the Child, established general criteria for designing appropriate reparation measures for minors, underlining the need to apply measures that take into account their best interest (Article 3).

In particular, TC I focused on what former child soldiers required to return to their lives, reintegrate into their communities and resume their training process (seriously affected by their recruitment):

> Reparation orders and programmes in favour of child soldiers, should guarantee the development of the victims' personalities, talents and abilities to the fullest possible extent and, more broadly, they should ensure the development of respect for human rights and fundamental

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ticular needs of children, elderly persons and persons with disabilities. In order to facilitate the participation and protection of children as witnesses, the Unit may assign, as appropriate, and with the agreement of the parents or the legal guardian, a child-support person to assist a child through all stages of the proceedings".

> freedoms. For each child, the measures should aim at developing respect for their parents, cultural identity and language.

Based on this decision, various reparation orders were issued in the Lubanga case, some of which were appealed before the ICC Appeals Chamber (AC). Thus, in 2015, the AC amended the initial reparation order issued by TC I and requested the ICC Trust Fund for Victims (TFV) to: (a) prepare a draft implementation plan for collective measures of reparation; and (b) present it to TC II.

In 2016, TC II approved and ordered the implementation of the plan put forward by the TFV, concerning collective reparation measures of a symbolic nature. Moreover, in 2017, TC II also approved the service-based collective reparation framework proposed by the TFV, as well as the first stage of its implementation process. Months later, TC II established the amount of liability of Thomas Lubanga Dyilo (2017), thus completing the initial reparation order issued by TC I in 2015.

However, it was not until 2021 (nine years after Lubanga´s conviction and fifteen years after his capture) that these reparation orders could begin to be materially implemented by the TFV in the Ituri District (DRC); a process which still continues at the end of 2024. In fact, the most recent reports of the TFV still refer to the process of accrediting the victims and the problems faced in communicating with them[21]. This delay has prevented the application of effective measures for the psychosocial rehabilitation of the former child soldiers before they reached adulthood.

Concerning the Ntaganda case, the reparation order issued by TC VI[22] is almost identical to that of the Lubanga case in regard to its justification and disposition, thus it is also based on the principle of

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21 ICC, 2023, Consolidated response of the Common Legal Representative of the Former Child Soldiers to the VPRS' and TFV's submissions of supplementary information in accordance with Trial Chamber II's First Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, ICC-01/04-02/06-2883.

22 ICC, 2021, Trial Chamber VI, Reparations Order, The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-2659, para. 47

prevalence of the best interest of the child. However, unlike TC I and TC II in the Lubanga case, TC VI has recognized that, due to the time that has passed from the commission of the crimes, most victims have reached adulthood without receiving any reparation measure to address their psychosocial and educational issues.

Notwithstanding the above, the TFV has sought to implement certain individual and collective reparation measures in the affected communities, such as: (a) imparting a 10-day general training and/or training in specific competencies for 2 to 4 months[23]; (b) supporting the creation and development of economic activities that generate income for the victims and/or communities[24]; (c) financing the education of the victims or of their close relatives[25] and (d) offering 1300 physical and/or mental health treatments.

Moreover, when applying these measures, the TFV has adopted some complementary measures, including: (a) the search for missing persons; (b) psychological support for the victims; (c) the strengthening of local infrastructure; (d) the establishment of protective measures concerning sexual and gender violence; and (e) the access to public education[26]. All these measures have been articulated in the Former Child Soldiers Programme in the Ntaganda case (a similar program has also been articulated in the Lubanga case).

> More recently, in 2024, ICC TC IX issued its reparation order in the Ongwen case, in which several of the elements articulated in the orders issued in the Lubanga and Ntaganda cases have been included: reparation orders and programmes in favour of child victims, should guarantee the development of the victims' personalities, talents, and abilities fully and, more broadly, they should ensure the development of respect for human rights and fundamental freedoms. They should

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23 ICC, 2024, Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, ICC-02/04-01/15-2074.

24 Ibid., p.14

25 Idem.

26 ICC, 2023, Consolidated response of the Common Legal Representative of the Former Child Soldiers to the VPRS' and TFV's submissions of supplementary information in accordance with Trial Chamber II's First Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, ICC-01/04-02/06-2883; ICC, 2024, Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, ICC-02/04-01/15-2074.

> also include measures to combat stigmatization, discrimination and social isolation of child victims and survivors through awareness raising and education within communities. Furthermore, bearing in mind that children who have experienced international crimes are in extremely vulnerable situations, they should be assisted to ensure they gain access all of the rights found in the Convention on the Rights of the Child including birth registration, basic health, education, and social welfare in order to fully participate in their recovery and reintegration into society. Former child soldiers, children born out of SGBC, and child victims in general should also be helped to live responsibly in a free society, recognizing the need for a spirit of understanding, peace, and tolerance, with respect for equality between the sexes and friendship between all peoples and groups.

However, TC IX has also included in its reparation order additional elements. First, Ongwen´s arguments regarding the interrelation between the status of victim of forced recruitment and the subsequent commission of international crimes have been addressed. This, taking into account that the active participation in hostilities of the recruited minors, has been forced through the application of traditional measures like the *baraza* in the Democratic Republic of Congo (DRC) and the *mato oput* in the North of Uganda[27] (for TC IX these factors have not been relevant because the crimes were committed when Ongwen was already an adult who was aware and responsible for his actions)[28].

Furthermore, TC IX has analyzed the distinction between intergenerational and transgenerational harm, which, although had already been covered by the reparation order in the Katanga case (2017), was not centered around minors due to its exclusive focus on the attack on the Bogoro town (DRC)[29]. Based on this distinction, TC IX has highlighted that reparation measures for indirect victims from

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27 Kiyala, J. C. K., 2016, Utilising a traditional approach to restorative justice in the reintegration of former child soldiers in the North Kivu Province, Democratic Republic of Congo, Africa Insight, 46(3), 33–50

28 ICC, 2024, Trial Chamber IX, Reparations Order, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-2074, 28 February, parrs. 658–660.

29 ICC, 2017, Order for reparations pursuant to article 75 of the Statute, ICC-01/04-01/07-3728.

other generations[30] should be directed towards a community rehabilitation that limits the harm caused by the trauma suffered by parents and transmitted to their children (either through epigenetics or through social transmission). Consequently, in contrast to the international criminal tribunals (ICTY and ICTR) and hybrid criminal tribunals (SCSL, ECCC and STL), the reparation orders issued by ICC TC I, TC II and TC X in the Lubanga, Katanga and Ongwen cases have been focused on: (a) the principle of prevalence of the best interest of the child, as provided for in the Convention on the Rights of the Child; and (b) the need for the damages suffered to be compensated through more complex reparation measures than in the case for adults.

In this way, the ICC´s jurisprudence has progressively developed a comprehensive theoretical framework to address reparations for the minors who have been victims of international crimes, recognizing the need for integral reparations that go beyond economic compensation, with the aim of also including psychosocial, educational, and social reintegration aspects.

However, as will be seen below in greater detail, these efforts have faced significant challenges, especially regarding the delay in the implementation of reparation measures in the places where the crimes have been committed, as shown particularly by the Lubanga case[31].

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30 Ibid., p. 67.

31 In contrast with the ICC, the Inter-American system of human rights protection initially limited, in the reparation, an economic compensation for the material harm suffered. However, the Inter-American Court of Human Rights (IACtHR) has adopted in the XXI century an integral standard of reparation according to which States, apart from restoring the affected situation as much as possible, also have to repair pecuniary and non-pecuniary damages (including moral damage). See also: Shelton, D., 2010, Remedies in International Human Rights Law, Oxford University Press eBooks. See. also: ISCHR, Case Velásquez Rodríguez v. Honduras, *Reparaciones y Costas*, Decision of 21 July 1989. Series C No. 7; Case of Godínez Cruz v. Honduras., *Reparaciones y Costas*, Decision of 21 July 1989. Series C No. 8, parrs. 23-24; Case of Penal Miguel Castro Castro v. Perú. Fondo, *Reparaciones y Costas*, Decision of 25 November 2006. Series C No. 160, par. 413, and Case of La Cantuta v. Perú. Fondo, *Reparaciones y Costas*, Decision of 29 November 2006. Series C No. 162, par. 199). Furthermore, art. 19 of the American Conven-

tion on Human Rights (ACHR), regarding the rights of the child, provides that every child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state. This recognizes the right of minors to special protection measures due to their vulnerability because of their age. Yet, the content of the minimum standards of protection that the states must grant and the specific reparation avenues have still not been fully developed by the IACtHR. Vid. Ibañez, J., 2010, *Los derechos de los niños, niñas y adolescentes en la jurisprudencia de la Corte Interamericana de Derechos Humanos*. Pg. 23. Vid. also: IACHR., case of Los Hermanos Gómez Paquiyauri v. Perú, *fondo, reparaciones y costas*, decisión of 8 July 2004. Series C No. 110, para. 168 and IACHR case of Chitay Nech y otros v. Guatemala, preliminary exceptions, *fondo, reparaciones y costas*, decisión of 25 May 2010. Series C No. 212, par. 169. Likewise, the Inter-American System of Human Rights has recognized the vulnerability of the elderly and the need to guarantee their fundamental rights in the context of accelerated aging in Latin American and the Caribbean. For this purpose, the Organization of American States (OAE) adopted in 2015 the American Convention for the Protection of the Human Rights of the Elderly, which is the first binding instrument at a global level centered exclusively on this group. The Convention establishes specific obligations for the member states, such as guaranteeing the right to health, social security, autonomy, and an active participation in society, promoting a dignified and inclusive life for the elderly. Based on the foregoing, the Inter-American Commission of Human Rights (IAComHR) has issued thematic reports that tackle the situation of the elderly, highlighting challenges in areas like poverty, social exclusion, and the lack of access to essential services. The IAComHR also emphasizes the importance for states to implement public policies that integrate an intersectional perspective, recognizing that factors like gender, ethnicity, and disabilities can aggravate the vulnerability of the elderly. This is essential to address the systematic inequalities faced in the region. The Convention also urges the States to guarantee the integration of the elderly in the political, social, economic and cultural life, ensuring opportunities for participation in the decision-making that affects their wellbeing. This not only implies the recognition of their rights, but also the strengthening of their agency and protagonism, promoting a positive image of aging as a productive and valuable stage. Vid.: *Organización Panamericana de la Salud. La Convención Interamericana sobre la Protección de los Derechos Humanos de las Personas Mayores como herramienta para promover la Década del Envejecimiento Saludable*. Washington, DC: OPS; 2023. Available at: https://doi.org/10.37774/9789275326947. In contrast with the IACtHR, the European Court of Human Rights (ECtHR), presents a reparation system centered on the categories of restoration of the situation before the human rights viola-

4.2.2. The treatment of the special needs of minors in the reparation orders issued by the International Criminal Court

4.2.2.1. Measures concerning health:

In the decision on the principles of reparation in the Lubanga case, psychosocial assistance and health benefits are explicitly mentioned as a way of reparation for the victims. The foregoing as part of the necessary rehabilitation measures for the existence of an integral reparation. As TC I points out in its decision on the principles of reparation in the Lubanga case (2012), the reparation measures for minors have to: (a) protect the best interests of the child; (b) address their feelings; (c) avoid their revictimization; (d) include their communities; (e) be developed in their own towns; and (f) be endowed with transformative objectives[32]. Moreover, regarding specifically the rehabilitation of minors, it must: (a) include the provision of medical and health services, as well as psychological, psychiatric and social assistance to support the overcoming of grief and trauma caused by the violence suffered; and (b) place emphasis on the treatment of sexually transmitted diseases and the assistance to minors infected with HIV[33]. Nevertheless, the decision does not explicitly contain a section that highlights the importance of social integration assistance, or which explains the way it should be carried out[34].

In the Ntaganda case, TC VI issued a reparation order (2021) that contains measures specifically aimed at the restitution of physical, moral, psychological, and material harm suffered by the minors. These measures include: (a) psychological rehabilitation; physical rehabilitation; and (b) programs for the recovery of the physical in-

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tion, and, if this is not possible, the individual (or in some cases collective) indemnification or compensation of the suffered harm. However, neither normatively nor through jurisprudence, is there a differential regime based on age in relation to minors or the elderly. Vid. Cruz Ortiz de Landázuri, L. M., 2010, *La reparación a las víctimas en el Convenio Europeo de Derechos Humanos, Revista española de derecho internacional*, 62(1), 89-117.

32 ICC, 2012, Trial Chamber I, Decision of 7 August 2012, ICC-01/04-01/06-2904, § 79.

33 Ibid., p. 32.

34 Ibid., p. 79.

frastructure used by the minors, such as schools and hospitals. Considering that most of the victims of this case were child-soldiers, who suffered sexual abuses, the sanitary measures of the reparation are fundamental for their socio-economic reinsertion and reintegration (ICC, 2019).

Finally, the reparation order issued by TC VIII in the Al-Mahdi case (2017) constitutes an important example of: (a) the importance of moral harm; and (b) the adoption of individual as well as collective reparation measures, in the face of such harm, as both aspects are closely related. As TC VIII pointed out, the concept of moral damages is not only a central aspect in the restoration process, but has begun to be interpreted broadly, including within it the injury, or even the loss of childhood.

Thus, the importance of mental health measures to repair the damage caused to minors by forced recruitment is recognized. However, in spite of this advancement in the reparation of moral harm, TC VIII has not adopted any differentiated standard for minors, limiting itself to affirming that measures focused on mental health are materialized through compensation (in the cases of individual reparation) or rehabilitation (in the cases of collective reparation)[35].

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[35] As the ICC, the IACtHR has adopted reparation measures aimed at protecting the health of the minors. Still, this has been carried out through an indirect accompaniment, since the rehabilitation orders have to be carried out by exogenous entities, representing a great difficulty for their realization. Consequently, the dependence of the ICC and the IACtHR on exogenous entities that materially carry out the reparation, represents an important problem that is not easy to overcome. Vid. Cubides Molina, J.M., 2016, *Reparaciones en la Corte Interamericana de Derechos Humanos, Razón Crítica,* 1, 52-91 doi: http://dx.doi.org/10.21789/25007807.1137 y Corte IDH, *Caso Vera Rojas y otros v. Chile*. Preliminary exceptions, *Fondo, Reparaciones y Costas,* Decision of 1 October 2021. Series C No. 439. The problem is, if possible, even greater in relation to the ECtHR, because although through jurisprudence there have been attempts to establish arguments to integrate the protection of the right to health within the Tribunal, this has not crystallized in the adoption of integral reparations. On the contrary, the reparations issued by the ECtHR are indemnification for the most part, consisting of a single payment to be reimbursed by the state that generates the violation. Vid. Hernández, A. C. G., 2018, *El derecho a la salud en la jurisprudencia del*

4.2.2.2. Measures in the area of education and insertion into the labor market

In its decision on the principles of reparation in the Lubanga case (2012), TC I has affirmed the importance of promoting the restitution of minors to their former life, through, inter alia: (a) returning to their families, as well as, their former homes and employment; (b) the possibility of continuous education; and (c) the guarantee of an economic income. It has even been stated that restitution could also be appropriate for legal entities such as schools or other institutions[36].

Likewise, in the matter of compensation, TC I has highlighted the need to compensate for lost opportunities, including those related to employment, education, and social benefits (such as, for example, the loss of status). Furthermore, in the area of rehabilitation, the importance of adopting measures aimed at facilitating the reintegration of minors into society is also highlighted, in light of the impact that the crimes they have committed have had on them. Therefore, these modes of reparation include measures in the area of education and vocational training, along with sustainable job opportunities that allow the promotion of an active and economic role of the minors in the society[37].

4.2.2.3. Compensation measures

Regarding compensation measures, it can be said that, although minors are mentioned as a group with special conditions and especially protected, there is no differentiated approach in relation to measures of this nature to which they may be entitled. Thus, in the Lubanga case, TC I has addressed the question of compensation for children under the age of 15 who are victims of forced recruitment,

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Tribunal Europeo de Derechos Humanos y de la Corte Interamericana de Derechos Humanos. https://www.redalyc.org/journal/282/28264622027/html/.

36 ICC, 2012, *Trial Chamber I, Decision of 7 August 2012, ICC-01/04-01/06-2904*, § 79.

37 Idem.

stating that this form of reparation should only be considered when: (a) the economic damages are sufficiently quantifiable; and (b) the circumstances of the case and the available funds make it feasible, so that the amount allocated can be appropriate and proportional to the damages suffered. For TC I, the damages that can be object of economic reparation are only the following: (a) physical harm, including the loss of ability to have children; (b) moral and intangible damages that result in physical, mental and emotional suffering; (c) material damages, including the loss of economic gains and employment opportunities, the loss or damage of property and any other form of interference with the individual capacity of working or that entails the loss of savings; (d) loss of opportunities (including those related to employment, education, and social benefits), the loss of status and the affectation of fundamental rights (in this respect, the ICC has especially emphasized that traditional discriminatory practices, such as those based on gender, should not be extended); and (e) costs of professional, medical, psychological, or social assistance services, including, where relevant, the assistance to minors suffering from HIV and any other sexually transmitted disease[38].

TC I have also highlighted that reparation is not only limited to direct victims, (meaning, recruited minors or sexually abused girls), but it should also include their parents and their community. Therefore, to establish an adequate compensation, the gender and age of the victims should be taken into account and should therefore objectively evaluate the impact of the commission of these crimes in all its aspects[39].

However, despite recognizing all these elements in relation to the compensation of minors (considering their special needs, the comprehension of their condition of vulnerability, and the devastating effects of being victimized at an early age), TC I does not establish a differential rule for its determination (like, for example, a minimum standard). This is coupled with the existing normative gap on this matter in the ICC Statute and its complementary instruments. As

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38 ICC, 2012, Trial Chamber I, Decision of 7 August 2012, ICC-01/04-01/06-2904, § 79.

39 Idem.

a result, the amount of compensation to the victims (including minors) ultimately depends upon the will of the judges in the case. This problem is partially addressed in the Al Mahdi case, whose reparation order specified certain relevant factors for determining the compensation to minors, recognizing the loss of childhood as a moral harm that must be repaired in this manner (2017). To this end, TC VIII proceeded to calculate the compensation based on the indemnification awarded by the Eritrea-Ethiopia Claims Commission in a case with a similar factual basis[40].

4.2.2.4. Symbolic reparation measures

As in the Inter-American Court of Human Rights (IACtHR), the ICC recognizes the importance of symbolic reparation measures, adopting its own approach. Thus, although TC I (2012) does not provide in the Lubanga case a specific section for symbolic reparation measures, some of these measures are mentioned in the sections on reparation modalities, including: (a) reuniting the minors with their families; (b) reconstructing the social fabric of the community; (c) reconstructing the historical memory of what occurred; and (d) collecting the traces left in the territories by the international crimes committed. Moreover, within the section on other reparation modalities, it is stated that convictions issued by the ICC, as well as the imposed sentences, constitute symbolic reparation measures because

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[40] All of this in contrast with the judicial decisions of the IACtHR and ECtHR, where there is a development in the jurisprudence regarding the protection of minors based on the progress of the cases decided there. However, neither of the two tribunals has managed to establish a differentiating factor in practice, repeating the pattern of issuing reparations based on the crime committed against them, and not based on the differentiating factors specific to the type of victim that condition the way harm is experienced, and thus the consequences and impact it causes. Vid. case of Velásquez Rodríguez v. Honduras, *Indemnización Compensatoria* (Art. 63.1 *Convención Americana sobre Derechos Humanos*), Decision of 21 July 1989, Series C Nº. 7. 26 and IACHR case of Fornerón e hija v. Argentina, *Fondo, Reparaciones y Costas*, Decision of 27 April 2012. Series C No. 242. 212.

they usually have great relevance for the victims, their families and communities.

In the same sense, TC I stresses that a wide dissemination of the conviction can contribute to raising awareness about the perpetrated violence, and thus prevent the commission of future crimes, including the forced recruitment of children under 15 years of age to actively participate in hostilities. TC I also states the need for: (a) symbolically repairing the social shame felt by the former child soldiers; and (b) preventing future revictimizations, especially when they have suffered sexual violence, torture and other inhumane and/or degrading treatment during the recruitment.

Subsequently, in the reparation order in the Ntaganda case (2021) TC VI has placed emphasis on the relevance of hearing the victims in order to declare reparation measures, which in this case implies acquiring awareness of their desire not to be repaired through: (a) symbolic measures that lack pragmatic effects; or (b) short-term and long-term unsustainable measures. This calls into question the efficiency of symbolic reparations, because generally, they lack practical effects[41].

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41 In contrast, the IDH Court has adopted more visible symbolic measures, like a public pardon and the erection of monuments, with a high impact in cases such as the massacres of *El Mozote* and *Barrios Altos*. Nevertheless, as the ICC, it lacks a solid doctrine focused on the reparations specific to children, leaving a gap in the differentiated attention to underage victims. On the other hand, the ECtHR presents a different perspective centered around the concept of equitable satisfaction, where the judicial recognition of the violations is considered sufficient as symbolic reparation. This perspective has received criticism for limiting itself to monetary compensation and omitting more comprehensive reparations, as evidenced by the case of the Bangladeshi child migrants in Malta. In contrast with the ICC and the IACtHR, the EctHR seems to prioritize a formalistic model, leaving behind differential approaches and measures with a greater social impact. All of this highlights the need for international tribunals to develop specific guidelines and more inclusive approaches to ensure effective symbolic reparations, particularly for vulnerable groups such as children Vid. IACHR case of Masacres de El Mozote y lugares aledaños v. El Salvador, *Fondo, Reparaciones y Costas*, Decision of 25 October 2012. Serie C No. 252 and IACHR, 2001, Case of Barrios Altos v. Perú, final decisión of

4.2.2.5. Collective reparation measures

Collective reparations refer to diverse forms of reparation involving a particular community or group that share certain characteristics. With respect to these types of reparations, the ICC has highlighted the importance of community members being the fundamental pillar in the design of reparation measures[42].

In its decision on the principles of reparation in the Lubanga case (2012), TC I has underlined that collective reparation measures are difficult to apply to ex-child soldiers because they are not a cohesive group and are frequently in conflict with their communities. Nonetheless, despite these problems, TC I ended up supporting the adoption of such collective measures in the interest of promoting the social reintegration of ex-child soldiers. Furthermore, for TC I, these types of reparations should focus on the communities to which the minors belong, since: (a) it is not possible to identify them all as a collective; and (b) it is an offense to generalize the way in which each child lived this experience and the trauma suffered as a result of the violence endured[43].

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14 March. San José, Costa Rica: IACHR. Recovered from. Vid. also: Tapia, L. E., 2024, 26 October. Malta endangered the rights of minor aged migrants who suffered discrimination by being detained, resolution in TEDH. Diario Constitucional. https://www.diarioconstitucional.cl/2024/10/26/malta-vulnero-los-derechos-de-migrantes-menores-de-edad-que-sufrieron-un-trato-discriminatorio-al-ser-detenidos-resuelve-el-tedh/.http://www.corteidh.or.cr/casos.cfm. Vid. also: Tapia, L. E. (2024, 26October). Malta endangered the rights of minor aged migrants who suffered discrimination by being detained, resolution in TEDH. Diario Constitucional. https://www.diarioconstitucional.cl/2024/10/26/malta-vulnero-los-derechos-de-migrantes-menores-de-edad-que-sufrieron-un-trato-discriminatorio-al-ser-detenidos-resuelve-el-tedh/.

42 In contrast with ICC jurisprudence, the IACtHR has limited itself to pointing out that victims may sometimes be recognized as a group due to the gravity of the harm. Meanwhile, the ECtHR has emphasized that the community is directly related to socio-legal evolution, and thus, States should not go against it.

43 ICC, 2012, Decision of 7 August 2012, Trial Chamber I, ICC-01/04-01/06-2904, § 79. https://www.icc-ICC.int/sites/default/files/CourtRecords/CR2012_07872.PDF

In the Ntaganda case, TC VI has also ordered collective reparation measures, such as the construction of community centres for the victims, along with individual measures, such as compensation for psychological harm. In this way, and unlike TC I in the Lubanga case, TC VI has affirmed that collective reparation measures (understood as actions directed towards a particular community) can coexist with individual reparation measures, as a holistic and multifaceted response to the various harms suffered by the victims, and in particular, the forcibly recruited boys and the girls victim of sexual abuse and slavery.

More recently, TC IX has clarified in the reparation order in the Ongwen case (2024) that only collective reparation measures would be applied due to the large number of direct and indirect victims, the multidimensional damages suffered and the need to able to implement the adopted measures. Consequently, TC IX has exclusively focused on two types of reparation measures: (a) those of rehabilitation; and (b) those symbolic or collective satisfaction measures aimed at the community. For TC IX, the latter have an important transformative value because they seek to address the meaning and cultural understanding of violence, thus confronting structural barriers that lead to the stigmatization of victims[44].

Likewise, TC IX considers it necessary to give priority as follows: in the first place, to the direct or indirect victims who, due to their vulnerability, need urgent assistance, secondly, to the directly vulnerable victims, thirdly, to the remainder of the vulnerable victims and lastly, to the non-vulnerable victims. This new order is the result of: (a) the problems experienced in applying the prioritization criteria adopted in the Ntaganda case where there is a substantial number of direct or indirect victims (an argument also accepted by the TFV); and (b) rejecting that the damage suffered by some of the different categories of victims is greater, more important or more significant.

This prioritization therefore rejects the position of the victims' representation, which, after consultation with their constituents,

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44 ICC, 2024, Trial Chamber IX, Reparations Order, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-2074, 28 February, paras. 658–660.

concluded that the prioritized categories should include families caring for minors, as well as children born in captivity (in the same sense, the Office of Public Counsel for Victims (OPCV) has stated that within the people that face conditions requiring urgent medical assistance, are kidnapped minors such as soldiers and children born in captivity)[45].

4.2.3. The treatment of the special needs of minors by the Trust Fund for Victims in application of its welfare mandate

The TFV, as an independent organism of the ICC, has a dual function: (a) a reparation mandate that seeks the implementation of reparation orders issued by the ICC after a conviction has been entered by the relevant Chamber; and (b) an assistance mandate, that intends to support all victims and their families, that have suffered physical, psychological, or material harm as a result of crimes within the ICC jurisdiction. It is important to mention that the TFV provides this assistance even in the absence of a conviction, thus, covering a wider range of victims than those who may participate in the ICC criminal proceedings.

Under this latest mandate, the TFV has launched important initiatives in several countries. Thus, in September 2020, the TFV launched a Project in the capital of the Central African Republic (CAR), Bangui, to support the most vulnerable victims and their families, focusing on those that had suffered sexual abuse during the armed conflict[46]. The program includes, among others, the Access to: (a) medical assistance related to sexually transmitted diseases; (b) food security and nutritional support; (c) psychological assistance and education; (d) housing; and (e) financial assistance to launch productive activities[47].

Likewise, between 2008 and 2017, the TFV developed in the RDC the first phase of an initiative to assist victims, which has had 58,439

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45 Ibid., p. 279.
46 TFV, 2004, Central African Republic.
47 TFV, 2004, Mandate.

direct beneficiaries in Ituri and North and South Kivu. Subsequently, in 2020, the second phase started, which is expected to have 20,000 beneficiaries and focuses on: (a) supporting the physical rehabilitation of victims of mutilation and survivors of sexual abuse and gender-based violence; (b) assisting with psychological rehabilitation; (c) encouraging productive activities; and (d) peace and strengthening reconciliation in victimized communities through "non-violence".

It is not apparent, however, that the SCSL has adopted a differentiated approach to assisting and providing reparations to minors, except in cases of victims of sexual violence and/or gender-based violence. This is in stark contrast with the treatment received for the special needs of minors in the reparation orders issued by different ICC TCs in the cases of Lubanga, Ntaganda and Ongwen.

4.4. The treatment of the special need of the elderly in the reparation orders issued by the International Criminal Court and in the exercise by the Trust Fund for Victims of its assistance mandate

4.4.1. The treatment of the special needs of the elderly in the reparation orders issued by the International Criminal Court

4.4.1.1. Reparation orders previous to the Ongwen case

The ICC reparation orders issued prior to the Ongwen case have not prioritized the elderly when determining damages for criminal conduct. The Lubanga case, concerning the mass recruitment of children by the UPC, did not have specific considerations for the elderly, beyond reparations attributable to the relatives of the recruits[48].

Similarly, in the Al-Mahdi case, characterized by the collective reparation measures, there are no specific references to the elderly beyond the general call to prioritize those most affected[49]. Although, a variety of meausres have been implemented to help victimized popu-

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48 ICC, 2015, Order for reparations, ICC-01/04-01/06-3129-AnxA.

49 ICC, 2017, Trial Chamber IM Reparations Order, The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15. https://www.icc-ICC.int/sites/default/files/CourtRecords/CR2017_05117.PDF

lation groups in Timnbuktu, their efdectivness has been questioned. Furthermore, although in this case attempts were made to create memorialization committees based on different population groups (including one for elder men and one for elder women)[50], according to Morgan, these measures have not been adequately implemented due to their limited material scope and time-related problems.

For its part, in the reparation order in the Katanga case (2017) there are specific mentions of the killing of elderly during the Bogoro attack, but no specific reparation measures are established for this group (only the killing of several elderly people is mentioned)[51]. It is, therefore, a new mention to the members of this population group, which does not go beyond recognizing that they were victims of the conflict.

Moreover, although the Ntaganda case mentions the elderly as a group in need of special treatment. it is just a brief reference that is limited to associating them with other population groups who may also face obstacles to their effective participation in the reparations process. These groups include persons with physical or psychological care needs, persons with disabilities, the elderly, victims of sexual and gender-based violence, victims that have lost their home or that are experiencing financial hardship, children born of rape and sexual slavery, and demobilized soldier children[52]. Nevertheless, the reparation order does not explain how this priorization system would be applied.

However, the reparation order does not explain how this prioritization system would be applied, since TC IX focused on the Report submitted in October 2020 by expert witness Sunneva Gilmore. The Report does not address in depth the problem of the special remedial needs of the elderly, making, for example, only a passing reference

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50 Lostal, M., 2021, Implementing reparations in the Al Mahdi case, Journal of International Criminal Justice. https://doi.org/10.1093/jicj/mqab064

51 ICC, 2014, Trial Chamber II, Decision on Sentence pursuant to Article 76 of the Statute, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, para. 47.

52 ICC, 2021, Order for reparations: situation in Democratic Republic of Congo, The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-2659, para. 46 et. seq.; 93; 214.

to: (a) their difficulties in participating in the proceedings; and (b) their problems in being granted the protective measures contained in rules 17 and 86 of the ICC RPP.

The above shows the importance of a more proactive role in prioritizing the elderly in the orders and programs of reparations.

4.4.1.2. The reparation order in the Ongwen case

The reparation order in the Ongwen case differs in many aspects from the rest of reparations orders issued by the ICC[53]. Thus, although the high number of victims who participated in the proceedings had generated higher expectations about the realization of justice and the implementation of protection and reparation measures[54], already from the trial it was observed that these expectations would not be fulfilled because only very limited protection measures were adopted for the victims. This generated great disappointment, which would later also extend to the reparation order[55].

As a result, the legal representatives of the victims and the OPVC sought special recognition for those victims that, due to their age, had suffered severe harm[56] and needed urgent assistance[57].

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53 Massidda, P., Akwenyu, J., & Moffett, L., 2024, Victims' perspectives on participation in the Ongwen Case: Justice in victims' interests. Journal of International Criminal Justice, Advance online publication.

54 Gade, T., 2021, Reparation in the Ongwen case: The impact of the International Criminal Court's Access to Justice Project in Uganda. Aarhus University. https://pure.au.dk/portal/files/219763068/Gade_Reparation_in_the_Ongwen_case.pdf

55 Sehmi, A., 2022, Emphasising socio-economic narratives of truth, justice and reparations in The Prosecutor v. Dominic Ongwen, The International Journal of Human Rights, 26(6), 1083–1106

56 For example, in reports A/00432/16, A/00559/16 of elderly people in need of support who were abandoned during Lord's Liberation Army takeovers of villages in Uganda. Reparations Order in the Ongwen case, par. 402.

57 ICC, 2021, Registry Submissions on Reparations in the Ongwen Case, Annex II, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-1919-AnxII, 6 December; ICC, 2021, Annex II: Public Registry Submissions on Repara-

The particular risky condition they had for being alone, the injuries caused by the vulnerable situations they experienced and the lack of capacity to protect or care for themselves led to the request to prioritize these groups)[58]. In fact, the ICC Registry and the government of Uganda supported the request with their observations, although these were limited to the elderly whose relatives had been killed or forcibly recruited in the conflict.

Similarly, the *amicus curiae* presented by the International Center for Transitional Justice, in 2010, highlighted the importance of protecting the elderly, something which was also reflected in the Acholi community's request for them to be prioritized.

However, despite all these requests and allegations, the reparation order issued by the TC IX in 2024 only puts an emphasis on the risk to life and material vulnerability[59], without specifying if old age constitutes a material factor for these purposes.

4.4.2. Treatment of the special needs of the elderly by the Trust fund for Victims in application of its welfare mandate

The TFV has been working with different local and international organizations. However, none of them recognizes that the elderly deserve a differentiated treatment[60]. This way, despite supporting the physiological medical procedures, they do not recognize the specific difficulties that the medical treatment of aging bodies has. Further-

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tions in the Ongwen Case, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-1919-AnxII, 6 December.

58 ICC, 2023, Notification of 832 administrative decisions from the Trust Fund for Victims' Board of Directors pursuant to Trial Chamber II's Ninth Decision on the TFV's administrative decisions on applications for reparations and additional matters, ICC-01/04-01/06-3558-Red.

59 ICC, 2024, Trial Chamber IX, Reparations Order, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-2074, 28 February. https://www.icc-ICC.int/sites/default/files/CourtRecords/0902ebd18078e195.pdf

60 TFV, 2024, First update report on the implementation of reparations for former child soldiers and for victims of the attacks, including for victims in urgent needs, in the Lubanga and the Ntaganda cases, ICC-01/04-01/06-3568-Red.

more, their vocational support is focused on the education and creation of income opportunities, and not on the generation of a vital minimum for those who, if they had not suffered the material and labor shortages resulting from the conflict, would presumably have the right to receive a pension[61].

The problem is even greater if we take into account that, as has been widely recognized, many elderly people have lost their support networks during situations of armed conflict or large-scale violence in their regions. This is how, in countries like Uganda, there is the paradox that elders retain the duty to implement certain measures to regenerate the social fabric and reintegrate ex-combatants into tribal structures (through restorative justice processes such as *mato oput*)[62], but they do not have the necessary material or psychological support to repair their own physical, emotional and/or moral wounds. Consequently, the limited recognition of the needs of the elerly, principally through their inclusion in community working groups, such as those established in the implementation of reparation meauseres in the DCR[63], is especially concerning, considering that: (a) up to 89 % of the elderly in this country have suffered some type of abuse[64]; and (b) public policy studies have reported that they suffer from very high rates of extreme poverty[65].

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61 TFV, s. d., Uganda., Retrieved April 27, 2025, from https://www.trustfundforvictims.org/en/locations/uganda

62 Jjuuko, D., 2024, Engaging Survivors in Transnational Justice Governance: Global, National and Local Perspectives From Uganda's Post LRA Insurgency, Doctoral dissertation, University of Massachusetts Boston, ProQuest Dissertations & Theses Global.

63 McCleary-Sills & Mukasa, 2013, External Evaluation of the Trust Fund for Victims programmes in Northern Uganda and the Democratic Republi of Congo: Towards a Perspective for Upcoming Interventions, International Center for Research on Women.

64 Gedfew, M., Getie, A., Akalu, T. Y., & Ayenew, T., 2024, Prevalence and types of elder abuse in Sub-Saharan Africa: A systematic review and meta-analysis. Journal of the National Medical Association, 116(3), 292–301.

65 Atim, L. M., Kaggwa, M. M., Mamum, M. A., Kule, M., Ashaba, S., & Maling, S., 2023, Factors associated with elder abuse and neglect in rural Uganda: A cross-sectional study of community older adults attending an outpatient clinic, PLOS ONE, 18(2), e0280826.

4.4.3. The absence of a focus on the special needs of the elderly as a common element of the reparations orders issued by the International Criminal Court and the action of the Trust Fund for Victims: the striking contrast with the recognition of these needs in the Inter-American Human Rights System

Both the ICC reparations orders and the TFV action reflect a worrying absence of specific measures directed to meeting the special needs of the elderly. Despite some decisions include generic references to their particular vulnerability, no clear guidelines or concrete programs have been established to specifically address these needs. Therefore, the elderly continue to receive no response commensurate with the damage suffered or the difficulties they face to access the justice and assistance mechanisms.

This omission is even more serious if one considers the high number of elderly who are victims of violence (up to 89 % in countries like Uganda), the rupture of their support networks as a consequence of armed conflicts and the crucial role that they play in the reconstruction of the social fabric, being fundamental in the processes of reconciliation and transmission of historical memory.

This situation contrasts notably with the recognition that the Inter-American System of Human Rights (IASHR) has affected since 2015 of: (a) special living condition of the elderly; and (b) the need to guarantee their fundamental rights and to adopt appropriate reparation measures in case they are violated. All this in a context of accelerated aging in Latin American and the Caribbean.

As a result, the Organization of the American States (OAS) has adopted the Inter-American Convention on Protecting the Human Rights of Older Persons (2015), which is the first binding instrument at a global level focused exclusively on this population group. The Convention establishes specific obligations for State parties, such as guaranteeing the right to health social security, autonomy and active participation in society, promoting a dignified and inclusive life for older persons.

On this basis, the Inter-American Commission of Human Rights (IAComHR) has issued several thematic reports that address the situ-

ation of the elderly, highlighting challenges in areas such as poverty, social exclusion and lack of access to essential services. The IACom-HR also emphasizes the importance of States implementing public policies that integrate an intersectional approach, recognizing how factors such as gender, ethnicity and disability can exacerbate the vulnerability of the elderly. This is essential to addressing the structural inequalities faced in the region.

The Convention also urges States to guarantee the integration of the elderly into political, social, economic and cultural life, and ensuring opportunities for participation in decision-making that affects their well-being. This implies not only the recognition of their rights, but also the strengthening of their agency and protagonism, promoting a positive image of aging as a productive and valuable stage.

In light of the above, the IACtHR established in the Pablete Vilches et al. vs. Chile (2018) important standards in the protection of the rights of the elderly, by declaring the international responsibility of the Chilean State for the violation of the rights to life, personal integrity and health of Sergio Poblete Vilches: an elderly man that died in a public hospital due to negligent medical care and the lack of adequate measures to protect his life and integrity.

The IACtHR has highlighted the social vulnerability of folder people and the need to adopt differentiated and adequate measures for the satisfaction of their fundamental rights. Consequently, for the IACtHR, when designing reparation measures for the elderly it is necessary to take into account their special needs as a result of their special vulnerability due to their age.

Thus, the gap between the differential treatment of the elderly in terms of reparations in the Inter-American system and the absence of such treatment both in the reparation orders issued by the ICC and in the assistance measures adopted by the TFV show the need to rethink them in order to explicitly design measures that specifically take into account the needs, rights and well-being of the elderly.

5. Conclusions

Age is a determining factor in the vulnerability of two groups of victims of international crimes: minors and the elderly. In this situation the OECD has highlighted the importance of adopting a comprehensive approach that considers all factors affecting their well-being, while ECLAC has pointed the precariousness faced by the elderly due to the lack of access to adequate pensions and essential services. The lack of protection of these groups not only impacts their development and quality of life but also perpetuates cycles of inequality that extend over time. Moreover, their situation is significantly aggravated when they are victims of international crimes, which is why a differentiated approach on reparations for minors and the elderly is necessary.

However, the special needs of minors and the elderly have not been adequately considered by ICJ so far. No, or very limited, attention has been paid to them by the ICTY, the ICTR and the hybrid tribunals established in the first decade of the XXI century (the SCSL, the ECCC and the STL). Save for the ECCC, the rest have lacked an effective reparation mandate, resulting in the absence of concrete measures specifically designed for these vulnerable groups. Moreover, despite their reparation mandate, the ECCC has also failed to develop this function.

In the case of the elderly, their situation has been even more marginalized, since specific non-judicial mechanisms have not even been developed in the respective transition processes to address their needs; mechanisms that have existed for minors in some of these processes, as shown in the final report the TRC of Sierra Leone (although the application of reparation measures has been limited and restricted to a small number of victims). In the case of the elderly, their situation is even more marginalized since no specific non-judicial mechanisms have been developed in transitional processes to deal with their needs. These are mechanisms that have existed for minors as demonstrated in the final report of the TRC of Sierra Leone (even if the application of reparation measures had been limited and restricted to a reduced number of victims).

This situation reflects a significant gap between the normative recognition of age-based vulnerability in international law and its lack of consideration when designing and implementing effective reparation measures when children and the elderly are victims of international crimes. Thus, their attention has been limited to fragmented public policies of short scope.

The ICC Statute has established a robust framework for reparations, which does not, however, expressly provide for measures that take into account the special vulnerability of minors and the elderly. However, the reparations orders in the Lubanga, Ntaganda and Ongwen cases (in which most of the victims were minors, mainly former child soldiers) have consolidated fundamental principles such as the prevalence of the best interests of the child, as well as highlighting the importance of psychosocial rehabilitation, access to education and the need to address the stigmatization often suffered by those who have suffered international crimes.

It is not observed, however, that the TFV has so far adopted a differentiated approach to assistance and reparation for minors, unless they are victims of sexual and/or gender-based violence, which contrasts significantly with the content of the aforementioned reparation orders.

The situation is much more complex in relation to the elderly because, despite the formal recognition of age-related vulnerability provided for in the ICC Statute and its complementary instruments, both the reparation orders of the ICC and the action of the TFV show the absence of specific reparation measures aimed at addressing their special needs. Apart from general statements, no clear criterion or concrete reparation or assistance measures have been adopted to date.

The seriousness of the problem (especially in relation to women, the vast who do not have a pension, or whose pension does not cover their basic needs) is evident if one considers: (a) the high percentage of the elderly who are victims of violence (up to 89% in countries such as Uganda); (b) the loss of their support networks due to armed conflict (which hinders their access to specialized medical care and sustainable livelihoods); and (c) their essential role in the process-

es of reconciliation and reconstruction of the social fabric and the transmission of historical memory.

This situation contrasts significantly with the recognition that the Inter-American System of Human Rights has made (including the 2015 Convention, as well as the reports of the IAComHR and the decisions of the IACtHR) of the special circumstances of the elderly and the need to guarantee the satisfaction of their fundamental rights and to provide adequate measures of redress for their violations. All this in the framework of a context of pronounced aging of the population in Latin America and the Caribbean.

This contrast reflects, without a doubt, the need for: (a) rethinking the reparation orders issued by the ICC and the welfare measures adopted by the TFV in order to specifically address the special needs and welfare elderly; and (b) reverse the disparity on the treatment of minors and the elderly in the ICC reparation orders, despite the fact that age as a factor of vulnerability manifests itself in both population groups. Consequently, for the ICC to fulfill its role from the perspective of the special reparation needs of minors and the elderly, the ICC Chambers and the TFV must: (a) continue to strengthen the minor reparation system; and (b) begin to establish clear guidelines and concrete programs to specifically address the special reparation needs of minors and the elderly. In doing so, they should consider the following criteria:

1. It is not enough to leave the content of reparation orders and assistance measures to the disciplinary interpretation of judges or TFV officials because, although valuable considerations have been given in relation to minors, a set of principles has not yet been established that must be applied in a binding manner in situations and cases where there are victimized minors or the elderly (which generates the risk of future reparation orders and assistance measures that make their basic needs invisible, or unjustifiably emphasize certain measures).
2. In relation to minors, reparation must be comprehensive in nature and prolonged over time, including measures in areas as diverse as Access to health and physical and mental rehabilitation to the development of their training and orientation

and integration in the labor sphere (which can sometimes also involve Access to financing to start up and develop productive activities). However, each of these measures (as well as those of a pecuniary nature and those of a collective symbolic nature) must be adjusted to the socio-cultural and personal context of the victims, in order to ensure their positive and lasting impact. Additionally, it is necessary to evaluate whether the minors have a safe family environment where their rights are truly guaranteed, since on many occasions they are revictimized in their private sphere in which case the provision of foster homes where they can live while they complete their training and integration process in the workplace, may be necessary.

3. With respect to the elderly their needs are substantially different from those of minors, so that unimpeded access to physical and mental health services (including medicines), as well as the guarantee of a sustainable income over time (as compensation measure), are indispensable for them (especially if they do not receive pensions or these are insufficient to cover their basic needs). In this sense, it is important to bear in mind that suffering crimes of this nature at an advanced age leaves permanent consequences that impede the normal development of old age and severely limit their ability to work (often leading to their incapacity), which is why they need special care and income over time. The situation is even more serious when violence and conflict have destroyed their socio-family support networks, so that there is no one to take care of them. These situations of extreme vulnerability are very frequent and cannot fail to be addressed by the reparation orders of the ICC Chambers and the assistance measure of the TFV.

4. Considering its complementary nature of the ICC reparation orders, the assistance mandate of the TFV should be extended to address the special needs of minors and the elderly in the ICC situations and cases, since so far it has only focused on the particular conditions of minors who are victims of sexual or gender-based violence. It is important, in this regard, to develop differential criterion and programs designed specifically for these two groups of victims given their special vulnerability,

since each child or elderly person who is part of them has suffered different types of victimization that require attention.

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9. Comparative Analysis of the National Treatment of the Special Needs of Minors in Terms of Reparation: With Special Attention to the National Systems of Argentina, Chile, Colombia, Spain, Guatemala and Peru

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1. Introduction

One of the areas in which national jurisdictions have demonstrated the most visible development within the framework of transitional justice has been in the design and implementation of reparation measures. However, despite the regulatory advances achieved, many of these measures continue to be built upon a generalized conception of victims, without adequately considering the specificities of certain population groups that present special conditions of vulnerability.

Among these, minors, including children and adolescents, occupy a central position because crimes committed within the framework of armed conflicts or in contexts of systematic violence have been shown to impact them differentially. They interrupt their vital

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developmental trajectories, compromise their physical and mental health, and have long-term impacts on their access to fundamental rights such as education, identity, and family life.

Therefore, although these impacts have led to the formal recognition of minors as a particularly vulnerable category, this recognition has not always materialized in reparation measures tailored to their real and specific needs. It is, therefore, essential to analyze the scope of the measures adopted by national jurisdictions regarding reparations for minors who are victims of international crimes.

In this context, this paper conducts a comparative analysis of the policies and programs implemented in six countries that have experienced episodes of systematic violence or internal armed conflicts: Argentina, Chile, Colombia, Spain, Guatemala, and Peru. To do so, it focuses specifically on five key aspects of reparation measures: health, education and access to employment, economic compensation, symbolic measures, and collective reparations.

On the basis of the analysis of these categories, we seek to identify the scope, structural limitations, and, in particular, the extent to which these measures respond to a differentiated approach that takes into account the specific needs of minors. This not only allows for a critical assessment of the impact of the reparations designed to date, but also offers key inputs in order that we can reflect upon pending challenges and good practices that could be replicated in other contexts.

Ultimately, ensuring effective and child-orientated reparations is not only a legal obligation, but also an ethical and political imperative in building more just, inclusive, and sensitive societies for those who have experienced violence since childhood.

2. Reparations measures in the field of health

2.1. First Approach

The right to health, which is understood as the enjoyment of the highest level of physical, mental, and social well-being[1], constitutes a fundamental pillar in the guarantee of human rights and is enshrined in various international instruments[2]. In the particular case of minors, the United Nations Convention on the Rights of the Child (CRC) reinforces this commitment by recognizing their right to the highest standard of health and corresponding rehabilitation services and urging States to adopt measures to ensure their full physical and psychological recovery in an environment that fosters their dignity and self-esteem[3].

The impact of armed conflict on the health of minors is devastating and multifaceted, and ranges from permanent physical injuries and disabilities to sexually transmitted diseases and profound emotional distress[4]. In addition, its consequences transcend the personal sphere, and generate scars that impact the families and communities to which the affected minors belong. However, all these effects often take second place behind the harm suffered by adults[5].

Within this context, specific reparation measures for minors must focus on ensuring their full recovery, through guarantees of access to physical and mental health services. This requires eliminating barriers to access, particularly in rural areas, and ensuring the availability of specialized medical care that responds to their special needs[6].

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1 Constitution of the World Health Organization, 22 July, 1946.

2 As provided under Article XI of the American Declaration and Article 10 of the Protocol of San Salvador, which emphasize the obligation of States to preserve health through sanitary and social measures.

3 Refworld, The global data base of ACNUR regarding legislation and policy, 2024a, June 10, Convention of the Rights of the Child.

4 UNICEF, 2022, Paris Principles, Operational Handbook, P. 51

5 UNICEF, 2018, Guaranteeing the rights of minors within transitional justice mechanisms. P. 49

6 Victims Unit, 2023, 28 June, Rehabilitation.

2.2. Argentina

In 2007, the Argentine Secretariat of Human Rights approved, by Resolution No. 003/2007, the National Plan for Comprehensive Support and Assistance to Victims and Witnesses of Criminal Acts Committed by the State during the Military Dictatorship. This led to the creation in 2011 of the Dr. Fernando Ulloa Assistance Center for Victims of Human Rights Violations[7].

The Ulloa Center provides comprehensive assistance to victims of serious human rights violations committed during the course of state terrorism. It also receives direct consultations from victims, their families, and indirect victims, providing information, guidance, and emotional support strategies. It also offers support to victims and witnesses in judicial proceedings, coordinating actions with various state actors to provide support[8].

Current regulations approve the establishment of Medical Boards to assess the damage suffered by victims and determine whether or not they are eligible for the treatments offered by the Ulloa Center. However, significant and revictimizing delays have occurred, due exclusively to administrative procedures because according to the legally established evaluation procedure, the medical boards will consist of state health services at the national, provincial, or municipal levels, and these would have difficulty in constituting them. Likewise, there are considerable delays in the scientific legal accreditation of the assessed damages, resulting from the lack of detailed supervision by the Ulloa Center, lack of accreditation of the causal link, informed consent, adequate consideration of the etiology and development of the potential beneficiary's symptoms, and a marked difference in the quality of the Interdisciplinary Reports depending on the provider[9].

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7 *Decreto 141 de 2011, 21 enero.*

8 *Defensor del pueblo de la nación, 2019, Informe al Relator Especial para la Promoción de la Verdad, la Justicia, la Reparación y las Garantías de No Repetición, República de Argentina, Pag. 9.*

9 *Defensor del Pueblo de la Nación, 2017, Informe anual, Pag. 35.*

2.3. Chile

The Specialized Child and Adolescent Protection Service of Chile is an agency responsible for protecting, repairing, and restoring the rights of minors (including their families) who have been seriously threatened or violated[10]. This service provides care programs focused on specialized clinical diagnoses, case follow-up, expert assessments, outpatient reparation interventions, strengthening and bonding, alternative care, and adoptions[11].

The programs described above involve the use of foster homes and residences that function as centralized entities for children, with the aim of interrupting and in this way repairing the violations suffered by minors. However, the country's sociopolitical and economic reality, the lack of empathy and/or ownership by the institution's staff, and the limited infrastructure for the project's sustainability, among other circumstances, suggest that the differential approaches established in the entity's internal regulations for its operation have no political relevance and are currently unsustainable[12].

2.4. Colombia

By including various mechanisms for the reception of minors as part of the health reparation measures, it is possible to affirm that Colombia has a system focused on family, social, and labor reintegration of minors who have been subjected to forcible recruitment. In particular, the Colombian Institute of Family Welfare/*Instituto Colombiano de Bienestar Familiar* (CIFW/ICBF) has developed a program for minors under 18 years of age that not only provides health care to those who have been "disengaged" but also provides multiple

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10 *Fundación Amparo y Justicia, 2024, 29 noviembre, Ley 21.302, Crea el servicio nacional de protección especializada a la niñez y adolescencia.*

11 *Del Congreso Nacional, B, s.f, Biblioteca del Congreso Nacional.*

12 Lobos, G., Burgos, C., & Ulloa, C., 2023, *Percepción de los profesionales interventores de organismos colaboradores del Servicio Mejor Niñez sobre la vulneración de los derechos de niños, niñas y adolescentes en comuna centro-sur de Chile: una mirada desde el contexto de pandemia, Revista Costarricense de Psicología, 42(1),* 81-96, doi.org/10.22544/rcps.v42i01.05

economic and legal benefits that facilitate their reentry into civilian life[13].

However, when a minor attains the age of 18 years, they are transferred to the program implemented by the Agency for Reincorporation and Normalization (ARN), in which the minor is no longer considered "disengaged" but rather "demobilized"[14].

Highlighting the conceptual difference between each of the terms is crucial to understanding the disconnect between the actions of the entities, because although the Agency also provides psychosocial care focused on generating a safe space for recovery, all individuals, whether they are those responsible for their involvement or minors forced to become combatants, receive the same treatment and are beneficiaries of the same measures. This means that the differential approach used with minors by the CIFW/ICBF disappear completely when they reach the age of majority[15].

2.5. Spain

In Spain, the main development in health reparation measures for minors is seen with respect to victims of various types of sexual violence. This development is generated through three essential legal instruments, namely: (a) the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Abuse (2007); (b) Organic Law 8/2021; and (c) Organic Law 10/2021. The first, also known as the Lanzarote Convention, establishes two essential axes for the construction of a differential approach in favor of minors. On the one hand, it recognizes the existence of additional protection measures for minors simply because they are minors, who are the responsibility of their families, the State, and society. On the other hand, it recognizes the serious danger that all forms of child sexual abuse pose to the health and psychosocial development of mi-

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13 *Red de Desarrollo Social de América Latina y el Caribe (ReDeSoc), s.f, Reparación integradora para niños, niñas y jóvenes víctimas de reclutamiento ilícito en Colombia.*

14 Ídem.

15 Ídem.

nors[16]. However, despite the above, there is no reference to reparations in the aforementioned international instrument.

Organic Law 8/2021 on the Comprehensive Protection of Children and Adolescents from Violence (LOPIVI for its Spanish initials) contains a comprehensive approach to child protection, encompassing awareness-raising, prevention, early detection, and reparation measures for minors who are victims of sexual violence. It also places significant emphasis on developing the capacities of professionals who work with and for minors, as well as on their participation. Specifically, Chapter VI, relating to the health sector, establishes specific protocols for the care of these types of victims, including the detection and prevention of crimes[17].

Finally, Organic Law 10/2021 establishes the implementation of a model based on the experience in the United States with the *Children's Advocacy Centers* and in Iceland with the *Barnahus* model[18]. This model consists of having a coordinated space based on the one-stop shop principle, meaning that minors can find in one place all the services they may require as victims of sexual violence, including police, child protection, legal, and health services[19]. In this way, as Save the Children (2019) points out, by placing the child at the center of the intervention and having all resources under one roof, the Children's Homes (Barnahus) prevent children from having to relive sexual abuse through multiple statements and, in turn, offer a friendly and respectful environment for their needs[20].

Although they do not constitute a form of reparation, the objective of these spaces is to expedite judicial processes and minimize revictimization, in order to avoid any further harm to minors[21].

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16 *Consejo de Europa*, 2007, *Convenio del Consejo de Europa para la protección de los niños contra la explotación y el abuso sexual, Preámbulo.*

17 *Ley Orgánica* 8, 2021, *4 junio, de protección integral a la infancia y la adolescencia frente a la violencia.*

18 *Ley Orgánica* 10, 2021, *6 septiembre, de garantía integral de la libertad sexual.*

19 Save The Children, 2019, Barnahus.

20 Save The Children, 2018, Barnahus: *bajo el mismo techo.*

21 Save The Children, 2019, Barnahus.

2.6. Guatemala

In 2003, as a result of government initiative, the National Reparations Program was created with the aim of providing reparations to victims of serious human rights violations during the internal armed conflict that the country had experienced between 1960 and 1996. This Program adopted a policy whose fundamental pillars are psychosocial reparation and rehabilitation measures. The design of these measures requires taking into account the special circumstances of victims in light of their vulnerability due to age, ethnicity, and gender[22].

The main measures adopted as part of the Program are: (a) diagnostic assessments of the victims' main psychosocial problems (which take into account the individual and collective responses developed by victims of human rights violations); (b) comprehensive psychosocial care with priority given to vulnerable groups; (c) educational measures and recovery of the victims' histories; (d) recognition of the occurrences and responsibility for them; (e) the creation of spaces enabling the discussion and sharing of experiences; and (f) the search for spaces for access to justice, the promotion of mental health in the community, and the training of community and institutional health personnel[23].

The Program also aims at promoting the rehabilitation of persons with disabilities, paying attention not only to their physical conditions but also to the socioeconomic aspects of the victims in order to foster and support their social integration[24].

There is, however, no specific mention directed at minors, as the latter are included within the general group of victims of certain crimes targeted by the Program[25]. Furthermore, health services have been very limited in practice, with no differential factors being considered among victims at any time. In addition, due to the increasingly limited budget, the Program lacks the facilities and health-

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22 PNR, 2005, *Política Nacional de Resarcimiento (libro azul)*

23 Ídem.

24 Ídem.

25 PNR, 2010, *Política Nacional de Resarcimiento*, pp. 31-32.

care personnel necessary to implement the initially proposed policy. Therefore, victims' files are frequently not processed, which prevents them from obtaining redress in the health field[26].

As an exception to this situation, a small mobile clinic has been set up in the community of Sepur Zarco, which focuses specifically on women and girls due to the nature of the crimes committed there. This is in compliance with carrying out a reparation ruling issued in an ordinary criminal case by Guatemala's High-Risk Court A[27].

2.7. Peru

In Peru, the greatest development of reparation measures in the health sector has been achieved through the recommendations issued by the Truth and Reconciliation Commission (TRC), whose final report provides for the creation of a Comprehensive Reparations Program/*Programa Integral de Reparaciones* (CRP/PIR), which includes a specific section on health reparations[28]. The inclusion of this section is due to the fact that, according to the TRC, there were high rates of psychosomatic problems, depression, addictions, increased domestic violence, child and youth gang membership, and physical after-effects among the population affected by the internal armed conflict (all as a result of the fighting during the conflict and the measures that the civilian population had to adopt to protect themselves from harm)[29].

The measures proposed by the CRP/PIR mainly include: (a) recovery through community-based intervention founded upon the cultural characteristics of the victims and their specific needs (it is suggested that this measure be connected with other CRP/PIR measures so that reparation is comprehensive and includes "the psycho-

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26 Martínez, D & Gómez, L., 2019, Reparations, Responsibility & victimhood in Transitional Societies, *Las Reparaciones para víctimas del conflicto armado en Guatemala: Una promesa por cumplir*, P. 25

27 *Sentencia* C-01076-2012-00021 Of. 2º, Guatemala, 2016, 26 February.

28 *Comisión de la Verdad y la Reconciliación*, 2003, *Informe Final, Tomo IX (2.2), Programa Integral de Reparaciones.*

29 Ídem.

logical, family, physical, employment, and social participation dimensions"); (b) the reconstruction of community support networks, whose principal focus is the repair of the emotional damage caused to the victims; (c) the recovery of historical memory through emotional support for victims; and (d) the creation of community spaces for comprehensive recovery work for the population. All of these measures are developed in light of a new perspective on the use of free time and the development of crafts and other skills and resources useful to the population[30].

Regarding clinical intervention, the TRC has suggested that it would be advisable to apply successful national and international models for caring for people affected by violence, but always with the necessary adjustments in light of the characteristics of the communities and areas of the country involved. To this end, it is necessary to extend health care programs to rural and urban areas through coordination with local health providers, whether public or private[31].

With respect to mental health care, the TRC has recommended free care for CRP/PIR beneficiaries[32].

However, only in exceptional cases has it been considered that among the criteria to be taken into account for assessing the victims' situation be included criteria related to their characteristics and their relationship to the impact of violence (including those related to minors among the categories to be prioritized)[33]. Furthermore, aside from this exceptional situation, there are no differential measures in Peru for minors, despite the extensive development proposed by the TRC regarding reparations.

The International Center for Transitional Justice (ICTJ) has stated, for its part, that until 2013, "[…] the implementation of reparations in health care has been largely limited to registering victims

30 Ídem.
31 Ídem.
32 Ídem.
33 Ídem.

for Comprehensive Health Insurance"[34]. However, the guarantee of a right that all citizens enjoy regardless should not be considered a form of reparation for victims.

Finally, regarding mental health care, progress is significant but insufficient. As a result, although the Ministry of Health has created a Comprehensive Mental Health Reparations Plan, the hiring of trained personnel has increased, and the allocation of funds to regional governments continues, efforts remain insufficient for the number of victims seeking services[35].

2.8. Conclusions

The above analysis allows us to reach two major conclusions. First, all the countries analyzed concur on the strict need to provide comprehensive reparation to victims of crime. This extends beyond financial compensation to minors for the harm they have suffered, and includes other types of complementary benefits, particularly access to quality physical and mental health services. This seeks to offer satisfactory reparation tailored to the harm caused to each victim. Of particular note are the measures implemented in Peru and Guatemala to repair the emotional damage to victims through psychological care and attention.

Secondly, none of the countries has to date adopted a reparation policy clearly focused on addressing the special needs of victimized minors. Despite this, it is worth highlighting the adoption of certain measures, such as the creation of homes for minors who have been victims of crime in Chile, Colombia, and Spain. While their scope could have been much broader, the truth is that these types of measures have been specifically designed to address the particular needs of minors, avoiding contact between them and their perpetrators and facilitating the development of judicial proceedings without generat-

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34 *Centro Internacional para la Justicia Transicional*, 2013, *Reparaciones en Perú, El largo camino entre las recomendaciones y la implementación*.

35 Ídem

ing double victimization (especially for those at younger ages, as they are susceptible to deeper and longer-lasting psychological impacts).

3. Remedial measures in the area of education and employment

3.1. Initial Approach

Education is a fundamental right for minors. It transcends academic instruction to become an essential means of social, cultural, and intellectual development. However, when viewed as a measure of reparation, it takes on a different meaning. It is recognized as a response to the acts of violence suffered and the State's responsibility for failing to adequately protect the victims. In this way, as Correa points out, education as reparation not only meets immediate needs but also explicitly recognizes the violations suffered and seeks to address the specific aspirations of the victims[36].

In addition to facilitating access to academic training through scholarships, subsidies, and validation programs, education as reparation can include structural reforms, such as the reconstruction of educational infrastructure or the introduction of curricula that promote reconciliation, historical memory, and the values of peace. These efforts not only contribute to inclusion and social cohesion but also foster resilience and opportunities for socioeconomic development for minors, who often face cycles of poverty exacerbated by conflict[37].

In this context, education stands as a bridge to a productive and dignified life, strengthening civic confidence and the capacity of victimized minors to become active agents of their own future and that of their communities.

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36 Correa, C., ICTJ, 2016, Helping Victims Overcome Human Rights Violations Through Education.

37 Ramírez-Barat, C. & Duthie, R., International Center for Transitional Justice, 2015, Education and transitional justice. Opportunities and challenges for peacebuilding, Pág.12.

3.2. Argentina

Although the regulations specifically aimed at providing reparations to victims of human rights violations during the dictatorship do not provide for measures aimed at victims' education and job placement, the situation is different in the National Program for Reparation and Strengthening of Labor Skills for those affected by the crimes of Human Trafficking and Exploitation.

This Program seeks to reduce the condition of labor vulnerability faced by victims (many of them minors) of the crime of human trafficking for sexual or labor exploitation. To this end, it facilitates access to educational programs, scholarships, and training to promote their access to the labor market. It also provides a basic monetary allowance that is non-remunerative[38].

The Program is divided into two main areas. The first seeks institutional connection and coordination to provide support, comprehensive assistance, and psychosocial assistance to victims. The second seeks to connect them with programs, projects, or training programs so that they can obtain the necessary training for stable reintegration into the labor market[39].

However, despite the level of impact on the capacity for educational development and active participation in the workplace being particularly high among minors, Argentine legislation does not provide for measures specifically aimed at addressing their special needs in terms of education, guidance, and access to employment.

3.3. Chile

Although there are certain institutions that can offer study scholarships for victims, and particularly for their children or grandchildren, such as the Reparation Scholarship that arises through the

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38 PNR, *Gobierno de Argentina*, 2024, *Reparación de Derechos y de Fortalecimiento de las Competencias Laborales para los afectados por los delitos de Trata y Explotación de Personas.*

39 Ídem.

Valech Law[40], there is no institution and/or entity in Chile whose main purpose is to provide courses, training or professional and educational advice that facilitates the real integration into society of minors who have suffered the consequences of crime.

3.4. Colombia

Colombia has various training programs for those minors who have been victims of crime. These include those offered by the National Commission for the Protection of Childhood and Adolescents (CIFW/ICBF for its Spanish initials) for demobilized child soldiers and those offered by the Agency for Reincorporation and Standardization/*Agencia para la Reincorporación y la Normalización* (ARS/ARN) for those who have already turned 18. Both the CIFW/ICBF and ARS/ARN programs offer specific educational programs so that minors (and those who have already reached the age of majority) can resume their educational activities[41]. In addition, both entities also offer certified vocational and technical training programs, which facilitate the reintegration of victims into their families, communities, and society as a whole[42].

On occasion, the academic and professional offerings offered by these institutions can problematic[43]. However, not only will minors who were victims of forced recruitment be over the age recommended for the resumption of their studies, but they will also have skills and abilities acquired during their experience in the armed conflict that are very different from those offered by the vocational training programs offered by the aforementioned institutions. This means that minors will have shorter learning periods to be trained in jobs that were previously unknown to them, which makes the economic

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40 *Ministerio de Desarrollo Social y Familia*, s.f., *Red de Protección Social: apoyos y beneficios del Estado*

41 *Desarrollo Social de América Latina y el Caribe* (ReDeSoc), s.f., *Reparación integradora para niños, niñas y jóvenes víctimas de reclutamiento ilícito en Colombia.*

42 Ídem.

43 Ídem.

and social integration of victimized minors even more difficult, given their limited experience[44].

3.5. Spain

The above-mentioned Organic Laws 8/2021 and 10/2021 establish certain measures in the field of education regarding minors who are targets of sexual violence. However, these are not reparation measures, but rather measures to prevent and raise awareness of this phenomenon.

Thus, Organic Law 8/2021: (a) seeks to promote accessible, equal, inclusive, safe, violence-free, and quality education to guarantee the development of all minors; (b) suggests providing affective-sexual education that prevents any conduct involving sexual violence against minors; and (c) urges educational institutions to closely monitor hiring processes and adhere to the necessary protocols to identify and address cases of sexual violence[45].

For its part, Organic Law 10/2021 establishes that he Spanish education system will include, within its principles of quality, the integration of content based on coeducation and feminist pedagogy on sexuality education and gender equality and affective-sexual education for students[46].

Furthermore, it seeks to implement information and prevention campaigns, particularly in the digital and communications fields. However, apart from these "preventive" measures, there are no provisions regarding reparations for minors who have been victims of sexual violence beyond the general recognition of their right to reparation[47].

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44 Ídem.

45 *Ley Orgánica* 8, 2021, *4 junio, de protección integral a la infancia y la adolescencia frente a la violencia.*

46 *Ley Orgánica* 10, 2021, *6 septiembre, de garantía integral de la libertad sexual.*

47 Ídem.

3.6. Guatemala.

The National Reparations Program/*Programa Nacional de Reparaciones* (NRP/PNR) includes educational measures as one of its pillars. As designed, these measures sought to facilitate access for victims and their close relatives to affordable formal education programs. To this end, plans included expanding existing scholarship programs, establishing partnerships with public and private institutions, and facilitating university and higher education[48]. However, none of the above has had a material impact on the victims because none of the intended mechanisms have been created[49].

The situation is even more serious because the reparations ordered by Guatemalan ordinary criminal courts have placed special emphasis on this point. Thus, for example, in the Sepur Zarco case, the judge ordered the establishment of a bilingual secondary school that would guarantee the right to education for girls, adolescents, and women[50].. Similarly, in the Molina Theissen case, the Inter-American Court of Human Rights (IACHR) ordered that, among the reparation measures to be adopted by Guatemala, the Ministry of Education was included the creation of a scholarship named after Marco Antonio Molina Theissen that would allow access to the various educational levels available in the country[51].

Unfortunately, none of these initiatives, as valuable as they could have been in theory, have been implemented in practice due to a lack of political will.

Something similar has happened with the NRP/PNR pillar relating to assistance for victims' economic activities to repair the harm suffered as a result of the crime. To this end, the PNR provides initially for the financing of such productive activities, provided they are

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48 NRP/PNR, Guatemala, 2010, *Política Nacional de Resarcimiento*, p. 21.

49 Martínez, D & Gómez, L., 2019, Reparations, Responsibility & victimhood in Transitional Societies, *Las Reparaciones para víctimas del conflicto armado en Guatemala: Una promesa por cumplir,* Pág. 31

50 *Sentencia* C-01076-2012-00021 Of. 2º, Guatemala, 2016, 26 February.

51 *Corte Interamericana de Derechos Humanos, Sentencia del 3 de julio de 2004, Caso Molina Theissen v. Guatemala, Reparaciones y Costas,* párr. 82 & 83, p. 43

considered sustainable and are accompanied by regional, national, and/or international marketing plans. Persons with disabilities, not minors, are the only population group for whom priority assistance is established[52].

However, in practice, this pillar of the NRP/PNR has only been implemented during a single presidential term due to a lack of political and budgetary support. Furthermore, during this period, although the focus was on financing small cooperatives formed by victims to present self-sustaining microenterprise projects (with the NRP/PNR offering technical advice for project development in addition to financing), the truth is that, despite the high expectations generated, only six of the projects presented were ultimately supported financially, and their results were not subsequently monitored or evaluated[53].

3.7. Peru.

According to the TRC, the internal armed conflict in Peru caused the loss of educational opportunities for young people who had to interrupt their studies due to the climate of insecurity in their communities. Some had to abandon their studies to support their families in the face of the death or disappearance of their parents, others due to the displacement they suffered when they had to leave their places of origin in search of safety, and still others due to dedicating themselves to the defense of their communities by joining the Self-Defense Committees[54].

As a result, according to the TRC, the affected minors, who at the time of reparation are already adults, find themselves in a situation of inequality with respect to their peers. This is why the State is obligated to provide them with reparation that should contain three

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52 NRP/PNR, Guatemala, 2010, *Política Nacional de Resarcimiento*, pp. 16-17.

53 Martínez, D & Gómez, L., 2019, *Reparations, Responsibility & victimhood in Transitional Societies, Las Reparaciones para víctimas del conflicto armado en Guatemala: Una promesa por cumplir*, Pág. 31.

54 *Comisión de la Verdad y la Reconciliación*, 2003, *Informe Final, Tomo IX (2.2), Programa Integral de Reparaciones.*

elements: (a) exemption from tuition and fees for all educational levels, including subsequent payments such as those related to graduation certificates and academic degrees; (b) the creation of a comprehensive scholarship program for higher education in national or international institutions (victimized minors would compete among themselves for available scholarships), which should also include the corresponding pre-university preparation in the event they are necessary; and (c) adult education, which, in harmony with the National Literacy Program, should provide special and tailored programs to allow victims who were unable to complete their primary and/or secondary studies due to the internal armed conflict[55].

Although the CPR/PIR initially included these three elements and considered those who interrupted their studies, as well as their children, to be beneficiaries of these measures, the modification made to the CPR/PIR in 2001 excluded the children of direct victims, unless the latter were missing or deceased. For this reason, as Guillerot (2019) points out, many of the victims over 40 years of age preferred to give up their rights in favor of their children[56], which limited the positive impact that these measures could have had on the insertion of victims into the workplace.

3.8. Conclusions

The main factor in common among the majority of the jurisdictions analyzed is the lack of educational and productive opportunities as part of reparations programs for victims (including victims of international crimes committed in armed conflicts and in situations of systematic or generalized violence that have occurred in the countries analyzed).

Although Argentina, Chile, Colombia, and Spain have some programs or laws focused on policies of social interest, these do not specifically address reparations to victims, or when they do, they do not

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55 Ídem.

56 Guillerot, J., 2019, *Reparaciones en Perú: 15 años de reparación*, Victimhood In Transitional Societies.

focus on the special needs of victimized minors. Instead, as happened in Argentina and Spain, they emphasize victims of certain crimes such as sexual or gender-based violence, or human trafficking.

In contrast to the foregoing, however, Guatemala and Peru, countries that have suffered from prolonged internal armed conflicts, have adopted valuable initiatives regarding training and access to employment for victimized minors. However, in both cases, a lack of political will has prevented the desired results from being achieved. This demonstrates the importance of ensuring that the institutions responsible for implementing reparation policies for minors have the greatest possible degree of political and budgetary autonomy.

That has not been the case, however, in either of these two countries. This is why, despite the fact that important educational, guidance, and labor integration measures have been theoretically designed with a focus on minors, most have not been implemented in practice, or have only been implemented to a very limited extent. This is due to the lack of political will of the current leaders, who have decided to cut the budget allocations allocated to these programs and restrict support to the institutions responsible for implementing them. All of this has greatly weakened their capacity for action and significantly reduced the number of victims who have, in the end, been able to access this type of reparation.

4. Compensation Measures

4.1. Initial Approach

Compensation as a reparation measure seeks to recognize and alleviate the suffering of victims through proportional and adequate financial compensation. This compensation should not only cover material losses but also attempt to repair more difficult-to-quantify damage, such as the disruption of family life, loss of educational opportunities, or deterioration of social status[57].

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[57] UNICEF, 2018, *La garantía de los derechos de los niños, niñas y adolescentes en los mecanismos de justicia transicional,* Pág. 53

This mechanism, which can take the form of single or multiple cash payments or monthly pensions, has the potential to offer both symbolic recognition of the harm suffered and economic relief [58].

However, its implementation faces significant challenges, such as resource limitations, the need to ensure confidentiality, and questions of gender and other community tensions that may arise from its distribution. Thus, while it can provide significant immediate relief for victims and their families, its impact varies. While some find it a necessary support, others experience negative consequences such as self-destructive emotional reactions or family conflicts, especially when it is not accompanied by psychosocial support and appropriate financial guidance[59].

4.2. Argentina

Among the various provisions regulating economic compensation or indemnification in Argentina, for the purposes of this article, the provisions of Law 25.914 (2004) stand out in relation to compensation for persons born during the deprivation of liberty of their mothers, or who, as minors, remained detained in relation to their parent, provided that either of them was detained and/or disappeared for political reasons, either at the disposal of the national Executive Authority and/or military courts[60].

The law also establishes a series of specific criteria to determine who is eligible for compensation:

1. For those born during the detention and/or captivity of their mother, proof of birth date prior to December 10, 1983, and proof, by any means, that their mother was detained and/or disappeared for political reasons at the disposal of the national

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58 UNICEF, 2022, Paris Principles, operational handbook, Pág. 374

59 Queen's University Belfast Human Rights Centre, 2016, Submission by QUB Human Rights Centre on reparations issues pursuant to Article 75 of the Statute, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC.

60 *Ley* 25.914, 2004.

Executive Authority, and/or military courts and/or military areas, regardless of her legal status.

2. In the case of minors born outside of prisons and/or captivity, establish by any means of proof that they had been there and that one of their parents has met the conditions required in Article 1 of this law.

3. A judicial ruling rectifying the identity of minors in the cases described in the second paragraph of Article 1. Those who, finding themselves in this situation and who have been fully and in good faith adopted, are exempt from submitting such a ruling; they must prove by any means the forced disappearance of their parents[61].

With regard to the amount of compensation, Article 4 of Law 25,914 (2004) establishes that a single payment shall be made equal to "TWENTY (20) times the monthly salary of Level A, Grade 8 agents of the National System of the Administrative Profession, Decree No. 993/91, t.o. 1995"[62]. Additionally, physical effects that aggravate the victims' suffering are taken into account provided that if, under the circumstances established in Article 1, the beneficiary has suffered serious or very serious injuries, as classified in the Penal Code, or has died, the benefit will be increased by fifty percent (50%), seventy percent (70%), and one hundred percent (100%), respectively[63]. Finally, the amount delivered will also be counted toward the beneficiary's retirement benefits.

In principle, there appears to exist within this legislation a differentiating factor regarding the special needs of victimized minors

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61 *Congreso de la Nación de Argentina*, 2004, *Ley* 25.914: establishing benefits for persons born during the deprivation of liberty of their mothers, or who, as minors, were detained by their parents, provided that either of the latter was detained and/or disappeared for political reasons, whether at the disposal of the National Executive Authority and/or military courts. Covers victims of identity theft; the requirements that must be met to qualify for the benefits of the law and the procedure for calculating compensation. See, in particular, Article 2.

62 Ibid., art 4.

63 Ibid., art 4 inc 1

to whom Law 25,914 (2004) applies, considering that a significant proportion of the victims of crimes committed by the State during the dictatorship were children or minors. However, at the same time, the same amount of compensation is applied to all victims, with the possibility of an increase only when the existence of injuries or the circumstances of the minor's death during the parents' detention can be proven.

4.3. Chile

In Chile, the recognition of the importance of providing reparations to victims who have suffered various types of violations through compensation measures has been legislatively approved. Bills have been passed legislatively recognizing, for example, compensation for those affected by state violence during social unrest[64].

Likewise, Law 19.123 of 1992, which seeks to comply with and follow up on the recommendations contained in the Report of the National Truth and Reconciliation Commission, provides for the provision of pensions to victims of state violence during the dictatorship of Augusto Pinochet[65].

It is therefore evident that the State recognizes its responsibility for human rights violations and considers that compensation should be proportional and appropriate in light of the seriousness of the events. This extends not only to individual victims but also to those who have been harmed collectively[66]. However, no differential treat-

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64 Collado, C., 2021, 20 *julio, Cámara aprueba proyecto que entrega indemnizaciones a víctimas del "Estallido Social", Cámara Diputados.*

65 Refworld, UNHCR's Global Law and Policy Database, 2024, 11 *febrero, Chile: Ley No. 19123 de 1990, Crea la corporación nacional de reparación y reconciliación, establece pensión de reparación y otorga otros beneficios en favor de personas que señala.*

66 Collado, C., 2021, 20 *julio, Cámara aprueba proyecto que entrega indemnizaciones a víctimas del "Estallido Social", Cámara Diputados.*

ment is observed in terms of compensation to address the special needs of victimized minors[67].

4.4. Colombia

Law 1448 of 2011, on measures for care, assistance, and comprehensive reparation for victims of the armed conflict, has recognized by the Colombian State the existence of an internal conflict within its territory and its responsibility to repair the damages caused by it. This constitutes a considerable advance in terms of eligibility for victims and types of reparation[68]. As part of the comprehensive reparation provided for each victim, Law 1448 provides a series of compensations based upon the type of crime (known as administrative compensation). For example, homicides and enforced disappearances entail payment of 40 times the current legal minimum monthly wage to be distributed among the victims' families[69]**.** However, as in the Chilean case, no differential treatment is provided for the amount of compensation to address the special needs of victimized minors.

4.5. Spain

Although various mechanisms exist in Spain to provide financial compensation to victims (as established in Law 35/1995 on the system of public aid for direct or indirect victims of intentional and violent crimes committed in the country), there is neither a comprehensive policy nor a specific public entity dedicated specifically to

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67 Particularly well-known in this regard is the case of Paul Schäfer, who, due to crimes such as torture, disappearances, and abuses within what was known as "Colonia Dignidad", was forced to give over $6 million to the victims under the supervision of the State Defense Council. See Ramírez, P., 2011, 23 mayo, *La negociación que entrega US$6 millones para indemnizar a las víctimas de Schäfer*, CIPER Chile.

68 Díaz-Gaviria, A. Y., 2016, Ley 1448 de 2011: Critical analysis of land restitution as a comprehensive mechanism for reparations, Repositorio Institucional Universidad Católica de Colombia, RIUCaC.

69 *Unidad para las Víctimas*, 2023, 21 June, Indemnification

ensuring that these measures are adequate, accessible, and tailored to the particular circumstances of each case. This particularly affects minors, since their special needs are not subject to differential treatment[70].

4.6. Guatemala

Although the main measure of reparation for victims in Guatemala is financial compensation, its regulations do not provide differential treatment for minor victims. Priority attention is given only to individuals whose disabilities prevent them from reintegrating into the workforce, regardless of their age[71].

Thus, the NRP/PNR Procedures Manual (2011) provides for a single amount of financial compensation depending on the type of crime. Thus, for victims of enforced disappearance or extrajudicial execution, the amount is $3,200 (which will be paid to their families), while for serious injuries or attempted crimes, the amount is reduced to $1,600[72].

These amounts are delivered per family when all the required administrative requirements are met, so, since in most cases they are large families, each of the beneficiaries (parents, children or siblings of the victims) end up receiving an average of 500 dollars per family member who disappeared or was extrajudicially executed. For the Guatemalan government this has a restorative nature[73]..

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70 *Ley* 35, 1995, 11 *diciembre, de ayudas y asistencias a las víctimas de delitos violentos y contra la libertad sexual.*

71 NRP/PNR, Guatemala, 2010, *Política Nacional de Resarcimiento*, pp. 16-17.

72 *Programa Nacional de Resarcimiento*, Guatemala, s.f., *Cantidad de beneficiarios por tipo de violación del* 2005-2014.

73 Martínez, D & Gómez, L., 2019, Reparations, Responsibility & victimhood in Transitional Societies, *Las Reparaciones para víctimas del conflicto armado en Guatemala: Una promesa por cumplir,* Pág. 31.

4.7. Peru

The economic compensation program included in the CPR/PIR is based on the two fundamental pillars proposed by the TRC: (a) respect for and guarantee of the victims' human rights; and (b) respect for their autonomy in defining and deciding their needs as citizens. Furthermore, as the TRC itself points out, "the need for financial reparation becomes more pressing due to the fact that the victims were, for the most part, from the poorest and most excluded groups in society."[74]

With regard to minors in particular, although no differential regime is provided for calculating the amount of their compensation given their special needs, they are granted beneficiary status in the following cases:

1. When they are relatives of fatal or missing victims, in which case they will be entitled to a pension until they reach the age of 18, which will be given to their legal guardian. The amount will be determined in accordance with civil inheritance law, although the victim's spouse has priority over their children.
2. When their birth is the result of rape, in which case they are also entitled to a pension until they attain the age of 18 years[75]..

4.8. Conclusions

The above analysis allows us to distinguish two groups of countries. On the one hand, Argentina, Colombia, and Guatemala have opted to create legal provisions that give rise to scaled compensation, that is, administrative financial compensation that, based on principles such as proportionality, is established by the government.

On the other hand, Chile, Spain, and Peru do not have an administrative reparations system. Accordingly, while there are certain specificities regarding the eligibility of victims and the types of state

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74 *Comisión de la Verdad y la Reconciliación, 2003, Informe Final, Tomo IX* (2.2), *Programa Integral de Reparaciones.*

75 Ídem.

support, they are limited to financial compensation ordered through court proceedings.

In addition, all systems share a common characteristic: the absence of differential treatment when determining the amount of compensation to address the special needs of minors. Even in Argentina, which is the only country in which such differential treatment is at least provided for in regulations, the impact in practice thereof is lost since Law 25.914 (2004) which includes this differentiation was enacted more than twenty years after the crimes were committed between 1976 and 1983.

5. Symbolic reparation measures

5.1. Initial approach

Symbolic reparations seek to provide children with meaning and recognition, allowing them to redefine their experience and project themselves toward a future filled with hope. The implementation of these reparations must consider individual and collective dimensions, ensuring that the proposed actions are culturally relevant and reflect recognition of responsibility by the State or other implicated actors[76]. Examples of these measures include public reconciliation ceremonies, the creation of memorials, traditional purification rituals, and the assignment of mentors to accompany minors in their reintegration process. These initiatives not only contribute to individual healing but also to the rebuilding of the social fabric, promoting community cohesion and understanding[77].

Symbolic reparation measures can take judicial and non-judicial forms, each with its respective advantages and disadvantages. Thus, while judicial mechanisms have greater deterrent value and strengthen international norms, non-judicial approaches tend to focus more on the specific needs of victims and local realities[78]. In any case, both

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76 UNICEF, 2022, Paris Principles, operational handbook, Pág. 367.
77 UNICEF, 2022, Paris Principles, operational handbook, Pág. 388.
78 Ibid., Pág. 362.

approaches must be aligned in order to provide justice to victims and ensure accountability for perpetrators, fostering changes in social attitudes and behaviors to prevent future violations[79].

In this way, symbolic reparations not only constitute an act of justice, but also an important tool for rebuilding trust in institutions and strengthening the resilience of minors, facilitating their integration and participation in a society that recognizes and values their rights[80].

5.2. Argentina

Presidential Decree 187 of 15 December 1983 created the National Commission on the Disappearance of Persons (CONADEP for its Spanish initials), which remained in effect until September 1984. This commission was created to: (a) investigate the serious human rights violations that had occurred repeatedly between 1976 and 1983; and (b) gather as much information as possible by searching for testimonies from survivors, family members, and perpetrators, as well as archives of facilities used as detention centers[81].

In carrying out its mandate, CONADEP conducted an inventory of reported disappearances and clandestine centers, classified the accounts, and analyzed all the information collected to reconstruct what happened. It issued a final report entitled "Nunca Más" (Never Again), which partially recorded the number of disappeared persons and clandestine detention centers[82]. All of this was understood in Argentine society as a means of reparation because it allowed the truth about what happened to be known, and thereby contributing to its non-repetition. Regarding minors, the disclosure of the facts made it possible to discover the names of the students who had been tortured and disappeared while still minors. Likewise, information

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79 UNICEF, 2022, Paris Principles, operational handbook.

80 Ídem.

81 *Defensor del pueblo de la nación, República de Argentina*, 2019, *Informe al Relator Especial para la Promoción de la Verdad, la Justicia, la Reparación y las Garantías de No Repetición*.

82 Ídem.

was provided about the stolen children and the context and purpose of these criminal practices[83].

To restore the rights of minors and their families, the National Commission for the Right to Identity (CONADI for its initials in Spanish) was created in 1992. Its activities focused on searching for the whereabouts of the children of the disappeared and of those born during the forced detention of their mothers, in order to restore their identities[84]. As a result, numerous victims (now adults) have been located and put in contact with their families of origin.

Likewise, monuments have been created in various parts of the country, such as the Memorial Park, which "contains a monument with five walls and thirty thousand plaques, of which eight thousand seven hundred eighteen bear names, in homage to those who disappeared and were murdered during the dictatorship[85]".

Similarly, those places that were used as centers of torture, murder, and rape have now been transformed into memorial sites. These sites today serve educational purposes and promote and defend human rights by generating a collective memory. Among the most emblematic sites that currently serve this purpose is the Memorial Space at the Navy Mechanics School (ESMA for its initials in Spanish). In this way, the ESMA, which between 1976 and 1983 was a clandestine detention center in which torture, forced disappearances of people and the thefts of newborn children were committed, among other serious human rights violations[86], has become a historical and cultural heritage. It has reparative content for the victims and is focused especially on minors whose identity and family unit were seriously affected.

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83 Ídem.

84 *Defensor del pueblo de la nación, República de Argentina*, 2019, *Informe al Relator Especial para la Promoción de la Verdad, la Justicia, la Reparación y las Garantías de No Repetición*, Pág. 2.

85 Ibid., Pág. 9.

86 Ídem.

5.3. Chile

Chile has a long history of transitional justice institutions that encompass various forms of reparation for the harm caused. Furthermore, the National Commission for Truth and Reconciliation/ *Comisión Nacional de Verdad y Reconciliación* (NCTR/CNVR) and the National Commission on Political Imprisonment and Torture/ *Comisión Nacional sobre Prisión Política y Tortura* (NCPIT/CNPPT) have proposed, in their reports, various possible measures of symbolic reparation with an inherently collective character. However, unlike in Argentina, information on how these proposals have materialized or how they might be maintained in the future is either nonexistent or not easily accessible[87].

5.4. Colombia

In regard to symbolic reparations, Colombia has implemented a series of legislative and administrative measures to compensate victims. Among these, the most notable are the Works, Projects, and Activities with Restorative Content/ *Trabajos, Obras y Actividades con Contenido Reparador* (WPARC/TOAR), which are currently being developed by the Special Jurisdiction for Peace / Jurisdicción Especial para la Paz (SJP/JEP) as a form of punishment for those considered most responsible for the international crimes committed during the armed conflict. In this way, the WPARCs/TOARs have a dual retributive and restorative nature.

Furthermore, some of the WPARCs/TOARs also have a clear symbolic component in their design, as is the case, for example, with the "Sowing of Life" Program. In initial implementation, this program provides that those most responsible for extrajudicial execu-

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87 López, M. F., s.f., *Reparación simbólica, trauma y victimización: la respuesta del Estado chileno a las violaciones de derechos humanos* (1973-1990), *Íconos, Revista de Ciencias Sociales*.

tions plant trees in certain geographic areas where the murders took place[88].

In any case, it is important to emphasize that to date hundreds of proposals for WPARC/TOAR of a private, mixed and public nature have been submitted[89]. Since there is no standardization of what can or cannot be considered as such, and particularly, since there is no guide and/or norm that regulates the resources under which they will be financed, vulnerabilities arise that are difficult to resolve.

5.5. Spain

Prior to the recent approval of Law 20/2022 on Democratic Memory (19 October 2022) Spain was characterized by the scarce, partial, and incomplete reparation and public memory policies adopted through legislation. A paradigmatic example of this situation is the maintenance for almost fifty years since the beginning of the transition process following the death of dictator Francisco Franco (who was in power between 1939 and 1975), of the legal effects of the resolutions issued by the repressive bodies of his dictatorship (the annulment of which was only provided for in the aforementioned Law 20/2022)[90].

In this context, although Law 52/2007 on Historical Memory contained certain initiatives for symbolic reparation aimed at acknowledging the victims' pain and strengthening that memory, it was far from providing for a comprehensive policy or a specific entity specifically charged with ensuring that these initiatives were effective, accessible, and appropriate to the specificities of each situation[91]. There is no doubt that this has prevented differentiated treatment for those

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88 Restorative system of the SJP/JEP began operating with the 'Siembras de Vida' Project in the Usme locality in Bogotá, s.f.

89 *Comisión Colombiana de Juristas*, s.f., *Observatorio sobre la* SJP/JEP.

90 Art. 3 *de la Ley* 52/2007 *sobre Memoria Histórica.*

91 Nuria, G. M., s.f, *Ley de memoria histórica española: Ley 52/2007, de 26 de diciembre*: Recognizes and expands rights and establishes measures in favor of those who suffered persecution or violence during the civil war and the dictatorship.

who were minors at the time of their victimization, for whom no symbolic measures designed to address their special needs have been adopted.

5.6. Guatemala

In Guatemala, it is possible to find certain symbolic reparation measures adopted on behalf of victims during certain presidential terms. For example, during the administration of Álvaro Colom (2008-2012), the compensation measures implemented by the NRP/PNR were accompanied by letters of apology addressed to the victims on behalf of the State[92]**.** Subsequently, during the administration of Otto Pérez Molina (2012-2015), the PNR launched a burial program for victims of the armed conflict, assuming the cost of the ossuary, the cemetery niche, and food for those participating in the burial ceremonies. It also offered psychological support to the victims' families[93].

This latter program should not, in any case, be confused with the work of the National Commission for the Search for Disappeared Children */ Comisión Nacional de la Búsqueda de Niñez Desaparecida* (NCSDC/CNBND), established to document the disappearances of mi-

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92 In fact, during this period, the PNR provided homes to the wives and children of some of the victims, although many of them were provided in an incomplete state. This gave rise to serious corruption scandals involving the funds budgeted for this purpose. See Prensa Libre,2013, 11 junio, "*Denuncias en Fonapaz suman Q19 millones.*"

93 However, although this program was theoretically led by the PNR, the truth is that those in charge of the exhumations and psychosocial support to the families of the victims were normally organizations such as the Human Rights Office of the Archdiocese of Guatemala (ODHAG), the Maya Saq b'e Center, the Mutual Support Group (GAM), the Utz K'aslemal Group, the Community Studies and Psychosocial Action Team (ECAP). This reflects how the victims of the conflict have greater confidence in civil society organizations than in state initiatives. See Impunity Watch, Guatemala, 2014, *Monitoreo de la Justicia Transicional en Guatemala, Tomo I, Derecho a la Justicia para las Víctimas del Conflicto Armado Interno.*

nors and search for their whereabouts[94]. This commission has compiled extensive documentation on what happened to minors. It has resolved 119 cases of missing children, promoted 70 family reunions, and initiated 49 exhumations in clandestine cemeteries[95]. The work of the NCSDC/CNBND has been highly relevant because one of the most common practices during the armed conflict was the forced disappearance of minors. The Commission has, therefore, been able to provide their families with the opportunity to finally know their whereabouts, which has also been accompanied, in most cases, with the necessary psychosocial support[96].

5.7. Peru.

As the TRC indicated in its final report, symbolic measures are always of great relevance because they represent recognition of the importance and severity of the harm caused to those who should have been protected by the State. They also have a pedagogical dimension by raising awareness about the events that occurred. They serve as a pivotal factor between truth-telling and reconciliation[97].

Among the measures of this nature proposed by the TRC, the following stand out: (a) the Peruvian State's express acknowledgment of the TRC's Final Report; (b) public apologies to the country by senior State officials; (c) public ceremonies of Explanation and Recog-

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94 Vid. *Procuraduría de los Derechos Humanos, Guatemala*, 2015, *Informe de supervisión del Programa Nacional de Resarcimiento.*

95 Although its work was extremely important, due to a lack of support and the abrupt cut in funding from the NRP/PNR, the NCSDC/CNBND disbanded shortly afterward. This left the search effort solely to humanitarian human rights organizations, without any governmental or political support. See Misión de las Naciones Unidas para la Verificación de los Acuerdos de Paz en Guatemala (MINUGUA). Informe de Verificación, El estado de cumplimiento de las recomendaciones de la comisión para el esclarecimiento histórico.

96 *Procuraduría de los Derechos Humanos, Guatemala*, 2015, *Informe de supervisión del Programa Nacional de Resarcimiento.*

97 *Comisión de la Verdad y la Reconciliación,* 2003, *Informe Final, Tomo IX (2.2), Programa Integral de Reparaciones.*

nition of the Truth; and (d) the change and redefinition of symbols of violence or human rights violations in the affected territories[98].

However, among all these measures, those presenting the greatest focus on minors are institutional actions in the education sector, such as renaming training centers (naming them after one or more victims) as a form of moral reparation. The foregoing carries importance since it is recognized that schools and colleges are an essential part of the identity of minors[99].

5.8. Conclusion

This analysis reveals a very poor development in the design of symbolic reparation measures in terms of a differentiated approach to the special needs of minors. Thus, even though the States studied have generally recognized the importance of symbolic measures in the construction of national historical memory and in the reconstruction of the social fabric impacted by violence (although, in the case of Spain, the existence of such recognition prior to the recent adoption of Law 22/2022 on Democratic Memory is highly controversial), only Guatemala and Peru have designed symbolic reparation measures based on a differentiated treatment for the special needs of minors (mainly through the creation of the NCSDC/CNBND and the renaming of educational institutions, respectively). Furthermore, the abrupt budget cuts to the NRP/PNR, which led to the gradual dissolution of the NCSDC/CNBND, demonstrates the weakness of being closely linked to the political will of governments in power and their willingness to allocate the necessary resources for their continued maintenance over the long term.

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98 Ídem

99 Ídem

6. Collective reparation measures

6.1. Initial approach

Collective reparations, which can be both material and symbolic, are ideal for addressing violations that affect not only individuals but also entire communities. Collective reparation is a fundamental right of groups, peoples, ethnic, and even political communities that have been subject to violations of collective rights, impacts on their social and cultural fabric, and the individual rights of collective members. They also entail mitigating the collective impact of the violation of individual rights[100].

In the case of minors, collective reparations must consider the family and community settings as spaces fundamental for the generation of transformative impact[101]. For example, education can be an important tool in this context, through the reconstruction of educational infrastructure, the provision of resources for ethno-education, and the strengthening of programs that respond to the specific needs of communities.

Likewise, collective reparations must be conceived as a rights-based political project, through which a dignified message is conveyed both in its design and implementation[102]**.** This approach involves ensuring the active participation of minors and their communities, by promoting their empowerment, resilience, and decision-making capacity.

6.2. Argentina.

For the Argentine State, the initiatives described in the previous section on symbolic reparations also constitute measures of collective reparation. Thus, the creation of the Memorial Space at the ESMA,

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100 *Gobierno del Estado Colombiano, Unidad para las Victimas*, s,f, *¿Qué es la reparación colectiva?;* International Center of Transitional Justice, 2009, The Rabat Report: The concept and Challenges of Collective Reparations.

101 UNICEF, 2018, *La garantía de los derechos de los niños, niñas y adolescentes en los mecanismos de justicia transicional,* Pág. 54.

102 Ibíd., pág. 44.

which has allowed this clandestine detention center (where extremely serious international crimes were committed) to be transformed into a center for culture and reparation of historical memory, is considered a form of collective reparation, as it aims at "the transmission of memory, education, and the promotion and defense of human rights, generating collective memory."[103]

Likewise, it considers that all reparation measures carried out entail prior acknowledgment by the State of its responsibility for the violations committed. In this way there is no doubt in the society as a whole about the State's acceptance of the serious human rights violations that occurred and its involvement in them[104].

However, there are many voices that assert inactivity of the State and even the deliberate decision not to include in criminal investigations actors who necessarily had a relationship with the commission of crimes against humanity that occurred (such as civil and political authorities and members of the hierarchy of the Catholic Church in Argentina)[105].

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103 *Defensor del pueblo de la nación, República de Argentina,* 2019, *Informe al Relator Especial para la Promoción de la Verdad, la Justicia, la Reparación y las Garantías de No Repetición,* p. 5.

104 Ídem.

105 Ídem.

6.3. Chile

In Chile, Law 19.123 of 1992 seeks, by means of public resources and through the efforts of government entities, to comply with and monitor the measures adopted to implement the recommendations contained in the Report of the National Truth and Reconciliation Commission[106]. However, in the absence of collective reparation measures in these recommendations, certain organizations, such as the Foundation for the Protection of Children Damaged by States of Emergency, have attempted to implement such measures, including those for children victimized during the Augusto Pinochet dictatorship.

In addition, it is worth mentioning the education and psychosocial support programs in conflict zones, or failing that, in communities that have been, and continue to be, traditionally affected. This is the case, for example, of the Tirúa Commune Project aimed at minors from the Mapuche community. Through this program, it has been possible to involve not only the minors, but also their families, local schools, and all members of the Mapuche Lavkenche community. This is because it was developed in three schools offering scholarships, academic remediation workshops, workshops where the rights-based approach was addressed, summer camps, as well as training aimed at strengthening the social fabric[107].

6.4. Colombia

In Colombia, it is worth highlighting once again the TOARs developed by the SJP/JEP because, although they have a substantially symbolic content, many of the reparation measures developed through them also have a collective nature. Of particular note in this regard

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106 *Refworld, UNHCR's Global Law and Policy Database,* 2024, 11 *febrero, Chile: Ley No. 19123 de 1990, Crea la corporación nacional de reparación y reconciliación, establece pensión de reparación y otorga otros beneficios en favor de personas que señala.*

107 *Educación y apoyo psicosocial en zona de conflicto, Fundación de Protección a la infancia dañada por los Estados de Emergencia,* s.f.

is the Casa Campesina project proposed by the Luis Carlos Pérez Collective Lawyers' Corporation, which aims to create a multipurpose space where perpetrators and victims can coexist.

According to the Corporation, the Casa Campesina project must include "temporary accommodation and food services, in a space of no less than one hectare, which also includes training and institutional support services related to the collection, processing, and marketing of agricultural products"[108].

However, as with all the WPARC/TOARs considered by the SJP/JEP, this proposal cannot have a broad symbolic and immaterial or collectively reparative content. This is because, if it were not materially sufficient, it would not be sustainable over time, and therefore, the reparation could not be considered comprehensive[109]. This is because, if it were not materially sufficient, it would not be sustainable over time, and therefore, the reparation could not be considered comprehensive. This creates significant difficulties because the Casa Campesina project is just one of many currently suffering from this problem. This is a situation exacerbated by the lack of guidelines or regulations governing how to finance implementation.

Furthermore, when designing WPARC/TOARs or other collective reparation measures, no specific approach is taken to address the special needs of victimized minors.

6.5. Spain

Contributions to collective reparation measures in Spain are practically nonexistent, given the rejection of the inclusion of collective victims in reparation processes. This is due, among other things, to the strict adherence to the European Commission Recommendation of June 11, 2013, on common principles applicable in all Member States to collective reparation mechanisms, which expressly states that population groups are not entitled to act as active subjects in

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108 *Propuesta TOAR desde las víctimas, Corporación Colectivo de Abogados Luis Carlos Pérez*, s.f.

109 Ídem.

such processes[110]. Although this Recommendation does not include a binding legal instrument[111], it has been essential in determining national reparations policy.

6.6. Guatemala

The primary victims of international crimes committed in Guatemala during the armed conflict were indigenous communities so, for the NRP/PNR, it was necessary to consider the importance of repairing the social fabric of the affected communities. Consequently, the PNR contemplates: (a) the celebration of the National Day of Dignity for Victims (25 February); (b) the creation of museums aimed at preserving historical memory and strengthening the dignity of victims (in fulfilment of this measure, a portion of the existing museum in the Palace of Culture was dedicated to exhibiting everything related to the internal armed conflict); and (c) the construction of monuments to dignify the sites where exhumations have been carried out, the communities of victims are located, or are sites of historical significance in the conflict[112].

One measure specifically designed to repair the damage caused to indigenous communities is the initiative to disseminate the "uses, customs, and technology of different cultures; compile and systematize the main cultural traits of the affected communities; recover community history based on the experience of the elders; and actions that promote multiculturalism and interculturality in Guatemala, as well as the recovery of the mother tongue"[113].

In light of the foregoing, it is pertinent to mention that among the measures that could possibly be considered collective, none are specifically designed in relation to minors who were disappeared or

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110 *Recomendación de la Unión Europea 2013/396 de la Comisión, 11 junio.*

111 *Tipos de legislación, Unión Europea*, s.f.

112 Martínez, D & Gómez, L., 2019, Reparations, Responsibility & victimhood in Transitional Societies, *Las Reparaciones para víctimas del conflicto armado en Guatemala: Una promesa por cumplir.*

113 PNR, Guatemala, 2010, *Política Nacional de Resarcimiento,* pp. 16-17.

violated. A widespread practice can be observed of obscuring the specific characteristics of each victim, overlooking differentiating factors, and attempting to adopt common reparation measures[114].

6.7. Peru

According to the CPR/PIR, collective reparation measures are measures focused on the "reconstruction of the social, institutional, material, and economic-productive capital of rural and urban families and communities affected by the violence"[115]**.** However, it is striking that the beneficiaries of the collective reparation measures provided for in the CPR/PIR comprise only two types of groups: (a) farming and indigenous communities as well as other population centers affected by the violence; and (b) organized groups of displaced persons who do not plan to return to their territories. Consequently, a number of sectors of the population having special needs (such as minors) have not been taken into account in the reparations program proposal prepared by the TRC[116].

However, other population sectors, such as women, have received differential treatment. Thus, the principles that inform the functioning of the CPR/PIR propose the adoption of a gender approach in all decisions made by the various territorial administrations in Peru. This is based on the recognition of the situation of disadvantage that exists between men and women when it comes to accessing all types of resources[117]. However, according to the Association for Human Rights (APRODEH for its initials in Spanish), only 15.4% of women beneficiaries of the CPR/PIR have perceived its measures as a form of reparation, and it is even considered that 47.2% of the entire pop-

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114 Ídem.

115 International Center for Transitional Justice, 2008, *Escuchando las Voces de las Comunidades: Un estudio sobre la implementación de las Reparaciones Colectivas en el Perú.*

116 *Comisión de la Verdad y la Reconciliación,* 2003, *Informe Final, Tomo IX (2.2), Programa Integral de Reparaciones.*

117 Ídem.

ulation of women victims are not even aware of the CPR/PIR[118]. Consequently, while the inclusion of a gender perspective in the CPR/PIR has represented progress in the protection of women's rights, it remains insufficient or ineffective, as its impact on victims is not perceived.

6.8. Conclusions

Collective and symbolic reparations are treated as if the former were a consequence of the latter. Thus, when designing symbolic reparation measures, it is assumed that they will have a collective and reparative impact on the social fabric.

In Colombia, it is possible to note reparation measures targeting a specific group that has been particularly affected by the armed conflict within the country, and is therefore in a particularly vulnerable situation. However, not all countries share this approach.

Thus, on the one hand, Chile and Spain completely ignore collective reparation measures and leave this task in the hands of humanitarian non-governmental organizations. On the other hand, Guatemala and Peru propose various initiatives that could be reparative in nature for certain groups selected based on their ethnic characteristics. However, they fall short in terms of: (a) identifying the victimized groups; and (b) by limiting reparation to the damage resulting from the crime suffered, instead of addressing its consequences on the social fabric of their communities.

Finally, Argentina bridges the gap between the two positions, since it attributes to symbolic reparations the responsibility of generating a collective reparative effect, without simultaneously seeking to establish reparations aimed at rebuilding the social fabric of the affected population groups.

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[118] International Center for Transitional Justice, 2008, *Escuchando las Voces de las Comunidades: Un estudio sobre la implementación de las Reparaciones Colectivas en el Perú.*

7. General comparative conclusion of the chapter on national measures and recommendations

Childhood is characterized as a particularly vulnerable period of life, which is even more so when it is a stage which experiences development within in a context of violence and serious human rights violations. This is the starting point for the different national jurisdictions analyzed when implementing reparation measures for minors.

However, there is no clear standard of protection. On the contrary, measures vary significantly and drastically according to the reparation policies of each country and their respective governments. This results in a lack of structure and a lack of awareness of the specific needs of the population in question.

Based on the foregoing, four key aspects are worth highlighting. In the first place, health reparation programs for minors have reflected an express and formal recognition of the impact that armed conflict and violence have on the physical and mental well-being of minors. However, various administrative and financial barriers continue to exist that hinder their implementation. For example, in Argentina, the Ulloa Center provides comprehensive assistance to victims of human rights violations, including psychosocial support, but faces delays in the accreditation process. Similarly, in Chile, the Specialized Protection Service for Children and Adolescents operates care programs, but their impact is limited due to structural problems. For its part, in Colombia, there are mechanisms for sheltering minors disengaged from armed groups, but the transition to the Agency for Reintegration and Normalization program upon the attaining of 18 years of age blurs the distinction between victims and perpetrators.

Secondly, with regard to measures related to education and access to the labor market, progress is even more precarious, as it is characterized by a lack of an approach differentiated in accordance with the specific needs of minors. Thus, while in Argentina, job reintegration programs have been developed for victims of specific crimes without any differentiation based on age, in Colombia, the CIFW/ICBF and the ARS/ARN provide training opportunities to minors affected by the conflict, without necessarily adapting this to their particular needs. Meanwhile, for their part, in Guatemala and Peru, although

some scholarship and educational access policies have been developed, their implementation has not been effective due to a disconnect between regulatory design and practical application.

Third, in regard to compensatory measures, the limitations are conspicuous, as most countries prioritize financial compensation for other population groups. Thus, in Argentina, Colombia, and Guatemala, tariff-based compensation schemes have been implemented, which do not, in any case, include differentiated treatment for minors. For their part, Chile and Spain, far from establishing a standardized system, attribute greater discretion to the will of the judicial authority, which has not resulted in the adoption of a differential approach given the particular circumstances of minors. Consequently, only minimal progress has been observed in Peru, where, in some sporadic cases, minors have been considered the primary beneficiaries of compensation.

Finally, with respect to symbolic and collective measures, a diffuse approach can be observed in regard to the needs of the population under study. Thus, in Argentina, the ESMA has become a memorial site with an educational component, while in Colombia, the SJP/JEP's WPARC/TOARs include initiatives with reparative content. Guatemala and Peru have also promoted symbolic measures such as the creation of the NCSDC/CNBND and the renaming of educational institutions, respectively, although their sustainability has depended on the political will of the governments in power. In contrast, Chile and Spain have shown more limited development in this area, with fragmented symbolic initiatives and without any medium- or long-term plan.

This analysis of the national systems studied shows that, while there has been progress in recognizing the need to provide reparations to minors who are victims of international crimes, significant gaps persist in the implementation of comprehensive and sustainable measures. As a result, the lack of a truly differentiated approach in most systems limits their capacity to respond to their specific needs, thus perpetuating barriers to effective access to justice and reparation. Furthermore, the scarcity of clear monitoring and evaluation mechanisms has made it difficult to adapt policies to the evolving needs of minors. Additionally, in many cases, the implementation of

reparation measures has been hampered by a lack of inter-institutional and international coordination, resulting in fragmented and ineffective responses.

Given this situation, the national jurisdictions under analysis should take into consideration the following aspects, so as to provide a model that is replicable in the international sphere:

1. Since the implementation of isolated and haphazard measures does not allow them to attain the primary objectives of reparation for victims, nor do they meet the specific needs of minors who have been victimized, it is necessary to develop a systematic, binding, autonomous, and comprehensive regulatory framework that establishes clear objectives for reparation for minors and provides the material, financial, and political resources to implement them. Furthermore, these programs must have a vocation of social reintegration, allowing minors to recover what they have lost most due to violence: the opportunity to develop their future.
2. Since a central challenge when providing reparation to minors is the lack of awareness of their specific and particular needs, it is essential to establish mechanisms for their participation in the definition and implementation of reparation measures, in order to guarantee their rights and meet their needs.
3. It is necessary to recognize that the effectiveness of reparation measures is closely related to the ability of States to generate harmonious coordination within themselves, among other states, and in their relationship with international organizations responsible for the protection of children's rights. Only in this way can coherence in the content and application of the various reparation programs be guaranteed.

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10. On the power of victims to trigger judicial review by the Pre-Trial Chamber of the International Criminal Court: special attention to the judicial review of the Prosecutor's decision to close the preliminary examination on the grounds that it would not be in the interests of justice to open an investigation

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1. Introduction

The Statute of the International Criminal Court (Statute or ICC Statute) included, among other proposals, a decisive role for victims in the proceedings before the International Criminal Court (ICC or Court). This marked a break concerning previous international criminal tribunals, such as those of Nuremberg and Tokyo after World

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War II, or those of Yugoslavia (ICTY) and Rwanda (ICTR) after the end of the Cold War[1].

Although the ICC Statute and the Rules of Procedure and Evidence (RPE) contemplate the possibility of victims intervening in the proceedings before the ICC when their interests may be affected, there are still limitations on their participation. This includes the preliminary examination phase, whose purpose is to determine whether the requirements to open an investigation are met.

Victims' participation at this stage depends upon several factors, one of which is the way the situation has been referred to the Court. The Statute provides for three procedural modalities for triggering the ICC's jurisdiction: (a) referral of a situation by a State Party (arts. 13(a), 14 and 53 of the ICC Statute); (b) referral of a situation by the Security Council (UNSC) under Chapter VII of the United Nations' Charter (arts. 13(b) and 53 of the ICC Statute); and (c) the Prosecutor *proprio motu*, based upon information about a crime within the jurisdiction of the Court (arts. 13(c) and 15 of the ICC Statute). In any of the three modalities, the Office of the Prosecutor (OTP) is the entity in charge of conducting the preliminary examination to decide whether to proceed with the opening of the investigation.

In cases of the initiation of the preliminary examination by referral by a State Party as per article 13(b) and 53 of the ICC Statute, or by the UNSC, as per article 13(c) and 15 of the ICC Statute, the decision of the OTP to open the investigation is final. This automatically triggers the notification provided for in article 18(1) to State Parties and to those who would normally exercise jurisdiction over the crimes committed in the situation under investigation. In cases of referral by the UNSC, this notification does not take place because article 18 of the Statute is not applicable.

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1 Vega, P., 2006, "*El Papel de Las Víctimas en los Procedimientos ante La Corte Penal Internacional: Sus Derechos y las Primeras Decisiones de la Corte*", (The Role of Victims in Proceedings before the International Criminal Court: Their Rights and the First Decisions of the Court), SUR - International Journal of Human Rights, No. 5, Pp. 19.

If the OTP decides not to open the investigation, there are two review procedures provided in article 53(3)(a) and (b). The first of these applies when the opening of the investigation is refused due to lack of jurisdiction or admissibility. This can only be triggered by the State Party that initially referred the situation to the OTP, in the case of an opening in the terms of article 13(b), or the UNSC, in the terms of its referral under article 13(c). Victims can participate in this procedure, but they have no power to initiate it and therefore depend on it being initiated by the State Party or the UNSC (Rule 107 RPP). If these entities decide not to request a review of the process, they have no procedural remedy against the decision of the OTP not to open an investigation.

The second procedure applies when the decision of the OTP to reject the investigation is based exclusively on reasons of prosecutorial discretion – that is, substantial reasons to believe that its opening would not be in the interests of justice, as established in article 53 of the Statute - and can only be initiated *ex officio* by the Pre-Trial Chamber (PTC). If the PTC decides to open the proceeding (for which it has 180 days) victims may participate, but they have no means to begin said proceeding on their own initiative, much as is established in the first proceeding (rule 109 RPE).

On the other hand, the ICC Statute and the RPE are silent on the issue of the PTC remaining entirely inactive or deciding not to initiate a review procedure. No reference to this issue appears in article 53(3)(b) nor in RPE 109. This silence renders it difficult to assess whether there is any procedural mechanism for victims to request the PTC to initiate the review.

On the other hand, in cases of *ex officio* opening of the preliminary examination by the OTP under articles 13(c) and 15 of the ICC Statute, the Prosecutor does not have the power to make the final decision to open the investigation but is required to request the authorization of the PTC to proceed. In these proceedings before the Chamber, victims have a recognized right to participate and submit observations (art. 15(3) ICC Statute and rule 47 RPE). However, when the OTP decides not to request the opening of the investigation in application of the criteria foreseen in rule 48 (which are the same as those

of art. 53(1) ICC Statute), the applicable provision is article 15(6), which reads as follows:

> If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence[2].

Under this provision, it appears that victims are limited to sending additional information and proof to the OTP, albeit they can argue on issues jurisdiction, admissibility, or interests of justice in order for the OTP to reconsider its decision. Ultimately the final choice is entirely within the purview of the Prosecutor. This not only fails to grant the victims any other tool to review the decision, but also means that no other organ of the Court is required to review the process. Clearly, this is a very different situation from what happens when the situation is referred to the Court by a State Party or the UNSC. Given this situation, a second question arises as to whether the Statute offers any possibility of action to victims to promote the review of the decision of the OTP by the PTC, at least when it is based exclusively on the principle of opportunity or prosecutorial discretion.

Ultimately, this memorandum aims to answer the following two research questions: (a) is it possible for victims to approach the PTC and request an *ex officio* review in the context of article 53(3)(b)? and (b) is it possible for them to do the same in relation to the Prosecutor's decision to close the preliminary examination under article 15(3)?

Both issues will be analyzed considering the ICC's system of sources under article 21 of the Statute and the Vienna Convention on the Law of Treaties' (VCLT or Convention) criteria for treaty interpretation, by first addressing the review procedure of article 53(3)(b), and then focusing on the interpretation of articles 15(3) and (6) of the ICC Statute.

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[2] ICC, 1998, "Rome Statute", Art. 15(6).

2. Analysis of the power of victims to request the PTC to initiate an *ex officio* review under Art. 53(3)(b) of the ICC Statute

The analysis of the raised question must be based on article 21 of the ICC Statute, which sets out the system of sources applicable to the ICC. This article reads as follows:

> 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.
> 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[3].

Thus, under article 21(1)(a), the Court must first refer to the Statute and the RPE when making any judicial determination, which in our case means interpreting article 53(3)(b) and rule 109 of the RPE.

2.1. The interpretation of Art. 53(3)(b) of the ICC Statute in the light of Art. 31 and 32 VCLT

Considering that the Statute is an international treaty, it is convenient to resort to the rules of interpretation of article 31 of the Vienna Convention on the Law of Treaties. The Convention includes

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[3] ICC, 1998, "Rome Statute", Art. 21.

three main criteria that must be applied in good faith: (a) a textual or literal approach; (b) a systematic or contextual approach; and (c) a teleological approach.

The textual approach can be understood as the way in which the treaty should be interpreted according to the most direct meaning of its terms, rather than interpreting them in any sort of abstract way. The systematic interpretation involves a logical and contextual study of the treaty, analyzing the preamble, articles, and annexes, paying attention to the different titles or chapters of the treaty to determine the function of the obligations within the complete legal text[4]. Finally, the teleological interpretation seeks to interpret any unclear provisions based upon the object and purpose of the treaty. This form of interpretation does not imply a distortion or modification of the instrument. It rather seeks to achieve the purpose established by the parties[5].

In addition, article 32 of the VCLT provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

With respect to the textual interpretation of article 53(3)(b) of the ICC Statute, it should be noted that the text establishes that the PTC may review *ex officio* only the decisions of the OTP taken based upon protecting the interests of justice (Art. 53 (1)(c) ICC Statute). It does not expressly provide any possibility for victims to request a review by the PTC.

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4 Remiro, A., 2010, "*Derecho Internacional. Curso General*", Valencia: Tirant lo Blanch, pp. 376.

5 Ibid., pp. 377.

Similarly, under a contextual interpretation of the Statute, it is not clear whether victims can take the initiative autonomously. It is only when other entities within the ICC system take the initiative (that is, either a State Party, the UNSC or the PTC) that they can participate in the review.

However, a teleological analysis that considers the object and purpose of the Statute may result in a different conclusion. The purpose of article 53(3)(b) of the ICC Statute is to create a mechanism of checks and balances, so that the PTC can control the exercise of the principle of opportunity by the Prosecutor when he or she closes the preliminary examination. The effectiveness of this mechanism would be strengthened if, when faced by the prospect of inaction on the part of the PTC, victims could request the Chamber to exercise its review powers.

This all means that permitting victims to participate in review processes would not contradict the architecture of the division of powers between the OTP and the PTC. On the contrary, allowing them to speak out strengthens the purpose of judicial control of the unregulated discretion attributed to the OTP by article 53(1)(a). In addition, promoting the access to and effective participation of victims in proceedings before the ICC is another of the aims of the Statue: to contribute to ending impunity for the most serious international crimes that affect the international community[6].

Finally, the preparatory works of the Rome Statute do not clarify whether the omission within article 53(1)(a) proceedings of any mention as to whether victims could intervene was intentional or not. No delegation at the time of drafting the Statute and the RPE mentioned the power of the victims, or lack thereof. Indeed, considering it is a very specific issue, even until the present, it has still not been addressed by any judicial decision.

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6 ICTJ, 2016, "Handbook on complementarity. Pp. 43", https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf.

2.2. Interpretation of art. 53(3)(b) of the ICC Statute in the light of the other criteria contained in art. 21: special attention to the general criterion of interpretation of art. 21(3)

Article 21(1)(a) expressly mentions the ICC Statute and the RPE, interpreted through articles 31 and 32 of the Vienna Convention, as the main sources of law for ICC Decisions. However, the article recognizes two other possible sources of law. Subparagraph (b) refers to applicable treaties and the principles and rules of international law – including the established principles of international law of armed conflict. Subparagraph (c) further references the general principles of law derived by the Court from the national laws of legal systems of the world.

Unfortunately, this sheds no new light on the matter, since analyzing these articles and rule 109 makes it clear that there are no international treaties that are directly applicable to the issue at hand – after all, this is a procedural issue that is not easily interpreted from outside sources. One could refer to the principles and rules of international law, to custom as a source of international criminal law, as it has been reflected in the jurisprudence of the *ad hoc* tribunals. However, the specificity of the process of opening an investigation in the Statute means that this is of little help.

Similarly, when performing an analysis under article 21(1)(c) of the ICC Statute, the general principles of law based on the various systems of domestic law, it is observed that although there are prior proceedings in relation to the investigation of crimes, national systems do not contemplate a procedural phase in which it is decided whether or not to initiate an investigation into a given situation as a prior step to inquiring into the crimes committed in that situation. This is a matter of jurisdiction based on the particular circumstances of the ICC and therefore it is not easy to derive content here from the simpler jurisdiction thresholds of national law.

Clarification of this issue could be undertaken by the Chambers, which, under article 21(2) of the Statute, the power to apply the interpretation of the applicable legal standards developed by the ICC jurisprudence in previous decisions on similar issues. However, as has

been previously set out, the issue raised has not yet been addressed by the Court.

For its part, according to article 21(3), the interpretation of the Statute and the RPE must be in accordance with international human rights standards. This principle highlights the importance of ensuring that any decision taken within the framework of the ICC is in line with such standards, thus guaranteeing the integrity and legitimacy of its proceedings. As a result, the PTC's power to review *ex officio* the decision to not initiate an investigation, pursuant to article 53(3)(b) of the Statute, must be interpreted in this light.

Thus, article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) provides that victims of serious human rights violations must have access to an effective remedy and that the judicial authorities must promote the development of the possibilities of judicial recourse[7]. At the regional level, the American Declaration on the Rights and Duties of Man on the right to justice in its article XVIII provides that:

> Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights[8].

The American Convention on Human Rights (ACHR) develops this provision in articles 8 (judicial guarantees) and 25 (judicial protection). The former affirms that everyone has the right to a hearing with due guarantees for the determination of his rights[9], while the latter recognizes the right to a simple and prompt recourse to a competent court[10], and imposes on States the obligation to develop this opportunity.

Article 25 of the ACHR provides the right to have human rights violations thoroughly investigated, to have those responsible punis-

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7 UN, 1996, "International Covenant on Civil and Political Rights", Art. 2(3).

8 OAS, 1948, "American Declaration of the Rights and Duties of Man", Art. XVIII.

9 OAS, 1969, "American Convention on Human Rights", Art. 8.

10 Ibid, Art. 8.

hed, and to provide adequate reparation to victims[11]. All the above, is premised upon the remedy being suitable (i.e., that it is possible to challenge before the judicial authorities) and effective (that it is impartial and allows for an adequate response and reparation). This implies that judicial instances must ensure a process that guarantees access to justice and the full protection of the human rights of all persons[12].

Inter-American Court of Human Rights (IACHR) case law has stated that article 25 (1) of the ACHR comes to the following conclusion:

> […] the victim's participation in criminal proceedings is not limited to the mere reparation of damages but, above all, to enforcing his or her rights to know the truth and to justice before competent authorities. This necessarily implies that, at the domestic level, there must be adequate and effective remedies through which the victim is able to challenge the competence of the authorities that may eventually exercise jurisdiction over matters over which it is considered that they do not have competence[13].

The IACHR Court, when referring to effective judicial protection, has also held that this right requires judges to seek to put an end to impunity breaches and situations where due protection of human rights is not recognized[14]. This is especially the case when seeking remedies. Thus, according to the IACHR:

> […] judges, as the rectors of the process, have the duty to direct and guide the judicial procedure so as not to sacrifice justice and due process of law for the sake of formalism and impunity[15].

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11 IACHR, 2021, "*Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos*".

12 Idem.

13 IACHR, 2010, Preliminary objection, merits, reparations, and costs. "Case of Rosendo Cantú et. al. v. Mexico", Judgement of August 31, 2010. par. 167.

14 IACHR, 2003, Merits, reparations, and costs, "Case of Myrna Mack Chang v. Guatemala". Judgement of November 15, 2003, par. 2010.

15 Ibid, par. 211.

For the remedy available to the victims to be considered effective, it is required, in any case, that the authority analyzes the reasons alleged and rule on them (this to be suitable to prevent future human rights violations)[16].

With respect to other regional human rights systems, while the African Charter on Human and Peoples' Rights expressly includes the right to be heard before a competent court and to appeal against human rights violations[17], the European Convention on Human Rights recognizes the rights to a fair, independent and impartial trial by a competent tribunal, where the content of the rights is determined (art. 6)[18] and to an effective remedy (art. 13)[19]. This not only implies the right to bring a case before a court and to have a fair trial, but also includes the right to due process at all stages.

> In this regard, the European human rights system has referred to the possibility that victims in criminal proceedings may request a review of the decision taken by a body such as the OTP. In 2009, the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE), at the request of the Committee of Ministers of the Council of Europe, issued an opinion on relations between judges and prosecutors (known as the Bordeaux Declaration). In article 1, the Declaration states:

It is in the interest of society that the rule of law be guaranteed by the fair, impartial and effective administration of justice. Public prosecutors and judges shall ensure, at all stages of the proceedings, that individual rights and freedoms are guaranteed, and public order is protected. This involves the total respect of the rights of the defendants and of the victims. A decision of the prosecutor not to prosecute should be open to judicial review. An option may be to allow the victim to bring the case directly to the court[20].

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16 IACHR, 2019, Merits, reparations, and costs, "Colindres Schonenberg case v. El Salvador", Judgement of February 4, 2019, par. 109.

17 Organisation of African Unity, 1983, "African Charter on Human and People's Rights", Art. 7.

18 Council of Europe, 1950, "European Convention on Human Rights", Art. 6.

19 Ibid, 13.

20 Council of Europe, 2009, "Bordeaux Declaration", Art. 1.

Regarding the relationship between prosecutors and judges during a prosecution, the Bordeaux Declaration highlights that, as prosecutors have the discretion to decide whether to bring a case before a court, it is crucial to establish a framework that avoids any form of arbitrary, discriminatory, or undue influence of prosecutorial powers, while ensuring the full protection of the rights of the victims involved[21]. Consequently, it is necessary that measures be implemented to safeguard impartiality and transparency in the exercise of prosecutorial discretion.

For the Council of Europe, an example of this is to ensure that anyone affected by the Prosecutor's decision – especially victims - have the option of requesting a review. A viable alternative is also to allow the victim to bring the case directly to the court[22], which ensures an effective judicial control mechanism over the Prosecutor's decisions, thus, strengthening the protection of victims' rights and the legitimacy of the judicial system in its entirety.

Article 21(3) of the ICC Statute recognizes that these international standards relating to the rights of victims of serious human rights violations access to justice and to an effective judicial remedy (which includes the review of decisions taken by organs such as the OTP) must be taken into account when interpreting article 53(3)(b) of the Statute and rule 109 of the RPE. This is in order to guarantee victims a participation that allows them to clarify the truth, prevent impunity and put an end to serious human rights violations. This is primarily the case when deciding whether international crimes within a situation are to be investigated by the Court's OTP.

Consequently, it can be argued that article 21(3) of the ICC Statute requires an interpretation of article 53(3)(b) that allows victims to formally request the PTC to proceed with the review of an OTP decision to close the preliminary examination on the grounds of opportunity or prosecutorial discretion, as their interests are directly

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21 Ibid, Art. 53.

22 Idem.

affected by any decision not to investigate the crimes they were subjected to.

2.3. Amicus curiae as a procedural alternative to the possibility for victims to request an ex officio review under art. 53(3)(b) of the ICC Statute

If the PTC does not accept the existence of an inherent procedural avenue in article 53(3)(b) for victims to seek review of a decision based solely on the interests of justice, a second procedural option may be raised in this regard. Rule 103 of the RPE (*amicus curiae*), states that "At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate"[23].

Under rule 103, victims have, at least, the authority to request the PTC in order to submit a brief explaining the reasons why, when a preliminary examination is closed solely in pursuit of "the interests of justice" as defined in article 53(2)(c), the Chamber should proceed to initiate its review *ex officio*. This possibility, which is drawn from the wording of rule 103, does not guarantee that the PTC will grant such authorization, much less that it will trigger the review process of article 53(3)(b). However, if all other procedural avenues are closed, it may be the only alternative through which victims can assert their interests in the face of the closure of a preliminary examination by the OTP on the grounds of opportunity or prosecutorial discretion.

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[23] ICC, 2000, Rules of Procedure and Evidence, Rule 103(1).

3. Analysis of the power of victims to request an *ex officio* review of the decision of the OTP to close the preliminary examination without requesting the opening of the investigation to the PTC

3.1. Interpretation of art. 15 (3) and (6) of the ICC Statute in light of its art. 21 (1)(a) and arts. 31 and 32 of the Vienna Convention

A textual interpretation of article 15(3) and (6) of the Rome Statute, as provided for in article 21(1)(a) of said Statute, as well as article 31 of the Vienna Convention, appears to lead to the conclusion that once the preliminary examination is completed, if the Prosecutor considers that there is no case for the opening of the investigation (art. 15(3)), his decision to close the preliminary examination is not subject to any review by the PTC (art. 15(6)). Under this reading, victims could only submit new facts or evidence to the OTP to enable it to reconsider its initial position on lack of jurisdiction, admissibility, or the existence of substantial reasons to believe that an investigation would not be in the interests of justice; they would not, however, be able to argue a decision taken following article 15(3) on its merits.

An initial reading of the contextual interpretation would yield the same result, given that both provisions develop different contents (art. 15 refers to the "Prosecutor", while art. 53 develops the "initiation of an investigation") and are placed within different parts of the Statute (art. 15 is included in Part II on "Jurisdiction, admissibility and applicable law", while art. 53 is in Part V on "investigation and prosecution"). However, the reference made by rule 48 of the RPE (applicable in art. 15 proceedings) to article 53(1) indicates a close interrelation between the two articles, which inevitably strains the contextual interpretation if it is to be used to reject victims' rights to request a review of decisions.

This tension is even greater with the teleological interpretation of article 15(3) and (6) of the ICC Statute (also provided for in art. 31 of the Vienna Convention). On the one hand, the ultimate purpose of the Statute is not only to end impunity for the most serious international crimes, and to contribute to their prevention, but also to

recognize a more active role for victims in ICC proceedings[24] (both purposes are fully compatible with each other, since the greater participation of victims contributes to the reduction of impunity).

However, unlike article 53 (3) (b), which explicitly allows the PTC to scrutinize the OTP's decisions to close a preliminary examination without initiating an investigation, article 15 seems to follow a different model of competence distribution between the OTP and the PTC. Under this model, the PTC's involvement is limited to granting authorization to the Prosecutor to initiate an investigation.

This means that, just as the OTP has full control over the decision to initiate a preliminary examination *proprio motu,* the same is true concerning its closure without requesting authorization for the opening of an investigation. Both decisions, therefore, appear to be within the exclusive competence of the OTP, with no judicial review by the PTC foreseen. This approach is confirmed by the preparatory works of the RPE, since during their negotiation, the French and Australian delegations suggested including a rule expressly providing for judicial review by the PTC of decisions to close the preliminary examination by the OTP based exclusively on the principle of opportunity. Specifically, the French delegation proposed the following:

> When the Prosecutor has before him a situation referred to him under articles 13 to 15 and his decision not to proceed with the investigation is based solely on article 53, paragraph 1(c). he must also so inform the Pre-Trial Chamber in writing as soon as possible[25].

Similarly, the Australian delegation's proposal provided that:

> Where the Prosecutor decides that there is no reasonable basis to proceed with an investigation solely on the basis of article 53, paragraph 1 (c), he or she shall inform the Pre-Trial Chamber in writing as soon as possible after making that decision. In doing so, the Prosecutor shall

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24 Vega, P., 2006, "*El Papel de Las Víctimas en los Procedimientos ante La Corte Penal Internacional: Sus Derechos y las Primeras Decisiones de la Corte*" (The Role of Victims in Proceedings before the International Criminal Court: Their Rights and the First Decisions of the Court), SUR - International Journal of Human Rights, No. 5, Pp. 19.

25 PCNICC, 1999, "Proposal by France on Rules of Procedure and Evidence Part 3, section 3, subsection 1", Pp. 2.

> set out the reasons which brought him or her to the view that an investigation would not serve the interests of justice[26].

Both proposals aimed at ensuring that prosecutorial decisions based solely on the principle of opportunity could be reviewed by the PTC which, as discussed above concerning article 53(3)(b), could have allowed victims to approach the PTC to request the activation of the review. At its time, this had the goal of avoiding a politically motivated decision by the Prosecutor, due to the broad unregulated discretion attributed to him/her by article 53(1)(c) and rule 48 of the RPE. It was seen that this situation could have a negative impact on victims by preventing the international crimes they had suffered from being investigated by the ICC, which would also have been deprived of any access to a judicial instance in which such decision could be reviewed.

However, these proposals were discarded by most of the delegations of the ICC Preparatory Commission, which considered that such direct control over the Prosecutor's decisions would affect the distribution of competences between the OTP and the PTC provided for in article 15 of the ICC Statute. This meant that, for these delegations, preserving the distribution of competences between the two organs of the ICC was central to the object and purpose of the Statute, and especially to those of article 15.

The previously described tension between the different elements that are part of the teleological interpretation of article 15 (3) and (6) is not only evident, but also inherent to the ICC Statute, having clearly been part of the preparatory tensions present in the drafting of the Statute. These tensions contrast, on one hand, the fight against impunity and the procedural participation of the victims; and, on the other, the jurisdictional architecture of the Statute and the balance of "powers" between the OTP and the Chambers. This tension is present in both the contextual and teleological interpretations previously discussed and can only be plausibly squared by a textual interpretation of the affected articles. However, this approach needs,

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26 PCNICC, 1999, "Proposal submitted by Australia. Draft Rules of Procedure and Evidence of the International Criminal Court", Pp. 32, Rule 56.

in turn, to be reconciled with the other sources of law provided for in article 21(1)(b) and (c), (2) and (3) Statute.

3.2. Interpretation of art. 15(3) and (6) by ICC jurisprudence under art. 21(2) of the Statute

It must be remembered, however, that article 53(3)(b) of paragraphs (b) and (c) and article 21(1) are of little use in interpreting article 15(3) and (6) of the ICC Statute, due to the specificity of the process of opening an investigation before the ICC. This is not the case with regard to Article 21(2), since the jurisprudence of the Court has expressly addressed this issue in its case law.

3.2.1. Situation in Afghanistan

On March 5, 2020, the Appeals Chamber (AC) accepted the appeal filed by the OTP against the decision of PTC II denying the request to open an investigation into the situation in the Islamic Republic of Afghanistan, on the grounds that it would not serve the interests of justice[27].

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[27] ICC, The situation in the Islamic Republic of Afghanistan, Pre-trial chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan of April 12, 2019. Doc ICC-02/17, parrs. 31-32; The AC accepted the OTP's appeal and authorized the initiation of an investigation in Afghanistan. In particular, the AC considered that the PTC erred in deciding that "an investigation into the situation in Afghanistan at this time would not serve the interests of justice". It therefore considered that the PTC's decision under art. 15(4) of the Statute should have addressed only whether there is sufficient basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and whether the case or potential cases arising from such an investigation appear to fall within the jurisdiction of the Court. See: ICC, The situation in the Islamic Republic of Afghanistan. Appeals Chamber. Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan of March 5, 2020. Doc ICC-02/17 OA4, par. 79.

The appeal filed by the Prosecutor focused on two main arguments: (a) the error of law committed by the PTC in determining the "interests of justice"[28]; and (b) the abuse of power by the PTC itself in assessing the "interests of justice"[29]. However, when examining the first argument of the appeal, the AC made a series of considerations on the interrelation of articles 15 and 53 of the ICC Statute, which, as the AC itself expressly acknowledged, were not part of the subject matter of the appeal, thus constituting *obiter dicta*.

In this context, the AC expressed the following considerations:

> Article 53(1) of the Statute thus reflects an expectation that the Prosecutor will proceed to investigate referred situations, while allowing the Prosecutor not to proceed in the limited circumstances set out in article 53(1)(a) to (c) of the Statute. If the Prosecutor decides not to initiate an investigation under article 53(1) of the Statute, her decision is subject to certain notification requirements. Article 53(3) of the Statute envisages judicial control over the Prosecutor's decision not to investigate and aims at ensuring that the Prosecutor complies with her duty to investigate referred situations.
>
> In contrast, article 15 of the Statute, titled 'Prosecutor', sets out the procedure for the triggering of an investigation by the Prosecutor proprio motu, that is, on her own motion when a situation has not been referred to her. Article 15 recognises the discretionary nature of this power, providing in paragraph 1 that 'the Prosecutor may initiate investigations proprio motu' (emphasis added). In this context, it is for the Prosecutor to determine whether there is a reasonable basis to initiate an investigation proprio motu. If the Prosecutor concludes that there is no reasonable basis to proceed (a scenario not arising in this appeal), article 15(6) of the Statute requires her to inform those who provided the information of her conclusion. They may provide additional information to the Prosecutor who may reconsider the matter; however, the legal framework does not envisage judicial review of the Prosecutor's conclusion[30].

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28 Office of the Prosecutor, Prosecution Appeal Brief of September 30, 2019, parrs. 12-59.

29 Ibid, parrs. 60-67.

30 ICC, The situation in the Islamic Republic of Afghanistan. Appeals Chamber. Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan of March 5, 2020, Doc ICC-02/17 OA4, par. 29-30.

Accordingly, for the AC, allowing an assessment by the PTC under article 53 (3)(b) in preliminary examinations initiated under article 15 of the Statute, "[…] is inconsistent with the nature of the Prosecutor's discretion under article 15 of the Statute, with the broader legal framework and with the drafting history of the Rules"[31].

The AC based these considerations on the following arguments:

1. Rule 49 of the RPP is clear that the Prosecutor is not obliged to notify the PTC of his decision to close the preliminary examination and is therefore only obliged to notify victims so that they may, in accordance with article 15 (6), refer new facts or evidence to the PTC. According to the SA, this only makes sense in a system where the PTC has no competence to review *ex officio* the Prosecutor's decision.
2. In the SA's view, the fact that rule 105 (concerning the notification of the Prosecutor's decision not to proceed with the investigation under Art. 53 (1)), expressly refers to the content of rule 49 when the preliminary examination has been initiated *ex officio* by the OTP under article 13(c) and 15 ICC Statute, only confirms this situation[32].
3. This interpretation is confirmed by the preparatory works of the RPE, since the above-mentioned proposals of the French and Australian delegations[33] for the PTC to be notified by the OTP of its decision to close the preliminary examination under article 15(3)[34] were not accepted.
4. The fact that rule 110, being entitled "decision of the Pre-Trial Chamber pursuant to article 53(3)(b)", makes it clear that the mechanism for the review of decisions of the Prosecutor to not open an investigation as not being in the interests of justice

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31 Ibid., footnote 52.
32 Ibid., footnote 50.
33 Ibid., footnote 53.
34 PCNICC, 1999, "Proposal by France on Rules of Procedure and Evidence Part 3, section 3, subsection 1", P. 2

is limited to decisions taken under article 53 ICC Statute and therefore cannot be extended to article 15 proceedings[35].

Consequently, according to the SA, neither the Statute, nor the RPE, provide for the joint application of articles 15(3) and 53(3)(b) to allow for *ex officio* judicial review of the decision to close a preliminary examination initiated *motu proprio* by the OTP. In the absence of such a possibility, victims cannot be entitled to request the PTC to conduct a judicial review of such a decision.

3.2.2. Situation in Colombia

On April 27, 2022, the International Federation for Human Rights (FIDH) and the *Colectivo de Abogados* José Alvear Restrepo (CAJAR), representing Colombian victims of international crimes, submitted a request to the president of the Pre-Trial Division for a PTC to review and reverse the Prosecutor's decision to close the preliminary examination in the situation in Colombia. The request was based on article 53(3)(b) of the ICC, according to which the PTC was empowered *ex officio* to review the Prosecutor's decision not to proceed with a preliminary examination, if it was based solely on article 3(1)(c), relating the interests of justice[36].

According to the victims' representatives, the closure of the preliminary examination by the Prosecutor could only be based on an undue use of the principle of opportunity, in the absence of any other reasonable explanation as to why the decision was made. Thus, although at the end of the preliminary examination, a Cooperation Agreement was signed between Colombia and the OTP[37], and certain statements were made, there was no rigorous analysis explaining the lack of jurisdiction or admissibility in relation to the situation in Colombia.

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35 Ibid., footnote 52.

36 ICC, Situation in Colombia, President of the Pre-Trial Division, Request for review of the Prosecutor's decision of 28 October 2021 to close the preliminary examination of the situation in Colombia, April 27, 2022, ICC/RoC46(3)-01/22-1-Red, par.3-8.

37 Ibid., par. 36.

In particular, the petitioners could not find any complementarity analysis that would have considered the potential cases, including the specific conduct on which investigations or judicial decisions existed, nor the persons that could be the subject of a possible investigation[38].

Given this situation, the decision could only have been based on political considerations, specifically related to the Final Agreement between the Colombian government and the FARC-EP, and Colombian policy regarding the Special Jurisdiction for Peace (SJP). Under this interpretation, the decision was made to give time to the national system to move forward in terms of truth and reconciliation, and an opportunity for Colombia to take matters into its own hands before the complementarity principle was invoked.

The victims' representatives considered that the Prosecutor's decision merited judicial review, given it went against the victims' right to the truth, as there were numerous cases over which the SJP had no jurisdiction and over which there had been no judicial processes, which meant an impunity gap still existed within the national justice system[39].

On May 6, 2022, the president of the Pre-Trial Division, pursuant to Regulation 46(3) of the Regulations of the Court, assigned the request to PTC I, which two and a half months later issued its "[d]ecision on the '[a]pplication for review of the Prosecutor's decision of October 28, 2021 to close the preliminary examination of the situation in Colombia' and related requests."

According to PTC I, the AC in the Afghanistan situation had already distinguished between the application of articles 15 and 53 of the ICC Statute, the former being applicable to investigations by the OTP *proprio motu* and the latter to referrals by a State Party or the UNSC[40]. As a result, the PTC relied exclusively on the interpretation

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38 Ibid., par. 34.

39 Ibid., par. 44.

40 ICC, Situation in Colombia, Pre-Trial Chamber I, Decision on the request for review of the Prosecutor's decision of 28 October 2021 to close the preliminary examination of the situation in Colombia and related requests, 22 July 2022, Doc. No. ICC-RoC46(3)-01/22, parrs. 4-6.

rendered by the AC not to review the OTP's decision. All this, even though the AC itself in the above decision, as well as the FIDH and CAJAR in their application, had expressly underlined that the AC's considerations on the interrelationship between articles 15 and 53 ICC Statute were *obiter dicta*.

3.2.3. Situation in Kenya

The decision taken by PTC in the situation in the Republic of Kenya is different from the one of Afghanistan and Colombia. In the context of this situation, the victims requested that the PTC II: (a) determine that the decision taken by the Prosecutor not to conduct further investigative activities in relation to the crimes committed in the situation constituted a decision based on article 53(1)(c) or 53(2)(c); and (b) proceed with its *proprio motu* review under Art. 53(3)(b) ICC Statute. All this, in view of the fact that the Prosecutor's decision did not contain any reasoning whatsoever.

In its argumentation, PTC II expressly underlined that[41]:

> [A]rticle 53(3)(a) of the Statute is not applicable, considering that the investigation into the situation in the Republic of Kenya took place following an authorisation by the Chamber under article 15. Accordingly, only article 53(3)(b) of the Statute is potentially applicable as it is a proprio motu power of the Chamber which may be exercised irrespective of the way the Court's jurisdiction was triggered under article 13 of the Statute. Under this provision, the Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed when such a decision is based solely on article 53(1)(c) or (2)(c) of the Statute – i.e. on the grounds that an investigation or a prosecution would not be or are not in the interests of justice.

In addition, PTC II stated that allowing victims to request the Chamber to review a decision of the Prosecutor based on article 53(1)(c) or (2)(c) constitutes one of the valid forms of participation during the preliminary examination and investigation.

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41 ICC, The Situation in the Republic of Kenya, Pre-trial Chamber II. Decision on the "victims" request for review of Prosecution's decision to cease active investigation, Doc.: ICC-01/09, pp.9.

This means that PTC II expressly accepted the possibility that: (a) the PTC may conduct an *ex officio* judicial review of the Prosecutor's decision to close a preliminary examination initiated *proprio motu*, provided it is based solely on the grounds that it would not be in the interests of justice to open the investigation; and (b) victims may request the PTC to conduct such a review. This is based on the application of the review mechanism under article 53(3)(b) to article 15 proceedings.

In any case, it is important to note that, as in the above-mentioned considerations of the AC, this interpretation of PTC II has also to be considered as *obiter dicta*, because the victims' application was aimed at challenging the decision of the OTP to close the investigative leads in the Kenya situation, and therefore did not refer to the closure of a preliminary examination.

3.2.4. Dissenting opinion by Judge Luz del Carmen Ibáñez Carranza

The position adopted by PTC II was subsequently endorsed in the dissenting opinion of Judge Luz del Carmen Ibañez Carranza in the above-mentioned AC decision. While Judge Ibañez agreed with the AC majority in authorizing the opening of the investigation in Afghanistan, she stated, however, that the considerations upon which the ruling was structured were far from ideal because she did not believe it to be true that:

> […] the Prosecutor has absolute discretion to decide whether to open an investigation *proprio motu* and that paragraphs (1) and (3)(b) of Art. 53 apply *only* to referrals[42], since "nothing in the express wording of those articles indicates such a restriction"[43].

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42 ICC, Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17-138-Anx-Corr, par. 2.

43 Ibid., par. 3, no. iii.

Likewise, she emphasized that the considerations on which the decision was based had not been the object of the *causa petendi* of the appeal, so they should be taken as *obiter dicta* and not have any incidence in future cases that, in substance, could be related to the analyzed issue. Otherwise, the decision would be *ultra petita*, since by exceeding the scope of the challenge, a legal rule would be defined by virtue of a non-existent cause. As a result, the judge stated that the decision of the AC should be taken with the utmost caution.

Judge Ibáñez Carranza expressed concern with the AC majority's interpretation of the scope of article 53(3)(b) because:

1. A bubble of impunity would be created in situations that are not referred to by a State Party or the UNSC and where the Prosecutor decides to close the preliminary examination *ex officio*. In the absence of judicial review of such decisions, impunity would be perpetuated, thereby violating the object and purpose of the Statute. Thus, justice would be largely dependent upon political issues[44].

2. Articles 15 and 53(1) ICC Statute should not be understood as two separate provisions on preliminary examination. On the contrary, they should be read systematically in their mutual context, because Part V of the Statute regulates in greater detail issues relating to "investigation and prosecution" dealt with in Part II on "jurisdiction, admissibility and applicable law".

3. Article 15 of the ICC Statute should not be read in terms of absolute discretion of the OTP. Although the referenced norm uses the expression "may" when indicating that it is up to the Prosecutor to open an investigation, it also states that the OTP will submit its request to the PTC for the opening of an investigation. Therefore, their investigative powers are not absolute, and interpreting this article in this way is contrary to what is indicated by its holistic reading[45].

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44 Ibid., par. 7, no. v.

45 Ibid., par. 7, no. vi.

4. The proper administration of justice requires a system of checks and balances. Accepting that the Prosecutor's decisions are shielded from judicial review is contrary to justice[46], and may affect the rights of those involved[47]. Indeed, the very purpose of article 53(3)(b) seems to avoid this type of shielding of the Prosecutor's decisions.

5. Under the principles of presumptive freedom of action and legality in international law, interpreters of norms cannot limit or deny access to rights, unless this possibility is expressly recognized in the law[48].

Consequently, it can be affirmed that the dissenting opinion of Judge Ibañez follows the position adopted by the PTC II in the Kenya situation, in contrast to the position adopted by the AC majority in the Afghanistan situation and the PTC I in the Colombian situation. Moreover, except for the brief explanation given by the latter, the rest of the interpretations are all *obiter dicta*.

3.3. Interpretation of art. 15(3) and (6) under art. 21(3) of the ICC Statute

Faced with a situation as complex as the one described here, the general criterion of article 21(3) ICC Statute requires, as previously seen, that any interpretation adopted be in accordance with international human rights standards. In particular, as regards the participation of victims in the proceedings under articles 15 and 53 of the Statute, what is at stake are their fundamental rights to access to justice and to an effective judicial remedy.

In interpreting article 53(3)(b), we affirm that, in order to guarantee victims a participation that allows for the clarification of the truth, the prevention of impunity and the cessation of serious human rights violations, it is necessary to allow, in the first place, their participation in the proceedings through which it is decided whether the

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46 Ibid., par. 7, no. vii.
47 Ibid., par. 7, no. xi
48 Ibid., par. 7, no. x.

international crimes committed in a given situation are to be investigated by the OTP.

According to the majority of the AC and PTC I, the interests of victims to truth, justice and reparation, and their fundamental rights to access to justice and to an effective judicial remedy, would appear to be sufficiently safeguarded by article 15 (6) of the ICC Statute, which allows them to send as many communications as they wish to the OTP regarding the facts about the harms suffered (and other similar acts committed in the same situation) and the evidence that could prove them. It would not be necessary, therefore, to provide for a judicial review instance, external to the OTP, not even when the decision to close the preliminary examination by the latter does not respond to legal criteria, but is based on political considerations that characterize the exercise of the principle of opportunity, when it is based on criteria of unregulated discretion such as those contained in the expression "interests of justice".

However, according to the analysis made in section 2.2, the bodies that form part of the universal and regional human rights protection systems do not seem to agree with this interpretation, given the emphasis they place on the need for external review, of a judicial nature, of the decisions of the OTP that have such a profound impact on the rights and interests of the victims as the decision to close the preliminary examination of a given situation under article 15(3) of the ICC Statute. And it is precisely the latter interpretation that is decisive in providing content, in the specific case, to the general criterion of interpretation provided for in article 21(3).

4. Conclusion

This paper has attempted to answer the two research questions formulated in the introduction. The first is regarding whether it is possible for victims to approach the PTC and request an *ex officio* review in the context of article 53(3)(b) of the ICC Statute. The second concerns whether this is also possible in relation to the OTP's decision to close the preliminary examination under article 15(3) and

(6). For this purpose, the statutory provisions have been analyzed in the light of article 21 of the ICC Statute and articles 31 and 32 VCLT.

In relation to the first question, there are three factors that lead to answering it in the affirmative: (a) the teleological interpretation of article 53(3)(b) of the ICC Statute in light of the statutory purposes of ending impunity and promoting the participation of victims in the proceedings; (b) the content of the fundamental rights of victims to access to justice and to an effective judicial remedy; and (c) the very architecture of checks and balances on which the Statute is built, and in particular article 53(3)(b), according to which any decision by the OTP to not to open the investigation because it would not be in the interests of justice should be subject to judicial review by the PTC.

The answer to the second question is certainly more complex because of the concurrence in the interpretation of article 15 (3) and (6) of two important factors that are not applicable in relation to article 53(3)(b). On the one hand, the jurisprudence of the Court, which, although limited, contradictory and largely consisting of *obiter dicta*, does appear, following the position taken by the AC majority in the Afghanistan situation, to lean, at least to some extent, towards a strict separation between the proceedings under articles 15 and 53, so that the review mechanism under article 53(3)(b) would not be applicable to the OTP's decisions to close the preliminary examination under article 15(3).

On the other hand, the architecture of checks and balances on which article 15 of the ICC Statute appears to be built, as reflected in the preparatory works: (a) limits the intervention of the PTC to request for authorization for the opening of an investigation by the OTP; and (b) attributes the OTP with full control over the decision to initiate a preliminary examination *proprio motu* and to close it without proceeding with the investigation.

However, this construction is in direct contradiction with the statutory purposes of ending impunity and promoting victim participation, and above all, it appears to violate international standards regarding the content of the fundamental rights of victims to access to justice and to an effective judicial remedy.

Consequently, neither an *obiter dicta* of the AC majority, nor a brief reference by PTC I to said *obiter dicta*, can be sufficient to decide a question of a constitutional nature, such as whether the checks and balances architecture envisaged by the drafters of the Statute can take precedence over international human rights standards for victims and the statutory purposes of promoting their participation and ending impunity for those most responsible for the most serious crimes for the International Community as a whole.

This conclusion is reinforced if we consider the crucial function that Art. 21(3) of the ICC Statute attributes to such standards in the ICC system of sources.

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11. Intergenerational and transgenerational harm

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1. Introduction

On November 7th, 2019, Bosco Ntaganda, a high commander of the Patriotic Forces for the Liberation of Congo (FPLC), was convicted by Trial Chamber VI (TC VI) for five crimes against humanity and thirteen war crimes[1] committed in the Ituri district of the Democratic

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[1] Bosco Ntaganda was convicted for: "As set out above, the Chamber determines the following sentences in respect of the crimes for which Mr. Ntaganda has been convicted, in the order the crimes were charged: murder and attempted murder as a crime against humanity and as a war crime (Counts 1 and 2): 30 years of imprisonment; intentionally directing attacks against civilians as a war crime (Count 3): 14 years of imprisonment; rape of civilians as a crime against humanity and as a war crime (Counts 4 and 5): 28 years of imprisonment; rape of children under the age of 15 incorporated into the UPC/FPLC as a war crime (Count 6): 17 years of imprisonment; sexual slavery of civilians as a crime against humanity and as a war crime (Counts 7 and 8): 12 years of imprisonment; sexual slavery of children under the age of 15 incorporated into the UPC/FPLC as a war crime (Count 9): 14 years of imprisonment; persecution as a crime against

Republic of the Congo (DRC) between August 6, 2002, and December 31, 2003[2].

On March 8, 2021, TC VI ordered collective reparations with individualized components for direct and indirect victims of the crimes for which Mr. Ntaganda was convicted. In the Reparations Order, TC VI considered '[…] that given the short and long-term consequences of certain crimes, as discussed above, children of the direct victims may have suffered transgenerational trauma regardless of the date when they were born, if they can show that their harm is a result of the crimes for which Mr. Ntaganda was found guilty'[3]. In addition, TC VI quantified the damages and imposed a thirty million USD reparation[4].

In the appeals brief, the defense contended for the existence of specific evidentiary errors related to the way in which requests for reparations for this type of harm should be evaluated[5]. The Appeals Chamber (AC) decided to partially reverse the 'Reparations Order' to the extent that TC VI failed to: '(i) make any appropriate determination in relation to the number of potentially eligible or actual victims of the award and/or to provide a reasoned decision in rela-

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humanity (Count 10): 30 years of imprisonment; pillage as a war crime (Count 11): 12 years of imprisonment; forcible transfer of the civilian population as a crime against humanity (Count 12): 10 years of imprisonment; ordering the displacement of the civilian population as a war crime (Count 13): 8 years of imprisonment; conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities as a war crime (Counts 14, 15, and 16): 18 years of imprisonment; intentionally directing attacks against protected objects as a war crime (Count 17): 10 years of imprisonment; and destroying the adversary's property as a war crime (Count 18): 15 years of imprisonment.". ICC, The Prosecutor v. Bosco Ntaganda, Trial Chamber VI, Sentencing Judgment, November 7, 2019, Doc. No.: ICC-01/04-02/06-2442, par. 246.

2 Ibid., par. 178.

3 ICC, The Prosecutor v. Bosco Ntaganda, Trial Chamber VI, *Reparations order*, March 08, 2021, Doc. No.: ICC-01/04-02/06-2659, par. 182.

4 Ibid., p. 97.

5 ICC, The Prosecutor v. Bosco Ntaganda, The Appeals Chamber, *Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order"*, September 12, 2022, Doc. No.: ICC-01/04-02/06-2782, par. 141.

tion to its conclusion about that number; (ii) provide an appropriate calculation, or set out sufficient reasoning, for the amount of the monetary award against Mr. Ntaganda; (iii) assess and rule upon victims' applications for reparations; (iv) lay out at least the most fundamental parameters of a procedure for the Trust Fund for Victims to carry out the eligibility assessment; and (v) provide reasons in relation to the concept of transgenerational harm and the evidentiary guidance to establish such harm, the assessment of harm concerning the health center in Sayo and the breaks in the chain of causation when establishing harm caused by the destruction of that health center, and the presumption of physical harm for victims of the attacks'[6].

Additionally, the AC defined 'transgenerational harm' as a 'phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter. It is characterized by the existence of an intergenerational cycle of dysfunction that traumatized parents set in motion, handing-down trauma by acting as violent and neglectful caretakers deforming the psyche and impacting the next generation'. The chamber explained that traumatized parents, who live in constant and unresolved fear, unconsciously adopt a frightening demeanor that affects 'their children's emotional behaviour, attachment, and well-being, increasing the risk that they will suffer post-traumatic stress disorders, mood disorders, and anxiety issues. It is argued that the noxious effects of trauma may be transmitted from one generation to the next, with a potential impact on the structure and mental health of families across generations'[7].

Thus, the AC establishes the importance of this concept and expressly uses the terms 'transgenerational harm' and 'intergenerational cycle' but does not indicate the existence of a distinction between these two. In fact, the chamber uses both terms within the same explanation; the latter term is used to elucidate the former.

A similar approach can be found in the recent Report of the Truth Commission in Colombia (2022) (created as a result of the

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6 Ibid., par. 1.

7 Ibíd., par. 458.

Agreement between the Revolutionary Armed Forces of Colombia – People's Army (FARC-EP) and the Colombian Government). In the definitions section, the Commission states that transgenerational impacts are '[…] those that give an account of the effects or repercussions of inherited traumatic experiences, which are manifested in the generations of the descendants of those who suffered them directly. These impacts recognize the perpetuation of trauma in contexts of impunity, as well as the inefficiency of governments in the face of their obligation to respond and attend to the impacts of war, including their duty to make full reparation to the victims'[8].

In light of this, this work seeks to analyze whether there is any difference between 'intergenerational' and 'transgenerational' harm. Accordingly, the first section will study both terms from a psychological viewpoint. The second section will revolve around International Criminal Law (ICL) and International Human Rights Law (IHRL) research, complemented by the decisions of: (a) the International Criminal Court (ICC); (b) the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR); (c) the Hybrid Criminal Courts; (d) the universal human rights' system committees; and, (e) regional tribunals for the protection of human rights.

2. Distinction between the terms intergenerational and transgenerational harm according to psychological literatur

Authors such as Dan Bar-On, Eland, Kleber, Krell, Moore, Sagi, Soriano, Suedfeld and Van der Velden refer to intergenerational harm in relation to 'attachment theory', also known as 'social transmission theory'. This theory is founded on the existence of a parent's trauma that has not been resolved during the development stage of the children. This trauma is subsequently transmitted to their children, because they can perceive fear and assume it as their own[9].

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8 Truth Commission, 2022, *Glosario.* (Translation made by the authors)

9 Bar-On, D., Eland, J., Kleber, R. J., Krell, R., Moore, Y., Sagi, A., Soriano, E., Suedfeld, P., Van-der-Velden, P. G. & Van-IJzendoorn, M. H., 1998, Multigenerational Perspectives on Coping with the Holocaust Experience: An

Attachment theory stems from the study of the trauma transmitted by Holocaust survivors to their children. These studies established that: (a) survivors had not overcome the fear generated by the crimes they had suffered, and that they therefore presented fearful behavior; and (b) this situation instilled insecurity and fear in their children throughout their upbringing[10].

Psychologists continued to study the transmission of trauma - not only between parents and children, but also between grandparents and grandchildren; studies evaluating children and grandchildren of the Apartheid era survivors were carried out. A particularly relevant one for the present work is the Adonis investigation, which suggests that physical harm and psychological trauma suffered by direct victims can affect their parenting abilities. Therefore, trauma suffered by elder generations can negatively impact both children and subsequent generations, through the possible transmission of psychosocial harm. As such, 'psychological disorders of primary victims can be genetically transmitted to subsequent generations'[11]. The same phenomenon has also been observed in the children and grandchildren of Holocaust survivors[12] and of the Rwandan genocide[13]. Thus, children and grandchildren not only experience economic deprivation as a

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Attachment Perspective for Understanding the Development Sequel of Trauma across Generations. International Journal of Behavioral Development, pp. 319-320.

10 Ibid., p. 321.

11 Adonis, C.K., 2016, Exploring the Salience of Intergenerational Trauma Among Children and Grandchildren of Victims of Apartheid-Era Gross Human Rights Violations. Research Specialist Human Sciences Research Council (HSRC), Pretoria, South Africa, p. 2.

12 Bar-On, D., Eland, J., Kleber, R. J., Krell, R., Moore, Y., Sagi, A., Soriano, E., Suedfeld, P., Van-der-Velden, P. G. & Van-IJzendoorn, M. H., 1998, Multigenerational Perspectives on Coping with the Holocaust Experience: An Attachment Perspective for Understanding the Development Sequel of Trauma across Generations. International Journal of Behavioral Development, supra n. 10, pp. 319-320.

13 Rudahindwa, S., Mutesa, L., Rutembesa, E., Mutabaruka, J., Qu, A., Wildman, D., Jansen, S., Uddin, M., 2018, Transgenerational effects of the genocide against the Tutsi in Rwanda: A post-traumatic stress disorder symptom domain analysis. Open Research Africa, pp. 3-7.

result of the material oppression of their parents and grandparents, but also suffer mental health problems as a result of the 'cumulative impact' of the trauma suffered by their parents and grandparents (attachment theory)[14].

Based on the above, Lev-Wiesel has considered attachment theory to be applicable to trauma transmission between subsequent generations (grandfather/grandson), meaning that trauma can also cause transgenerational patterns of conduct. Furthermore, the author emphasizes the protective role assigned to the child towards the parent who has suffered the direct trauma caused by unresolved psychological issues and the feeling of not having been able to fulfill his caretaker duty. All of this is passed down to the third generation[15].

Abraham and Torok agree with this and confirm that the transmission of harm through successive generations should entail an investigation as to the possible transmission of trauma and how it affected family memory and development, on account of the connection that binds each person to the experiences of previous generations[16]. Additionally, these authors distinguish between: (a) intergenerational harm, which occurs between contiguous generations that have a direct relationship (parents/children); and, (b) transgenerational harm, which occurs when psychological influence is transmitted between successive generations (grandparents/grandchildren)[17]. This type of harm essentially consists of the negative effect that grandchildren may experience because of the mental functioning of their grandparents; in other words, mental functioning of elder generations marks the psyche of younger generations, even if grandparent and grandchild never met[18].

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14 Adonis, C.K., 2016, Exploring the Salience of Intergenerational Trauma Among Children and Grandchildren of Victims of Apartheid-Era Gross Human Rights Violations. Research Specialist Human Sciences Research Council (HSRC) Pretoria, South Africa, supra n. 12, p. 5.

15 Lev-Wiesel, R., 2007, Intergenerational Transmission of Trauma across Three Generations: A Preliminary Study. Qualitative Social Work, pp. 77-78.

16 Abraham, N. & Torok, M., 2005, *La Corteza y Núcleo.* Amorrortu, p. 233.

17 Ibid., p. 53.

18 Faúndez, X. & Cornejo, M., 2010, *Aproximaciones al estudio de la Transmisión Transgeneracional del Trauma Psicosocial*, Revista de Psicología, Vol. 19, Nº 2.

Conversely, Lacal and Ventura highlight that the difference between intergenerational and transgenerational harm is not based on attachment theory, but rather on epigenetic inheritance[19], and thus the genes are transmitted from parents onto children. Epigenetic alterations can be the response to the trauma suffered by a previous generation (grandparents)[20].

3. Irrelevance of the terms intergenerational and transgenerational harm under International Criminal Law and International Human Rights Law

Unlike psychological doctrine, ICL and IHRL doctrine have not analyzed intergenerational and transgenerational harm until very recently; Gacka's analysis stands out as innovative, and studies victimization and causation. In it, the author mentions 'transgenerational harm' without ever using the expression 'intergenerational harm'[21].

The author explains that attachment and epigenetics' theories refer to intergenerational harm within the parent-child relationship;

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p. 47.

19 Lacal, I. & Ventura, R., 2018, Epigenetic Inheritance: Concepts, Mechanisms and Perspectives. Fronier in Molecular Neuroscience, p. 2; Epigenetic theory is based on the transmission of epigenetic marks from one generation to the next or from grandparents to grandchildren. These authors establish some criteria from which transgenerational epigenetic inheritance is represented: "only when two criteria are met: 1. exposure to an event in generation F0. 2. an effect of the event must be observed in the third or fourth generation—i.e., F2 or F3—depending on whether the mother or father was first affected (F0). Female exposure to a certain environmental factor during pregnancy might even affect the offspring's germ cells directly, for which reason only the fourth generation can be considered "event-free" and unsullied. When a certain event produces an epigenetic change in the father, it can only modify his sperm, effecting reliable nongenetic inheritance in the third generation".

20 Ibid., pp. 2-3.

21 Gacka, P., 2022, Remote Victimisation and the Proximate Cause. Transgenerational Harms before the International Criminal Court, International Criminal Law Review, pp. 452-455.

ostensibly, this would distinguish it from transgenerational harm, which limits them to successive generations. Gacka follows and analyzes ICC jurisprudence, specifically the Katanga case, which identifies 'transgenerational harm' as the trauma that is transferred onto their children (indirect victims) by parents who directly suffered the crime[22].

As Gacka points out, this type of harm is relevant to the ICC jurisprudence insofar as it can be included in the concept of indirect victim, because it does not have the criminal act as the source of the harm, but the harm suffered by the direct victim[23].

4. Jurisprudence of the International Criminal Tribunals and Hybrid Courts

4.1. International Criminal Court

Initially, the ICC did not use intergenerational or transgenerational harm as relevant jurisprudential concepts. Instead, the court developed the concepts of direct and indirect victims. According to the Court, indirect victims, can be a spouse (same generation as the direct victim), children (next generation), and more distant relatives (which, hypothetically, could even include third generation relatives such as grandchildren), provided they have suffered a harm that has a direct causal link with the crime[24].

In the Lubanga case, Trial Chamber I (TC I) considered in its Decision on indirect victims (2009) that a person can be considered a direct or indirect victim of a crime[25]. The chamber established that

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22 Idem.

23 Idem.

24 ICC, The Prosecutor v. Thomas Lubanga Dyilo, The Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, July 11, 2008, Case ICC-01/04-01/06 OA 9 OA 10, par. 32.

25 ICC, The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, Redacted version of "Decision on indirect victims", Abril 8, 2009, Case 01/04/-01/06-1813, para. 41.

the harm suffered by a victim can affect others around her, especially the ones with whom she has a close relationship. This is clearly shown in the context of child recruitment; where the parents of a child soldier may experience personal suffering as a result of the enlistment[26].

Moreover, Trial Chamber III (TC III) analyzed the concept of indirect victim in the Bemba Judgment (2016). The chamber recalled the research on the damaging effects that harm can psychologically transmit from one generation to the next (parents/children; grandparents/grandchildren). Mental disorders of anxiety and depression found in the children and grandchildren of Holocaust survivors provide an example this[27].

Subsequently TC II, in the Lubanga case (2017), further developed the distinction between direct and indirect victims by emphasizing that harm caused to victims and recognized by the Court does not need to be direct. Rather, it is required that the victim has personally suffered the harm. However, in order to determine the eligibility of an indirect victim (whether a spouse, sibling or descendant) it is necessary for her to have a previous and close relationship with the direct victim[28].

The Katanga Reparations Order of 2017 proved to be a turning point for ICC jurisprudence, as TC II used the expression 'transgenerational harm' for the first time. This is considered to be a critical juncture because, as evidence has shown, ICC decisions until that date exclusively used the expressions of direct and indirect victim. According to the Reparations Order, 'even where those Applicants are, in all likelihood, suffering from transgenerational psychological harm, the point must be made, as the Defense has, that no evidence is laid before the Chamber to establish on a balance of probabilities

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26 Ibid., par. 42.

27 ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, Trial Chamber III, Submission by QUB Human Rights Centre on reparations issues pursuant to Article 75 of the Statute, October 17, 2016, Case 01/05-01/08-3444, par. 28.

28 ICC, The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber II, Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", December 21, 2017, Case 01/04-01/06-3379, par. 41.

the causal nexus between the trauma suffered and the attack on Bogoro'[29].

As mentioned in the introduction, the decision was appealed by the defense, and the AC, based upon the concept of indirect victim, held in 2018 that psychological harm between generations (called 'transgenerational harm') ought to be understood as a 'phenomenon whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter'[30].

Furthermore, TC II in its Decision on the Question of Transgenerational Harm (2018) in the Katanga case developed further on the existence of the transgenerational harm based upon the epigenetic and attachment theories. According to the chamber, the first one consists in the 'parent-to-child transmission of epigenetic marks that retain a memory of traumatic events experienced by the parents'[31], whereas the second one explains the link between the trauma suffered by the parents and the child's development of post-traumatic stress; this is underpinned by the parent's role as main emotional caregivers[32].

As also mentioned in the introduction, TC VI's Ntaganda Reparations Order (2021), followed the same approach as TC II in the Katanga case[33]. Nevertheless the AC (2022) partially reversed the Order, as it considered that TC VI had not, *inter alia* '[…] (v) provided

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29 ICC, The Prosecutor v. Germain Katanga, Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, March 24, 2017, ICC-01/04-01/07-3728-tENG, par. 134.

30 ICC, The Prosecutor v. Germain Katanga, The Appeals Chamber, 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" March 8, 2018, ICC-01/04-01-3778, par. 223.

31 ICC, The Prosecutor v. Germain Katanga, Trial Chamber II, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, July 19, 2018, ICC Doc. No.: ICC-01/04-01/07-3804, par. 11.

32 Ibid., par. 13.

33 ICC, The Prosecutor v. Bosco Ntaganda, Trial Chamber VI, Reparations order, March 08, 2021, Doc. No.: ICC-01/04-02/06-2659, par. 182.

reasons in relation to the concept of transgenerational harm […]'[34]. The AC also defined the concept of transgenerational harm by expressly using the terms 'transgenerational harm' and 'intergenerational cycle' without mentioning whether, in its view, there was any difference between the two[35].

In conclusion, ICC jurisprudence did not use the expressions intergenerational or transgenerational harm until 2017, and chambers relied only on the concepts of direct and indirect victim. TC II, while addressing the Katanga Reparations Order on the broader concept of indirect victim, used for the first time the term 'transgenerational harm', referring to the psychological harm transmitted within the parent-child relationship. Consistently, TC VI followed the same approach for the Ntaganda reparations order (2021). This decision was partially confirmed in 2022 by the AC, which also used the term 'transgenerational harm' when referring to the transmission of trauma directly experienced by parents to children.

4.2. International Criminal Tribunals for the former Yugoslavia and Rwanda

Notwithstanding the study by Rudahindwa, Mutesa, Rutembesa, Mutabaruka, Qu, Wildman, Jansen and Uddin (2018), on the effects of trauma suffered by the survivors of the Rwandan genocide, their children and grandchildren[36], at no point did the ICTY[37]

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34 ICC, The Prosecutor v. Bosco Ntaganda, The Appeals Chamber, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", September 12, 2022, Doc. No.: ICC-01/04-02/06-2782, Par. 1.

35 Ibíd., par. 458.

36 Rudahindwa, S., Mutesa, L., Rutembesa, E., Mutabaruka, J., Qu, A., Wildman, D., Jansen, S., Uddin, M., 2018, Transgenerational effects of the genocide against the Tutsi in Rwanda: A post-traumatic stress disorder symptom domain analysis, Open Research Africa, supra n. 14, pp. 3-7.

37 The cases Aleksovski, Babić, Banović, Blagojević & Jokić, Blaskic, Bobetko and Boškoski & Tarčulovski were reviewed, without finding information regarding transgenerational and intergenerational harm. See.: Table of references.

or ICTR[38] refer to the concept of indirect victim, nor did they use the expressions intergenerational and transgenerational harm.

This is underpinned by the fact that both ICTYS and ICTRS have no legal provisions as to a reparation system such as the one established in the ICC Statute. ICTY and ICTR Statutes refer only generally to the restitution of property 'to their rightful owners'[39], without considering reparations for personal harm of a physical or mental nature[40]. Rule 106 of the Rules of Procedure and Evidence (RPP) of the tribunals, establish that victims can access compensation through individual proceedings in national courts, thus excluding a discussion on the recognition of victims.

4.3. Hybrid Courts

Much like the ICTY and ICTR, the Statute of the Special Court for Sierra Leone (SCSL) did not have legal provision on the matter. Consequently, SCSL's jurisprudence does not develop the concept of indirect victim, nor does it use the terms intergenerational and transgenerational harm. Rule 105 (B) of the SCSL's RPE, states that '[…] pursuant to the relevant national legislation, a victim or persons claiming through him or her may bring an action in a national court or other competent body to obtain compensation'[41].

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38 The cases Jean Paul Akayesu, Michel Bagaragaza, Ignace Bagilishma, Simon Bikindi were reviewed, without finding information regarding transgenerational and intergenerational harm. See.: Table of references.

39 United Nations, 2009, Updated Statute Of the International Criminal Tribunal For the Former Yugoslavia, art. 24 (3); United Nations, 1994, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, art. 23 (3).

40 Bassiouni, M. C., 2006, International Recognition of Victims' Rights. Human Rights Law Review, pp. 242-243.

41 Perez, J., Acevedo, L., 2007, *Las Reparaciones en el Derecho Internacional de los Derechos Humanos, Derecho Internacional Humanitario y Derecho Penal Internacional.* American University International Law Review 23, no.1, pp. 23-25.

By contrast, the Extraordinary African Chambers (CAE) analyzed the term of indirect victim, and defined it as 'any person who has suffered direct harm caused to a member of his family by the commission of one or more crimes for which Hissein Habré [was] convicted'[42]. According to the CAE, indirect victims (which may also include children and grandchildren) suffer harm as a result of arbitrary executions, forced disappearances, deaths from torture or massacres of one or more members of their families, and therefore ought to be repaired[43]. However, the CAE has not referred to intergenerational or transgenerational harm, nor has it addressed possible harms transmitted from parents to children or from grandfathers to grandchildren through parenting or genetic transmission.

The TC of the Special Tribunal for Lebanon (STL), in the case of Prosecutor v. Ayyash et. al., relied on the term of indirect victim, establishing that 'rule 2 defines a victim as 'a natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal's jurisdiction'. This definition of a victim encompasses both 'direct' victims and 'indirect' victims who personally suffered harm as a direct result of the attack'[44]. The TC recognizes that children and grandchildren may suffer harm that justifies their recognition as indirect victims. Nevertheless, and much like the CAE, the chamber does not use the terms intergenerational and transgenerational harm, nor does it refer to any social or genetic transmission of harm onto subsequent generations. The AC particularly emphasized that '[…] pursuant to article 25 of the Statute, a victim or persons claiming through the victim, whether or not such victim has been identified as such by the Tribunal, may bring an action for compensation before a national court or other competent body'[45]. However, it made no reference to intergenerational or transgenerational harm.

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42 CAE, Ministère Public v. Hissein Habré, Trial Chamber, Judgment, 30 May, 2016, parrs. 66-68.

43 Idem.

44 STL, The Prosecutor v. Jamil Ayyash, Hassan Habib Merhi & Hussein Hassan Oneissi, Hassan Sabra, The Trial Chamber, Judgment, 18 August 2020, STL-11-01/T/TC, par. 794.

45 STL, The Prosecutor v. Hassan Habib Merhi & Hussein Hassan Oneissi, The Appeals Chamber, Sentencing Judgment, 16 June 2022, STL-11-01/T/TC,

Finally, neither the Extraordinary Chambers in the Courts of Cambodia (ECCC)[46] nor the Specialized Chambers of Kosovo (SCK)[47] have referred to harm transmitted between generations, either as part of the concept of indirect victim, or by using the expressions intergenerational and transgenerational harm.

5. Perspective from the universal and regional systems of human rights protection

5.1. The universal human rights system

None of the UN committees mentions the concept of harm transmitted between generations in their reparations decisions. This applies to all nine of them, i.e.: the Human Rights Committee (HRC); the Committee on Economic, Social and Cultural Rights (CESCR); the Committee on the Elimination of Racial Discrimination (CERD); Committee on the Elimination of Discrimination against Women (CEDAW); the Committee against Torture (CAT); Committee on the Rights of the Child (CRC); Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW); Committee on the Rights of Persons with Disabilities (CRPD); and the Committee on Enforced Disappearances (CED). These nine committees do not use the expressions intergenerational and transgenerational harm[48].

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par. 72.

46 In the cases 001, 002, 002/1, 002/2, 003, 004, 004/1, 004/2 the Extraordinary Chambers of the Courts of Cambodia mention neither transgenerational harm nor intergenerational harm as a type of harm that could justify the recognition of victim status for the purposes of reparations. See.: Table of references.

47 In the documents of the cases of Salih Mustafa, Hysni Gucati and Nasim Haradinaj, Pjetër Shala, and Hashim Thaçi, Kadri Veseli, exhep Selimi and Jakup Krasniqi, transgenerational harm and intergenerational harm are not mentioned as a type of harm that could justify recognition of victim status for the purposes of reparations. See.: Table of references.

48 The concept of indirect victim or trauma transmitted between generations (trans/intergenerational) is not mentioned in the searches done, as this

5.2. Regional human rights systems

5.2.1. The Inter-American system

Article 63.1 of the American Convention on Human Rights (ACHR) establishes that the Court ought to guarantee and ensure an injured party (someone who experienced a violation of a right or freedom protected by the Convention) the enjoyment of his right or freedom, and that fair compensation be paid. This legal provision is further developed in rule 23 of the Rules of Procedure of the Inter-American Court of Human Rights (IACtHR), which states that the potential beneficiaries of reparations are direct victims and their closest relatives.

Until 2009, closest relatives were considered the ones who could be encompassed by the 'next of kin' concept, which rule 2 (15) defined as '[…] the immediate family, that is, the direct ascendants and descendants, siblings, spouses or permanent companions, or those determined by the Court, if applicable'[49]. However, when this rule was overturned in 2009[50], IACtHR jurisprudence made more frequent use of the 'indirect victim' concept.

Although the IACtHR jurisprudence has never relied on the expressions intergenerational and transgenerational harm, it has ordered reparations to children and grandchildren of direct victims for psychological harm as a consequence of enforced disappearance.

The case of Movilla Galarcio et. al. v. Colombia (2022) concerning the forced disappearance of Mr. Pedro Movilla (whose whereabouts are still unknown) is relevant in this regard. The IACtHR considered Mr. Movilla's children as indirect victims based on the psychological harm caused by their father´s disappearance. According to

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type of reparations is not considered in the committees of the universal system. However, the term intergenerational equity is used when referring to the rights of children regarding the issue of climate change, a topic that is different from the subject of this paper, since it does not consider the trauma acquired between generations.

49 Burgorgue, L., & Amaya, L., 2011, The Inter-American Court of Human Rights: Case Law and Commentary. Oxford, p. 225.

50 Ibid., p. 227.

the IACtHR, 'they were children at the time of their father's forced disappearance, they were particularly affected, given their experiences in an environment that suffered suffering and uncertainty due to the lack of determination of their father's whereabouts. The forced disappearance of Pedro Movilla generated in his sons and daughter feelings of loss, intense fear, uncertainty, anguish, and pain, which varied and intensified depending on the age and particular circumstances of each one'[51].

Consequently, the IACtHR, decided that Mr. Movilla's forced disappearance directly caused psychological harm to his children and, therefore, there was no transmission of harm onto his descendants (children).

The case of Rocha Hernández et. al. v. *El Salvador* (2014) is also relevant, as the IACtHR expressly cited the testimony of expert witness Martha de la Concepción Cabrera Cruz on the 'transgenerational consequences of enforced disappearances', in the following terms: 'The Court also takes note of the expert opinion […], according to which forced disappearance can produce transgenerational repercussions. The expert witness Martha de la Concepción Cabrera Cruz affirmed that "when the concept of trauma and (family) ties are combined, we can formulate a principle –which is the principle of systematic and transgenerational psychological trauma- whereby a mother who has suffered trauma and has not healed inevitably transmits that experience to her son or daughter in one way or another. Therefore, a traumatic experience continues to have effects on the next generations." She also explained that "the families of disappeared children feel that they alone have experienced the loss of their sons and daughters, but in reality it is a collective problem" and that "[the] collective trauma of war suffered by thousands of people is stored and frozen in the collective unconscious." Finally, she considered that "the healing process must focus on the family, in other words, it is the family that was affected, and it is the family that should allow itself the space to heal and, in turn, the community, because we see

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51 IACtHR, Movilla Galarcio and others v. Colombia, Judgment of 22 june 2022, (Merits, Reparations and Costs), June 22, 2022, par. 186.

that this was the result of the war, the war affected the community where that family lived"[52].

Nevertheless, the IACtHR did not elaborate in this case on the existence of psychological harm transmitted by the direct victims (who suffered the original harm) onto the next generations or descendants (children and grandchildren). In fact, it would have been impossible for the court to analyze this matter, as the case dealt with the forced disappearances of five children in El Salvador, and indirect victims were the disappeared children's siblings, mothers, fathers, grandmothers, grandfathers, aunts, and uncles. Indirect victims were compensated because of the psychological harm they had suffered. Thus, and according to the IACtHR, 'owing to the facts of this case, the victims' next of kin suffered psychological effects and irreversible harm to their immediate family, uncertainty regarding the whereabouts of the victims and a feeling of impotence due to the lack of cooperation from the State authorities and the resulting impunity for more than three decades […]'[53].

The only case in which the IACtHR seems to recognize children's and grandchildren's suffering (indirect victims) of psychological harm transmitted by their parents and grandparents during child rearing (who suffered the original harm), is the case of Gudiel Alvarez et. al. (Military Diary) v. Guatemala (2012). In this case, the court analyzed the forced disappearance of 26 people who had, at the time of their disappearance, children, grandchildren, nephews and nieces. The Court also included consideration of family members not yet born. The IACtHR recognized all of them as indirect victims, and established that 'two of the children of those who disappeared were not yet born when their fathers were disappeared. In this regard, as it has in other cases and taking into consideration the terms of the State's acknowledgement of responsibility, the Court considers that they also suffered a violation of their mental and moral integrity, because the fact that they had to live in an environment of suffering and uncertainty owing to the failure to determine the whereabouts of

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52 IACtHR, Rochac Hernández et. al. v. *El Salvador*, Judgment of 14 October 2014 (Merits, Reparations and Costs), October 14, 2014, par. 114.

53 Ibid., par. 258.

the disappeared victims prejudiced the integrity of the children who were born and lived in this situation'[54].

5.2.2. The European system

In the Vallianatos and others v. Greece case, the European Court of Human Rights (ECtHR) stated regarding the victim's condition '[…]that, in order to rely on Article 34 of the Convention, an applicant must meet two conditions: he or she must fall into one of the categories of petitioners mentioned in Article 34 and must be able to make out a case that he or she is the victim of a violation of the Convention. According to the Court's established case-law, the concept of 'victim' must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act […] The word 'victim', in the context of Article 34 of the Convention, denotes the person or persons directly or indirectly affected by the alleged violation'[55].

Therefore, the ECtHR refers to indirect victims within the context of article 34 of the European Convention of Human Rights (ECHR) which '[…] concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end'[56].

Nonetheless, in order for the ECtHR to recognize a person as a victim (direct or indirect) able obtain compensation, the harm suffered must have been: (a) personal; (b) direct; and (c) certain[57]. According to the ECtHR, this criteria only includes those who personally suffered the violation of the rights established in the ECHR[58].

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54 IACtHR, Gudiel Alvarez et. al. ("*Diario Militar*") v. Guatemala, Judgment of 20 November 2012 (Merits, Reparations and Costs), November 20, 2012, par. 287.

55 ECtHR, Vallianatos and others v. Greece, Judgment, November 7, 2013, par. 47.

56 Idem.

57 ECtHR, Colozza v. Italy, Judgment, February 12, 1985, par. 38.

58 Burgorgue, L., Amaya, L., 2011, supra n. 50, p. 225.

As a result, although the ECtHR has not expressly ruled on the matter, strict interpretation of the personal harm requirement (which notably limits the scope of the concept of indirect victim) seems to exclude cases of intergenerational and transgenerational harm that are the subject of this paper.

6. Conclusions

This paper has analyzed whether there is a conceptual difference between the expressions 'intergenerational' and 'transgenerational' harm. The analysis carried out allows us to conclude that the psychological theories of attachment (or social transmission) and epigenetics confirm the existence of a real conceptual difference between both expressions.

Hence, according to these theories, intergenerational harm consists of the transmission of harm by the parents (direct victims of crimes or serious human right violations) onto their children, either as a result of upbringing, or genetic inheritance. These same theories state that transgenerational harm is transmitted from those who originally suffered it (the parents), to their children, and subsequently, to the next generations (grandchildren), by either of these two modalities.

By contrast, ICL and IHRL jurisprudence and doctrine had not referred to the term intergenerational harm until Gacka's 2022 study on victimization and causation. In his study, the author exclusively analyses 'transgenerational harm' (without ever using or mentioning the term 'intergenerational harm'). By analyzing ICC jurisprudence, specifically the Katanga case, he considers transgenerational harm as the psychological harm transmitted by the parents who directly suffered the crime to their children (indirect victims).

In terms of international criminal law and hybrid tribunals, ICC jurisprudence did not use expressions of intergenerational or transgenerational harm until the Katanga Reparations Order issued by Trial Chamber II in 2017 (up until then, its decisions were limited to the concepts of direct and indirect victim).

As part of the discussion on the scope of and concept of direct victim, in its Reparations Order Trial Chamber II refers to the psychological harm transmitted by parents (direct victims) to children during child rearing, calling it 'transgenerational harm'. Trial Chamber VI followed the same approach in the Ntaganda case, which was later confirmed in 2022 by the Appeals Chamber. However, Trial Chamber VI introduced as a specificity the use of the terms intergenerational and transgenerational harm interchangeably to refer to the transmission to children of the trauma experienced directly by the parents.

The ICTY, ICTR and SCSL have never used nor analyzed the terms intergenerational and transgenerational harm, despite studies on the effects that the trauma suffered by survivors of the Rwandan genocide has had upon the children and grandchildren of direct victims. Moreover, these tribunals did not refer to the concept of indirect victim. This is largely due to the fact that their Statues do not include any legal provision in regard to a reparations system such as the one established in the ICC Statute.

Regarding hybrid tribunals, the CAE, the STL, the ECCC, and KSC, although they apply the concept of 'indirect victim', and under certain circumstances recognize as such the children and grandchildren of the direct victims, none of them have used the expressions intergenerational and transgenerational harm, nor have they addressed the issue of the transmission of harm between immediate (parents/children) or successive generations (grandparents/grandchildren).

None of the various committees of the universal and regional systems of human rights protection, nor the ECtHR have so far issued a reparation decision specifically related to harm transmitted between generations, and therefore have not used the expressions intergenerational and transgenerational harm. Moreover, within the European system of protection and under a strict interpretation of the ECtHR of the requirement of personal harm (which significantly limits the scope of the concept of indirect victim), children and grandchildren of the direct victims cannot be recognized as victims.

Finally, the Inter-American system for the protection of human rights is the only one which seems to recognize the status of indi-

rect victims to include children and grandchildren who have suffered psychological harm as a result of their parents and grandparents' trauma (which is transmitted through upbringing). Such is seen in the case of Gudiel Alvarez et. al. (Military Diary) v. Guatemala of 2012. Also relevant to the present research, may be the IACtHR' reference to the expert witness testimony of Martha de la Concepción Cabrera Cruz, on the transgenerational aftermath of enforced disappearances in the case of Rocha Hernández et. al. v. El Salvador in 2014.

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12. Forced marriage and its legal characterization as a crime against humanity: sexual slavery, other inhumane acts, or both?

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1. Introduction

Forced marriage has been a particularly recurrent practice in the armed conflicts in Uganda, Sierra Leone, the Democratic Republic of the Congo (DRC) and Cambodia. The Lord's Resistance Army's (LRA) systematic and widespread practice is an example of this, whereby its members have, for decades, taken women as 'wives', subjecting them to slavery, rape, forced labor, forced pregnancy and cruel treatment.

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Although there are several definitions of this phenomenon, the core of the problem is the lack of free and full consent by the victim[1]. In this sense, Gill and Anitha's definition insightfully reflects on this situation by considering as forced marriage any '[…] marriage in which one or both spouses do not (…) consent to the marriage and duress is involved. Duress can include physical, psychological, financial, sexual and emotional pressure'[2].

Since the practice of forced marriage is not explicitly provided for in any of the existing categories of crimes against humanity (CAH), there are different positions as to its legal characterization. This debate goes back to the cases concerning the Armed Forces Revolutionary Council (AFRC) and Liberia's former President, Charles Taylor, before the Special Court for Sierra Leone (SCSL). It continued in case 002 before the Extraordinary Chambers of the Courts of Cambodia (ECCC) and in the Ongwen case before the International Criminal Court (ICC).

It took until the Ongwen trial judgment for the ICC to address the practice of forced marriage in a comprehensive and in-depth manner. This tardiness is not coincidental, but rather a result of the lack of development of case law on gender and sexual crimes. In its judgment, Trial Chamber (TC) IX legally characterized forced marriage as a CAH of 'other inhumane acts' (defined in article 7(1)(k) of the ICC Statute (ICCS)), thus establishing a precedent on the seriousness of the physical and psychological consequences that such practice entails for the victims.

Nevertheless, the Defense argued in the appeals process that TC IX erred because the crime of forced marriage is not expressly provided for in the ICCS and, therefore, the ICC cannot create a new crime by considering this practice as a CAH of other inhuman acts[3]. By

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1 Borowska, M., 2013, 'The Phenomenon of Forced Marriage', *Review of Comparative Law,* Vol. 18, p. 24.

2 Gill, A. & Sundari, A., 2011, Forced Marriage: Introducing a Social Justice and Human Rights Perspective, London, Zed Books, p. 26.

3 ICC, the Prosecutor v. Dominic Ongwen, Appeals Chamber, Defense Appeal Brief Against the Convictions in the Judgment of 4 February 2021, October 19, 2021, Doc. No.: ICC-02/04-01/15, par. 148.

contrast, the Office of Public Counsel for Victims of the ICC (OPCV) supported TC IX´s conviction for the CAH of other inhumane acts because the practice of forced marriage meets all requirements provided for in Article 7(1)(k) of the ICCS[4]. Finally, a third approach considers that forced marriage may constitute two CAH with distinct elements (sexual slavery and other inhuman acts), thus justifying cumulative convictions for both of them.

Considering the above, this paper seeks to analyze whether forced marriage should be legally characterized as a CAH of 'sexual slavery' or as a CAH of other inhumane acts. Furthermore, it studies the possibility, under specific circumstances, of convicting an accused person with cumulative convictions for both CAH. This possibility is explored because forced marriage is not entirely encompassed by the legal definition of sexual slavery, since not all types of harm experienced by victims of forced marriage are sexual in nature.

In order to analyze and study this issue, a jurisprudential and doctrinal study will be conducted, particularly focusing on case law of international and hybrid criminal courts.

2. Forced marriage as a crime against humanity of sexual slavery

2.1. The jurisprudence of the Special Court for Sierra Leone

In the 1990s, Sierra Leone's armed conflict was characterized by extreme brutality[5] and by the systematic and widespread practice of forced marriage. Hundreds of women and girls were abducted and forced to become 'wives' of their captors. Sierra Leonian armed

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4 ICC, the Prosecutor v. Dominic Ongwen, Appeals Chamber, Public redacted version of CLRV Observations on the Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021, October 28, 2021, Doc. No.: ICC-02/04-01/15, par. 175.

5 SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzt Kamara & Santigie Borbor Kanu, Appeals Chamber, *Judgment*, February 22, 2008. Case No.: SCSL-04-16-T.

groups (the Armed Forces Revolutionary Council (AFRC), the Revolutionary United Front (RUF) and the Civil Defense Forces (CDF)) and governmental forces carried out this practice. The report of the Sierra Leonian Truth and Reconciliation Commission noted that 'women and girls were detained under conditions of extreme cruelty with the deliberate intention of raping and perpetrating other acts of sexual violence upon them'[6].

Since forced marriage is not explicitly criminalized in the SCSL Statute (SCSLS), there are two positions regarding the legal characterization of this conduct as a CAH. The first position, held by the judgments of TC II in the cases of the AFRC and Charles Taylor, considers forced marriage as a CAH of sexual slavery, according to Article 2(g) of the SCSLS. The second position, held by the Appeals Chamber (AC) judgment in the AFRC case, considers forced marriage as a CAH of other inhumane acts, pursuant to Article 2(1) of the SCSLS.

Regarding the first position, TC II's judgment in the AFRC found that forced marriage was subsumable into the CAH of sexual slavery, since the defendants used the term 'wife' intending to exercise the right of ownership over the victim, rather than assuming a marital relationship or a quasi-marital status[7]. Judge Julia Sebutinde issued a Separate Concurring Opinion regarding the practice of forced marriage in Sierra Leone. She concluded that the sexual element

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6 Sierra Leone, Truth & Reconciliation Commission Report, 2004, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission', *Graphic Packaging Ltd. GCGL,* Vol. 2, Chapter 2, p. 101. The West Side Boys case was a particularly grave situation, where a group of renegade soldiers linked to the AFRC and RUF, who 'kidnapped women and children, retained them against their will and perpetrated a series of brutal and inhumane acts upon them'. These acts have been thoroughly documented and condemned in multiple instances by different entities and international organizations; Human Rights Watch, 2003, 'We'll kill you if you cry' sexual violence in the Sierra Leone conflict', *Human Rights Watch,* Vol. 15, No. 1 (A), p. 17.

7 SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzt Kamara & Santigie Borbor Kanu, Trial Chamber II, *Judgment,* June 20, 2007, Case No.: SCSL-04-16-T, parrs. 703, 711; 713.

inherent in this practice tends to dominate and obscure the other elements therein, such as forced labor and other forced conjugal duties of 'bush wifes'. Thus, for Sebutinde, all elements provided for in Article 2 (g) of the SCSLS for the CAH of sexual slavery were met[8].

TC II's judgment in the Charles Taylor case also considered the practice of forced marriage as a CAH of sexual slavery. TC II quoted the judgment in the AFRC case mentioned above and concluded that this practice, which occurred during the civil war in Sierra Leone, constituted a specific form of sexual slavery, better defined as 'conjugal slavery'. This is because women and girls were enslaved with the dual purpose of continuous rape and forced domestic labor[9]. TC II specified that 'marital slavery' was not a new crime, but rather a practice with certain distinctive features, such as forced conjugal labor, the assertion on the victim's status as 'wife', the exercise of exclusive sexual control (prohibiting others from sexually accessing her), and coercing the victim into performing domestic chores such as cooking and cleaning, that fall within the scope of sexual slavery[10].

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8 SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzt Kamara & Santigie Borbor Kanu, Trial Chamber II, *Separate Opinion of Judge Sebutinde,* June 20, 2007 Case No.: SCSL-04-16, par. 576. According to the judge: 'The general and specific elements of the crime against humanity of Sexual Slavery are satisfied in that forced 'marriage' invariably occurred as part of a widespread or systematic attack on the civilian population in Sierra Leone. In addition, The 'bush husband' exercised any or all the powers attaching to the right of ownership over his 'bush wife' whereby not only was she was held under captivity and not at liberty to leave but, in addition, she was forced to render gender-specific forms of labour (conjugal duties) including cooking, cleaning, washing clothes and carrying loads for him, for no genuine reward. Invariably, the 'bush husband' regularly subjected his 'bush wife' to sexual intercourse, often without her genuine consent and to the exclusion of all other persons; The 'bush husband' abducted and forcibly kept his 'bush wife' in captivity and sexual servitude with the intention of holding her indefinitely in that state'.

9 SCSL, the Prosecutor v. Charles Ghankay Taylor, Trial Chamber II, *Judgment,* May 18, 2012, Case No.: SCSL-03-01-T, paras. 425-426, 2035.

10 SCSL, the Prosecutor v. Charles Ghankay Taylor, Trial Chamber II, *Judgment,* May 18, 2012, Case No.: SCSL-03-01-T, paras. 428–430.

2.2. The jurisprudence of the International Criminal Court

One of the first ICC decisions in which forced marriage is mentioned is the Katanga Decision on the Confirmation of Charges of 2008. In its decision, PTC I did not confirm any charges related to sexual slavery and forced marriage, since the Prosecution did not include them in the charging document. The only charges confirmed by PTC I were the CAH of murder and the war crimes of attacking civilians, destruction of property, and pillaging. Nevertheless, PTC I highlighted that '[…] sexual slavery also encompasses situations where women and girls are forced into 'marriage', domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be practices such as the detention of women in rape camps or comfort stations, forced temporary marriages to soldiers, and other practices that include the treatment of women as chattels, and as such, violations of the peremptory norm prohibiting slavery'[11].

Additionally, PTC I found that there was sufficient evidence to believe that 'when the combatants (i) abducted women from the village of Bogoro (DRC), (ii) captured and imprisoned them and kept them as their 'wives', and (iii) forced and threatened them to engage in sexual intercourse, they intended to sexually enslave the women or knew that by committing such acts, sexual enslavement would occur'[12].

Another ICC decision in which forced marriage is mentioned, is the 2012 trial judgment in the Lubanga case, in which TC I analyzed evidence related to the charge of conscripting and enlisting children under the age of 15 in hostilities as war crime under article 8(2)(e)(vii) of the ICCS. TC I concluded that the accused was guilty of these crimes. During its analysis, TC I stated that it would be impermissible to cast any opinion on how the issue of sexual violence was to be treated in this context, since Pre-Trial Chamber I did not confirm any

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11 ICC, the Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Pre-trial Chamber I, *Decision on the confirmation of charges*, September 30, 2008, Doc. No.: ICC-01/04-01/07, para. 431.

12 Ibid., par. 435.

charges related to sexual slavery and forced marriage. PTC I never confirmed these charges, because the Prosecution failed to charge 'rape and sexual enslavement at the relevant procedural stages', and 'factual allegations potentially supporting sexual slavery [were] simply not referred to at any stage in the Decision on the Confirmation of Charges'[13].

2.3. Doctrine

Iris Haenen argues that the practice of forced marriage in the Sierra Leone and Ugandan's armed conflicts, ought to be considered sexual slavery, because the perpetrator's real purposes are of a sexual nature[14]. Similarly, Mazurana highlights the many similarities that exist between forced marriages that occurred in the Ugandan, the DRC, and the Sierra Leonian armed conflicts[15]. He recalls the statement of the former ICC Prosecutor, Luis Moreno-Ocampo, on the 2005 Uganda Arrest Warrants. According to Moreno Ocampo, '[t]he LRA corrupts language to cover their criminal acts [the abduction, distribution and use of girls] by calling the girls 'wives' or 'sisters', although they have been enslaved'[16].

Regarding the *mens rea* element of forced marriage, Gong-Gershowitz contends that the perpetrator's use of the term 'wife' can be considered as proof of intent to engage in acts of sexual slavery, because assertions of exclusivity may be considered as evidence of ownership and/or control over the victim. Thus, forced marriage 'in the context of armed conflict represents the perpetrator's exercise of ownership over his 'wife,' and when the exercise of ownership invol-

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13 ICC, the Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, *Judgment*, March 14, 2012, Doc. No.: ICC-01/04-01/06, parrs. 629-630.

14 Haenen, I. E. M. M., 2013, 'The parameters of enslavement and the act of forced marriage', *International Criminal Law Review,* Vol. 13, No. 4, p. 914, 915.

15 Carlson, K. & Mazurana, D., 2008, Forced marriage within the Lord's Resistance Army, Uganda, Feinstein International Center, Tufts University, p. 22.

16 ICC, Office of the Prosecutor, 2005, Statement of the ICC Prosecutor, Luis Moreno Campo, on the Uganda Arrest Warrants, October 14, 2005, p. 6.

ves sexual acts, it constitutes sexual slavery'[17]. In sum, the author argues that it would not be appropriate to consider forced marriage as a CAH of other inhumane acts, because such legal characterization could potentially minimize the harm suffered by the victims. This is particularly insidious because the exercise of ownership rights over the victim, as well as the acts of sexual violence, would be hidden under the appearance of a marriage (a legitimate social institution).

3. Forced marriage as a crime against humanity of other inhumane acts

3.1. Introduction to the crime against humanity of other inhumane acts

ICTY[18], ICTR[19], SCSL[20], ECCC[21] and ICC[22] case law coincides in the fact that the CAH of other inhumane acts encompasses actions or omissions which: (a) cause suffering or mental or serious physical harm or constitute a serious attack against human dignity; and (b) are of a similar character to other prohibited acts that constitute CAH. The main purpose of this residual clause is to chastise victimizing conduct that would otherwise remain unpunished. It is neces-

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17 Gong-Gershowitz, J., 2009, 'Forced Marriage: A new crime against humanity?', *Northwestern Journal of International Human Rights*, Vol. 8, No.1, p. 72, par. 55.

18 ICTY, the Prosecutor v. Tihomir Blaskic, Trial Chamber, *Judgment,* March 3, 2000, Case No.: IT-95-14-T, para. 241.

19 ICTR, the Prosecutor v. Clément Kayishema & Obed Ruzindana, Trial Chamber II, *Judgment*, May 21, 1999, Case No.: ICTR-95-1-T, parrs. 150-151.

20 SCSL, the Prosecutor v. Charles Ghankay Taylor, Trial Chamber II, *Judgment,* May 18, 2012, Case No.: SCSL-03-01-T, par. 436.

21 ECCC, the Prosecutor v. Lim Suy-Hong, Matteo Crippa, Se Kolvuthy, Natacha Wexels-Riser, & Duch Phary, Trial Chamber, *Judgment*, July 26, 2010, Case No.: 001/18-07-2007/ECCC/TC, parrs. 367- 369.

22 ICC, the Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Pre-trial Chamber I, Decision on the confirmation of charges, September 30, 2008, Doc. No.: ICC-01/04-01/07, parrs. 446-447.

sary because the atrocities committed by future perpetrators exceed the imagination of any given person[23].

Chakrabarty considers that the 'other inhumane acts' clause enables the ICCS to adapt itself to new (or forgotten) forms of cruelty, as the article prevents any undue restraint on the exercise of jurisdiction by the ICC and provides sufficient notice to the international community of the criminal nature of such conduct. She underscores that the CAH of 'other inhumane acts' protects the peremptory rights to life, health, liberty and human dignity provided for in customary international law. Moreover, she emphasizes that the ICCS itself empowers the ICC to base its decisions on International Human Rights Law (IHRL)[24].

In interpreting this residual clause, the maxim *nullum crimen sine iure, nulla poena sine iure* is fundamental, and international tribunals cannot violate it. Hence, when they examine if certain conduct can be legally characterized as 'other inhuman acts', they ought to consider the following criteria in order to determine if the seriousness' threshold is met: its nature, the context in which it occurred, the personal circumstances of the victim (age, sex and health) as well as the physical, mental and moral effects of the act upon the victim[25].

Ambos and Triffterer stress that the CAH of other inhuman acts provided for in article 7 (1)(k) of the ICCS, propounds a more restrictive approach, when it comes to including conduct not explicitly referred to in the ICCS. According to them, this provision has a different and narrower scope than the 'other inhuman acts' provision provided for in the ICTYS and the ICTRS. This is because article 7 (1)(k) of the ICCS requires the conduct in question to be 'of a similar character' to some of the prohibited acts under article 7 (1) of the

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23 Cryer, R., Friman, H., Robinson, D. & Wilmshurst, E., 2010, An Introduction to Criminal Law and Procedure, New York, Cambridge University Press & ICRC, p. 265.

24 Chakrabarty, I., 2018, 'Finding a way through: The possible inclusion of labour trafficking as an 'other inhumane act' under the rome statute', *Penn Undergraduate Law Journal*, Vol. 6, pp. 15-20.

25 ICTY, the Prosecutor v. Mitar Vasiljevic, Appeals Chamber, *Judgment*, February 25, 2004, Case No.: IT-98-32-A, par. 165.

ICCS (which, according to the authors, goes beyond requiring a similar 'seriousness')[26]. In turn, for Chakrabarty, the gravity assessment must be carried out on the basis of the scale, nature, manner of commission and impact of the acts committed. Moreover, it must consider the context of the acts, prioritizing a qualitative analysis (acts that give rise to social alarm in a community) over a quantitative one[27].

The case law of the international tribunals has established that the following conduct may constitute a CAH of other inhumane acts: destruction of religious and cultural property, detention under inhumane conditions, provision of starvation rations, unhygienic living conditions[28], isolation from the outside, beatings, mistreatment[29], serious injuries intended to cause the death of the victims[30] and forcing victims to witness acts committed against others, particularly against family or friends[31].

3.2. The legal characterization of forced marriage as a crime against humanity of other inhumane acts

3.2.1. The jurisprudence of the Special Court for Sierra Leone

In February 2008, the Appeals Chamber of the SCSL reversed TC II's judgment in the AFRC case. The AC decided that forced marriage was a CAH of other inhumane acts, rather than a CAH of sexual

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26 Ambos, K. & Triffterer, O., 2016, The Rome Statute of the International Criminal Court: a commentary, Oxford University Press, pp. 235-242.

27 Chakrabarty, I., 2018, supra no. 24, p. 21.

28 ICTY, the Prosecutor v. Mico Stanisic & Stojan Zupljanin, Trial Chamber I, *Judgment Volume 2 of 3*, March 27, 2013, Case No.: IT-08-91-T, parrs. 776,778.

29 ICTY, the Prosecutor v. Milorad Krnojelac, Trial Chamber II, *Judgment*, March 15, 2002, Case No: IT-97-25-T, parrs 134.

30 ICC, the Prosecutor v. Charles Blé Goudé, Pre-Trial Chamber I, *Decision on the confirmation of charges against Charles Blé Goudé*, December 11, 2014, Doc. No.: ICC-02/11-02/11, para 121.

31 ICTR, the Prosecutor v. Clément Kayishema & Obed Ruzindana, Trial Chamber II, *Judgment*, May 21, 1999, Case No.: ICTR-95-1-T, par. 153.

slavery[32]. For the AC, forced marriage did not meet the elements of the CAH of sexual slavery because of two reasons: (i) it involves a perpetrator compelling a person by force or threat, into a coerced conjugal association with another person, resulting in great suffering on the part of the victim; and (ii) it implies a relationship of exclusivity between the 'husband' and the 'wife' – and the breach of this arrangement could ultimately have disciplinary consequences. According to the AC, these two reasons demonstrate that forced marriage is not predominantly a sexual crime, but rather a CAH of other inhumane acts.

3.2.2. The jurisprudence of the Extraordinary Chambers of the Courts of Cambodia

On September 15, 2010, the TC of the ECCC initiated Case 002/02 against the four surviving members of the Khmer Rouge Central Committee - Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith. Following the appeal judgment in the AFRC case, the TC of the ECCC also considered forced marriage as a CAH of other inhumane acts, rather than a CAH of sexual slavery[33].

In Cambodia, most forced marriages took place after 1975, when the Communist Party of Kampuchea (CPK), known as the Khmer Rouge, won the civil war and seized power. The objective of the regime led by Pol Pot was to achieve a communist revolution and regulate the constitution of families[34]. According to Neha Jain, the Khmer Rouge despised human life and produced large-scale repression and

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32 SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzt Kamara & Santigie Borbor Kanu, Appeals Chamber, *Judgment*, February 22, 2008, Case No.: SCSL-04-16-A, parrs. 195-202.

33 ECCC, the Prosecutor v. Nuon Chea, Khieu Samphan, Ieng Sary & Ieng Thirith, Trial Chamber, *Judgment,* August 7, 2014, Case No.: 002/02, parrs. 740-749.

34 International Federation for Human Rights, (2018), 'Cambodia: In landmark verdict, the Khmer Rouge Tribunal recognizes forced marriage as a crime against humanity and convicts former Khmer Rouge leaders for genocide'. International Federation For Human Rights, p. 1; ECCC, the Prosecutor v. Nuon Chea, Khieu Samphan, Ieng Sary & Ieng Thirith, Trial

massacres. They turned the country into a huge detention center, which later became a graveyard for almost three million people, including their own members and even some top leaders[35].

During this regime, marriages between previously unknown people were performed in massive public ceremonies. These unions were characterized by being impersonal. Women agreed to these marriages out of violence or fear, or to avoid being sent to do forced labor. Additionally, the consummation of the marriage was mandatory, as refusing to do so would lead to beatings, imprisonment or even death. According to some witnesses, forced marriages in Cambodia were a matter of state policy[36].

LeVine mentions that, at Khmer Rouge weddings, women and men were sometimes paired off at the request of labor camp chiefs, arbitrarily, or based on geographical proximity to where they grew up. They were additionally ordered to love each other, to have sexual relations in some cases, to live together in the same commune, or on the contrary, to separate[37]. Moreover, Theresa de Langis points out how, in some cases, forced marriage caused social exclusion and discrimination. This was especially true in the case of abandoned, divorced or widowed women, or of women involved in a polygamous marriage. This marginalization was often passed on to their children, who were not generally included in the wedding ceremonies of their communities. Sometimes, the victims would prefer to remain silent and not share their experiences, out of fear of stigmatization[38].

Chamber, Summary of judgment in case 002/02, November, 16, 2018, Case File No. 002/19-09-2007/ECCC/TC, par. 39.

35 Jain, N., 2008, 'Forced Marriage as a Crime against Humanity, Problems of Definition and Prosecution', *Journal of International Criminal Justice*, Vol. 6, pp. 1022–1023.

36 Ibid., p. 1026

37 LeVine, P., 2010, Love and Dread in Cambodia: Weddings, Births, and Ritual Harm Under the Khmer Rouge, National University of Singapore Press, p. 31.

38 de Langis, T., Strasser, J, Kim, T. & Taing, S., (2014), Like Ghost Changes Body: A Study on the Impact of Forced Marriage under the Khmer Rouge Regime, Transcultural Psychosocial Organisation, pp. 57, 61.

3.2.3. The jurisprudence of the International Criminal Court

The Prosecution charged Dominic Ongwen as a direct and indirect perpetrator of forced marriage as a CAH of other inhumane acts. The Defense, however, contended that this practice should have been charged a CAH of sexual slavery[39]. In its Decision on the Confirmation of Charges, PTC II concluded that the central element of forced marriage is the imposition of the marriage on the victim, regardless of her will. This situation results in further social stigma for the victim. Hence, the Chamber concluded that forced marriage is not a predominantly sexual crime[40].

PTC II relied on the appeal judgment in the AFRC case and the ECCC's case law. It concluded that forced marriage can constitute a CAH of other inhumane acts, since it takes place when '[t]he accused, by force, threat of force, or coercion, or by taking advantage of coercive circumstances, causes one or more persons to serve as a conjugal partner, and the perpetrator's acts are knowingly part of a widespread or systematic attack against a civilian population and amount to the infliction of great suffering, or serious injury to body or to mental or physical health sufficiently similar in gravity to the enumerated crimes against humanity'[41]. For PTC II, forced marriage has a gravity comparable to other CAH under article 7, because victims are forced into a conjugal relationship under coercive circumstances[42].

In 2021, TC IX's judgment affirmed that the CAH of other inhumane acts, as defined in article 7(1)(k) of the ICCS, must be interpreted in a conservative manner in order to preserve the *nullum crimen, nulla poena, sine iure* maxim[43]. Consistent with the Decision on the Confirmation of Charges, TC IX explained the distinction

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39 ICC, the Prosecutor v. Dominic Ongwen, Pre Trial Chamber II, Decision on the confirmation of charges, March 23, 2016, Doc. No.: ICC-02/04-01/15, par. 87.

40 Ibid., par. 93.

41 Ibid., par. 89.

42 Ibid., par. 90.

43 ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, *Trial Judgment*, February 4, 2021, Doc. No.: ICC-02/04-01/15, para. 2741.

between the CAH of sexual slavery and other inhumane acts; while the former sanctions the exercise of powers attached to the right of ownership over the sexual autonomy of the victim[44], the latter entails the imposition of conjugal association upon the victim[45]. Furthermore, TC IX affirmed that forced marriage does not necessarily require the exercise of ownership over a person (an essential and inherent element of the CAH of sexual slavery)[46]. TC IX further asserted that the harm suffered from this practice consists of the ostracism of the victims from their communities, mental trauma, serious attack on their dignity, and the deprivation of their fundamental rights to choose a spouse[47].

3.3. Doctrine

Frulli argues that the practice of forced marriage is not adequately described by international crimes of a sexual nature (including the CAH of sexual slavery), since it entails specific elements of psychological and moral suffering for the victims[48]. For this reason, he claims that this egregious conduct is better prosecuted as a stand-alone crime, under a definition that describes the entirety and complexity of forced marriage[49]. Similarly, Scharf and Mattler consider that the condition of 'bush wife'[50] implies more than just enduring sexual violence; it ought to taken into account that women and girls are also forced to cook, to do household chores, raise their captor's children and avoid having sexual or sentimental relationships with someone

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44 Ibid., parrs. 3082-3084.

45 Ibid., par. 3070.

46 Ibid., par. 2750.

47 Ibid., par. 2749.

48 Frulli, M., 2008, 'Advancing International Criminal Law. The Special Court for Sierra Leone recognizes forced marriage as a 'new' crime against humanity', *Journal of International Criminal Justice*, Vol. 6, p. 1037.

49 Idem.

50 A term commonly used in Sierra Leone to describe victims of the crime of forced marriage.

other than their 'husband'[51]. These women are also victims of different types of physical aggression such as being beaten, branded and cut.

For Kalra, forced marriage can cause different types of negative consequences on the victims. This kind of union degrades and distorts the institution of marriage, because victims are not only forced to endure heinous abuses such as rape, sexual slavery, forced pregnancy, enslavement and torture (acts which are considered as CAH)[52], but they are also indefinitely and inevitably married to the men who victimize them. This further violates their right to freely choose a spouse. Thus, it would be wrong to consider that the horrors inflicted on victims of forced marriage are less grievous violations of International Human Rights Law (IHRL) or International Humanitarian Law (IHL), merely because they are committed under the guise of marriage[53].

Kerr arrives to the same conclusion from a different standpoint: it is not possible to equate forced marriage to the CAH of sexual slavery defined in ICL. This is because the principle of legality would require international tribunals to study forced marriages through the lens of an *actus reus* limited to sexual acts[54]. Nevertheless, forced marriage is multi-layered in nature, and different types of conduct, such as forced labor, are associated with it. Therefore, from the *nullum crimen, nulla poena, sine iure* perspective, it is not correct to state that forced marriage can constitute a CAH of sexual slavery[55]. According to Kerr, the CAH of 'other inhumane acts' better reflects the purposes of ICL since '[…] the objective of [this] category […] was to be a residual

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51 Scharf, M. & Mattler, S., 2005, Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity, Case Research Paper Series in Legal Studies, *Case Western Reserve University*, Working Paper 05–35, pp. 4–5.

52 Art. 2 of the SCSL.

53 Kalra, M., 2001, 'Forced Marriage: Rwanda's Secret Revealed', *U.C. Davis Journal of International Law & Policy*, Vol. 7, No. 2, p. 56.

54 Kerr, V., 2020, 'Should forced marriages be categorized as 'Sexual Slavery' or 'Other inhumane acts' in the International Criminal Law?', *Utrecht Journal of International and European Law*, Vol. 35, pp. 8.

55 Ibid., pp. 16-17.

provision which covered crimes which were not specifically recognised as crimes against humanity, and therefore to fill in any 'loophole left open'[56].

Finally, Mettraux stresses that, according to the ICC and the SCSL case law in the Katanga and AFRC cases, when an inhumane act is charged, unlike sexual slavery, '[…] it is legally irrelevant whether the underlying conduct is sexual or non-sexual in character, although this might constitute a relevant factual consideration when evaluating the (sufficient) gravity of the act'[57]. It ought to be noted that the harm resulting from forced marriage is not limited to physical consequences, but has additional negative aspects, such as a social impact on the victim[58]. Furthermore, 'the notion of forced marriage, as an inhumane act or as an underlying act of terror, could prove particularly useful as a prosecutorial device in that the notion is capable of capturing the kidnapping aspect of the offence, which might otherwise be hard to fit into other existing categories of crimes against humanity or war crimes'[59].

4. Would it be possible to use 'cumulative convictions' for the crime against humanity of sexual slavery and other inhumane acts as a result of forced marriage?

4.1. Introduction

To answer this question, it's essential to remember that the term 'cumulative convictions' refers to the concurrence of crimes, which, according to Ambos, can be divided into: (a) cases in which '[…] the same conduct fulfills different offences at the same time or the same offence at various times'[60]; and (b) cases in which 'different forms of

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56 Ibid., p. 7.

57 Mettraux, G., 2020, International Crimes: Law and Practice: Volume II: Crimes Against Humanity. Oxford University Press. Vol 2. 797-798.

58 Idem.

59 Idem.

60 Ambos, K., 2014, Treatise on International Criminal Law Volume II: The Crimes and Sentencing, Oxford University Press, Vol. 2, p. 246.

conduct fulfill different offences [that is to say] […] accumulation of offences'[61].

The first group of cases is comprised of both 'inter-categories' cases and 'intra-category' cases. In the so-called 'inter-categories' cases, the same conduct is associated with the contextual elements of more than one category of international crimes (for instance, the killing of civilians in an armed conflict which may amount to both a CAH and a war crime)[62]. In turn, in the so-called 'intra-category' cases, the same conduct constitutes, at the same time, two or more crimes within the same category (e.g., rape and sexual slavery as CAH).

The Ongwen defense argued in its appeal brief, that ICL does not allow convictions for more than one crime in either 'inter-categories' cases or 'intra-category' cases. The defense contended that, as a result, if the same conduct (for example, murder) can be legally characterized as a war crime and as a CAH, the TC would have to choose to convict for one or the other crime (not for both of them), since there's 'a complete overlap of the facts'[63]. According to the Defense, the same holds true when the same conduct constitutes two different crimes within the same category (such as rape and sexual slavery as CAH). Otherwise, the fundamental rights of the convicted person would be affected, as he would be judged twice for the same conduct. Consequently, this is an issue that involves core aspects of ICL such as the distinction between crimes, the notion of 'relevant conduct' and the *ne bis in idem* principle that protects convicted persons from double jeopardy[64].

A different view is held by the OPCV, which considers the Decision on the confirmation of charges issued by PTC II [65] and the jud-

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61 Idem.

62 Idem.

63 ICC, the Prosecutor v. Dominic Ongwen, Appeals Chamber, Defence Appeal Brief Against the Convictions in the Judgment of 4 February*, 2021*, October 19, 2021, Doc. No.: ICC-02/04-01/15, para. 289.

64 Fernández, C., 2017, 'The International Criminal Court and the Celebici Test', *Journal of International Criminal Justice,* Vol.15, No. 4, pp. 689-712.

65 ICC, the Prosecutor v. Dominic Ongwen, Pre-trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen of 23 March, 2016*, March

gment issued by TC IX [66] to be correct. According to the OPCV, cumulative convictions can only be entered when the relevant offenses have materially distinct elements, each requiring proof of a fact not required by the other. Contextual elements should also be taken into consideration for this purpose. Cumulative convictions are justified due to the relevance of comprehensively expressing and underscoring the defendant's conduct and the harm suffered by the victims[67].

The OPCV also considers that cumulative convictions do not infringe upon the rights of the defendant since the ICC, ICTY and ICTR case law makes a distinction between cumulative charging, cumulative convictions and sentencing. Furthermore, cumulative convictions do not have any impact on the sentence to be served by the convicted person due to the practice of joint sentencing (an individual sentence is first imposed for each of the offenses, and a joint sentence is later decided after considering *inter alia* the seriousness of all offences and the personal circumstances of the convicted person)[68].

Thus, as noted by the Prosecutor, cumulative convictions, '[…] while having no impact in and of itself on the determination of the individual sentences for the crimes concerned, shall however be taken into account as part of the determination of the joint sentence with a view to ensuring that, in this sense, Dominic Ongwen is not punished more than once for the same underlying conduct and related consequences[69].

23, 2016, Doc. No.: ICC-02/04-01/15, par. 32.

66 ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, Trial Judgment, February 4, 2021, Doc. No.: ICC-02/04-01/15, parrs. 2792, 2797.

67 ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, *CLRV Response to Defence 'Motion for Immediate Ruling on Standard to Assess Multiple Charging and Convictions'*, December 20, 2019, Doc. No.: ICC-02/04-01/15, par. 22.

68 Ibid., par. 16.

69 ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, *Sentence*, May 6, 2021, Doc. No.: ICC-02/04-01/15, par. 149.

4.2. The jurisprudence on 'cumulative convictions' in 'inter-categories' cases

4.2.1. The jurisprudence of the International Criminal Tribunal for Rwanda

The first vestiges of cumulative convictions in ICL can be found in the Akayesu and the Kayishema and Ruzindana cases before the ICTR. In the Akayesu case, TC I stated that cumulative convictions would be limited to certain circumstances and would require a study on the potential harm that may be caused to the accused. Thus, it would only be admissible to convict an accused person for two different crimes related to the same set of facts, in the following circumstances: '[…] (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order to fully describe what the accused did'[70]. The expression 'in the following circumstances' used by the TC I can be interpreted to the extent that the criteria on which this initial test is based are alternative rather than cumulative (i.e., if a single element listed by the TC I is met, then this would be enough to enter cumulative convictions). Moreover, although TC I established three alternative criteria to enter cumulative convictions, it only focused on the first two.

In particular, in relation to entering cumulative convictions for CAH and war crimes resulting from violations of the Geneva Conventions, TC I stated that '[…] the offences under the Statute - genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II - have different elements and, moreover, are intended to protect different interests'[71].

Nevertheless, according to TC I, '[…] it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example,

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70 ICTR, the Prosecutor v. Jean-Paul Akayesu, Chamber I, *Judgment,* September 2, 1998, Case. No.: ICTR-96-4-T, par. 468.

71 Ibid., par. 469.

murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g., genocide and complicity in genocide'[72].

In the case of Kayishema and Ruzindana, TC II analyzed the so-called 'concurrence of the crime test', according to which genocide and CAH are categories of crimes that have elements that must be proven differently, and therefore cumulative convictions can be entered. In particular, TC II noted that 'some of the enumerated crimes under CAH would not be carried out with the objective to destroy a group in whole or in part; the primary requirement for genocide. For example, CAH of deportation or imprisonment would not generally lead to the destruction of a protected group'[73]. Furthermore, TC II highlighted that a '[CAH] must be committed specifically against a 'civilian population', whereas the crime of genocide requires the commission of acts pursuant to the destruction of 'members of a group'[74]. Finally, 'the discriminatory grounds under CAH include a type of discrimination not included under genocide, that is political conviction'[75].

In the Semanza case, the AC also stated that contextual elements are to be considered to determine whether one crime is materially different from another. The AC stressed that '[a] conviction for genocide under Article 2 of the Statute requires proof of an 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group'[76]. This is completely different from what is required to support a conviction for CAH: the existence of a 'widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds'[77]. On this basis, the AC decided that

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72 Ibid., par. 468.

73 ICTR, the Prosecutor v. Clément Kayishema & Obed Ruzindana, Chamber II, *Judgment*, May 21, 1999, Case No.: ICTR-95-1-T, para. 630.

74 Ibid., par. 631.

75 Ibid., par. 632.

76 ICTR, the Prosecutor v. Laurent Semanza, Appeals Chamber, *Judgment*, May 20, 2005, Case No.: ICTR-97-20-A, par. 318.

77 Idem.

both genocide and CAH convictions, were admissible, even if based on the same facts[78].

4.2.2. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia

The practice of cumulative charging at the ICTY was first mentioned in the Tadic case, although it was not further developed beyond the Prosecution's argument, which claimed that '[t]he accused may be charged and convicted for as many crimes as there are facts in the case if there is a concurrence'[79]. Not until the Kupreškić case, was the practice of cumulative charging substantially developed.

Concerning cumulative convictions, the TC in the Kupreškić case applied the 'Blockburger test', established by the United States Supreme Court in the Blockburger v. United States of America case. According to this test, '[t]he applicable rule is such that where the same act constitutes an infringement of two distinct statutory provisions, the test to be applied in determining whether there are two offenses or only one, is whether each provision requires proof of an additional fact not required in the other'[80].

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78 Idem.

79 ICTY, the Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo, Appeals Chamber, *Judgment*. February 20, 2001, Case No.: IT-96-21-A, para. 397.

80 Scotus, Blockburger v. United States, *Judgment of the Circuit Court of Appeals*, January 4, 1932, par. 12. See.: In ICTY, Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, Kupreskic et. al. Trial Chamber, *Judgment*, January 14, 2000, Case No.: IT-95-16-T, para 680, the TC explained the following: 'One test (Blockburger test) has been enunciated and spelled out by certain national courts, such as those in the United States. The Supreme Court of Massachusetts in Morey v The Commonwealth (1871) for instance held that: 'A single act may be an offence against two statutes: and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' Cassese (2009) warns that '[…] if the Blockburger test is not met, and one offence falls entirely within the ambit of the other offence, since it does not requiere an additional element, then the

Subsequently, in the Celebici Case, the AC applied the so-called 'reciprocal specialty test' or 'Celebici test', according to which, 'for reasons of fairness to the defendant and under the consideration that only different offenses can justify multiple convictions, it is concluded that multiple criminal convictions under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision involved contains a materially distinct element not contained in the other. One element is materially distinct from another if it requires proof of a fact not required by the other'[81]. According to the AC, when the offenses charged do not have a materially different element between each other '[t]he conviction must be upheld under the more specific provision. Thus, if a set of facts is governed by two provisions, one of which contains an additional materially distinct element, then a conviction must be entered under that provision alone'[82].

Based on the foregoing, the AC stressed that it is not permissible to convict, in respect of the same act of violence, for war crimes under Article 3 of the ICTY Statute and for grave breaches of the Geneva Conventions under Article 2. The reason for the AC's decision is that these crimes don't have materially different contextual elements[83]. Both crimes require as contextual element 'the connection of the individual act to the existence of an armed conflict of an international nature'. Nevertheless, the AC found that cumulative

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charges are cumulative and the Tribunal is precluded from entering cumulative convictions and should enter a conviction on the more specific of the cumulative charges, reflecting the principles enshrined in the maxim in toto iure generi per specimen derogatur (or lex specialis derogar generall). In short, when all the legal requirements for a lesser offence are met in the commission of a more serious offence, a conviction on the more serious count consumes the lesser offence and fully describes the criminal conduct of the accused'. In Cassese, A., et. al., 2009, 'The Oxford companion to international criminal justice', *Oxford University Press*, p. 257.

81 ICTY, the Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo, Appeals Chamber, *Judgment*. February 20, 2001, Case No.: IT-96-21-A, par. 412.

82 Ibid., par. 413.

83 Ibid., parrs. 414, 421, 427.

convictions could be entered in cases of concurrence between CAH and war crimes[84].

Nevertheless, two out of the five AC judges (Hunt and Bennouna), found that the Celebici test was conflicting because it caused prejudice to the defendant, since it 'fails to take into account the punishment and social stigmatization inherent in conviction for a crime. Moreover, the number of offenses for which a person is convicted may have some impact on the sentence that will ultimately be served when national laws are applied, e.g., early release of various types'[85]. Additionally, for these two judges, the test should not be based on the contextual elements of each crime because if they are taken into consideration, it is likely that the conduct will always fit into two categories of crimes[86]. Consequently, they proposed to compare only the *actus reus* and *mens rea* of the crimes concerned, setting aside the comparison of their contextual elements[87].

4.2.3. The jurisprudence of the International Criminal Court

In the Bemba case, TC VII entered cumulative convictions and explained that it did so because each of the crimes has a materially different element[88]. TC VII said that this distinction cannot be me-

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84 According to the AC, 'Article 3 (war crimes) requires a close link between the acts of the accused and the armed conflict; this element is not required by article 5. On the other hand, article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population; that element is not required by article 3. Thus, each article has an element requiring proof of a fact not required by the other. As a result, cumulative convictions under both articles 3 and 5 are permissible.' In ICTY, the Prosecutor v. Goran Jelisic, Appeals Chamber, *Judgment*, 5 July, 2001, Case No.: IT-95-10-A, par. 82.

85 ICTY, the Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo, Appeals Chamber, *Separate and Dissenting Opinion of Judge David Hunt And Judge Mohamed Bennouna*, February 20, 2001, Case No. IT-96-21-A, par. 23.

86 Ibid., par. 31.

87 Ibid., parrs 26, 31.

88 When discussing an element that is materially different from another crime, the test applied is the one initially used in the 'Blockburger v USA'

rely apparent, but rather clear and concrete[89]. Likewise, according to TC VII, contextual elements are a constitutive part of the elements of the crimes, so they must be considered for the purpose of deciding whether to enter cumulative convictions[90]. Moreover, according to TC VII, the crimes for which cumulative convictions are entered should have the same penalty[91].

Subsequently, TC VI underlined in the Ntaganda case that the CAH have elements that are materially different from war crimes. This is because the former requires proving the occurrence of a systemic or generalized attack against the civilian population, while the latter requires proof that the crimes were committed within the context of an armed conflict[92].

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case, which was used continuously in the Akayesu and the Celebici cases.

89 ICC, the Prosecutor v. Jean-Pierre Bemba Gombo et. al, Appeals Chamber, *Judgment on the appeals of Mr. Jean-Pierre Bemba Gombo, Mr. Aimé Kilolo Musamba, Mr. Jean-Jacques Mangenda Kabongo, Mr. Fidèle Babala Wandu and Mr. Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'*, March 8, 2018, Doc. No.: ICC-01/05-01/13-2275-Red, par. 740.

90 ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, *Prosecution's Response to Defence's 'Motion for Immediate Ruling on Standard to Assess Multiple Charging and Convictions'*, December 20, 2019, Doc. No.: ICC-02/04-01/15, parrs. 33, 35; ICC, the Prosecutor v. Jean- Pierre Bemba Gombo, Appeals Chamber, *Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's? Judgment pursuant to Article 74 of the Statute'*, June 8, 2018, Doc. No.: ICC-01/05-01/08 A, par. 117; ICC, the Prosecutor v. Jean- Pierre Bemba Gombo, Pre-trial Chamber, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, June 15, 2009, Doc. No.: ICC-01/05-01/08, parrs. 84-85.

91 ICC, the Prosecutor v. Jean-Pierre Bemba Gombo, Trial Chamber III, *Decision on Sentence pursuant to Article 76 of the Statute*, June 21, 2016, Doc. No.: ICC-01/05-01/08-3399, par. 94.

92 ICC, the Prosecutor v. Bosco Ntaganda, Trial Chamber VI, *Judgment*, July 8, 2019, Doc. No.: ICC-01/04-02/06-2359, par. 1203.

4.2.4. The jurisprudence of Hybrid Courts

Regarding the SCSL, during the Civil Defense Forces (CDF) case, TC I received requests from both the Prosecutor's Office and the Defense to impose one sentence without mentioning each of the crimes committed. Nevertheless, TC I dismissed such requests because of two main reasons: (i) although the statutory framework allows it, in order to clearly expose the punishable conduct of the accused, it is preferable to differentiate each of the crimes[93]; and (ii) when a joint sentence is imposed, the penalty does not necessarily increase[94].

The Special Tribunal for Lebanon (STL) also dealt with cumulative convictions in the Ayyash case. According to the TC, '[t]he practice of Lebanese courts appears consistent with articles 181 and 205 of the Code in imposing sentences for cumulative convictions. The decisions reviewed by the TC also illustrate that Lebanese courts have imposed a single sentence for convictions of intentional homicide (or attempted intentional homicide) of multiple people'[95]. Consequently, '[h]aving considered Lebanese sentencing practice and the international case law, the Trial Chamber will exercise its discretion to impose separate sentences on each count. This approach is consistent with the practice of the Lebanese courts. It allows the Trial Chamber to avoid double counting, to clearly set out its assessment and findings with respect to the gravity of each crime for which it convicted Mr. Ayyash, and to impose distinct sentences for each to reflect his culpability in a precise manner'[96].

Finally, the TC of the ECCC applied the Celebici test in the Kaing Guek Eav alias Duch case (case 001). According to the TC, materia-

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93 SCSL, the Prosecutor v. Moinina Fofana & Allieu Kondewa, Trial Chamber I, *Judgment on the sentencing of Moinina Fofana and Allieu Kondewa*, October 9, 2007, Case No.: SCSL-04-14-T-796, par. 97.

94 Ibid., p. 33.

95 STL, the Prosecutor v. Salim Jamil Ayyash, Trial Chamber, *Sentencing Judgment*, December 11, 2020, Case No.: STL-11-01/S/TC, par. 226.

96 Ibid., 238; Ayyash's sentence was based on the penalties provided for in the Lebanese Penal Code. He was sentenced to life imprisonment for each of the crimes subject to the conviction. Moreover, he served the different life sentences concurrently.

lly different elements are decisive for the application of cumulative convictions[97].

4.3. The jurisprudence on 'cumulative convictions' in 'intra-category' cases

As stated above, 'intra-category cases' are cases in which the same conduct constitutes, at the same time, two or more crimes within the same category (e.g., CAH). In the next sections, the ICTR, ICTY, SCSL and ECCC case law on cumulative convictions in this type of case will be analyzed. No ICC case law is dealt with since it has not addressed this question to date[98].

4.3.1. The jurisprudence of the International Criminal Tribunal for Rwanda

In the Rutaganda case, TC I stated that the CAH of murder and extermination do not have materially distinct elements, since 'mur-

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97 ECC, the Prosecutor v Kaing Guek Eav alias Duch, Trial Chamber, Judgment, July 26, 2010, Case No.:001/18-07-2007/ECCC/TC, par. 560. In this case, the TC affirms, based on ICTY jurisprudence, that '[w]here the Accused's conduct fulfills the elements of different offences, the Chamber will evaluate the impact of multiple convictions. The ad hoc tribunal jurisprudence has acknowledged that multiple convictions serve to 'describe the full culpability of a particular accused or provide a complete picture of his criminal conduct'.

98 In an amicus curiae presented by 'The Women's Initiative for Gender Justice' in the Bemba Case, it was considered that the existence of sexual crimes was analyzed in a very superficial way. It affirmed that the Chamber ruled in at least three cases that the elements of torture are subsumed within the elements of rape and that the Chamber could have referred to existing jurisprudence such as that of Prosecutor v. Furundzija, where Witness D, who was forced to monitor the repeated violations of Witness A, was considered a victim of torture. In the ICC, the Prosecutor v. Jean-Pierre Bemba Gombo, *Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence*, July 31, 2009, par. 28.

der is a killing of one or more individuals, whereas extermination is a crime which is directed against a group of individuals'[99]. Consequently, TC I did not enter cumulative convictions for both crimes. The same approach was followed in the Ntakirutimana[100] and the Ntabakuze cases[101].

4.3.2. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia

The question of cumulative convictions in 'intra-category' cases was dealt with for the first time at the ICTY in the Kunarac case. In this case, the defense claimed that cumulative convictions should be entered for torture and rape as CAH because only one crime (rape) had been committed, since the intention behind the rapes was to obtain sexual gratification (and not to inflict pain). Nevertheless, the TC and the AC rejected this position. According to the AC, '[…] torture and rape each contain a materially distinct element not contained by the other […]. That is, that an element of the crime of rape is penetration, whereas an element for the crime of torture is a prohibited purpose, neither element being found in the other crime'[102]. As a result, the AC found that the TC had not erred in entering cumulative convictions for torture and rape as CAH[103].

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99 ICTR, the Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Trial Chamber I, *Judgment and sentence*, December 6, 1999, Case No.: ICTR-96-3-T, par. 422.

100 ICTR, the Prosecutor v. Elizaphan Ntakirutimana & Gérard Ntakirutimana, Appeals Chamber, December 13, 2004, Cases Nos.: ICTR-96-10-A & ICTR-96-17-A, par. 542.

101 ICTR, the Prosecutor v. Aloyz Ntabakuze, Appeals Chamber. *Judgment*, May 8, 2012, Case No.: ICTR-98-41A-A, parrs. 259-261.

102 ICTY, the Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic, Appeals Chamber, *Judgment*, 12 June, 2002, Case. No.: IT-96-23/1-A, par. 179.

103 Ibid., par. 185; The AC based its decision on the case law of the inter-American and European human rights Courts. See.: IACHR, Fernando & Raquel Mejía v Peru, *Judgment*, March 1, 1996, Case No.: 10,970, Report No. 5/96, Inter American Yearbook on Human Rights, p. 1120; ECtHR, Aydin v Turkey, *Opinion of the European Commission of Human Rights*, March 7, 1996,

In the Kunarac case, the TC and the AC also acknowledged the possibility of entering cumulative convictions for slavery and rape as CAH. In particular, the AC found that 'slavery, even if it is based on sexual exploitation, is a different offence than rape'[104].

Subsequently, in the Krnojelac[105], Vasiljevic[106], and Krstic[107] cases, the AC analyzed the CAH of persecution and murder, rejecting cumulative convictions for both crimes. The AC considered that the CAH of murder was included within the CAH of persecution (through murder)[108], because, by requiring the intent to discriminate against the victims, persecution constitutes a more specific crime[109]. The same was held in the Krstic case[110], in relation to the CAH of persecution and forcible transfer as 'other inhumane acts'[111].

Nevertheless, a few months later, the AC changed its approach in the Kordic and Cerkez case and accepted cumulative convictions for persecution and imprisonment as CAH. According to the AC, '[t]he definition of persecution contains materially distinct elements that are not present in the definition of imprisonment under Article 5 of the Statute: the requirement of proof that the act or omission discriminates in fact *and* proof that the act or omission was committed with specific intent to discriminate. On the other hand, the offence of imprisonment requires proof of the deprivation of the liberty of an individual without due process of law, regardless of whether the de-

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parrs. 186, 189; TIPY, the Prosecutor v. Dragoljub Kunarac Radomir Kovac & Zoran Vukovic, Appeals chamber, *Judgment*, June 12, 2002, Case No.: IT-96-23 & IT-96-23/1-A, parrs. 183-184.

104 Ibid., par. 186.

105 ICTY, the Prosecutor v. Milorad Krnojelac, Appeals Chamber, *Judgment,* September 17, 2003; Case No.: IT-97-25-A, par. 188.

106 ICTY, the Prosecutor v. Mitar Vasiljevic, Appeals Chamber, *Judgment*, February 25, 2004, Case No.: IT-98-32-A, par. 146.

107 ICTY, the Prosecutor v. Radislav Krstic, Appeals Chamber, *Judgment,* April 19, 2004, Case No.: IT-98-33-A, parrs. 231-232.

108 Ibid., 230.

109 Ibid., parrs. 231- 233.

110 Ibid., par. 230.

111 Ibid., par. 231.

privation of liberty discriminates in fact or was specifically intended as discriminatory, which is not required by prosecutions'[112].

Subsequently, in the Stakic case, the AC found that the CAH of persecution and murder required materially different elements: while in the CAH of persecution it must be proven that an act or omission is carried out with the specific intent to discriminate, in the CAH of murder it is required that the accused causes the death of one or more persons[113]. The AC also found in the Stakic case the correctness in law of entering cumulative convictions for the CAH of deportation and persecution[114], since deportation requires a materially different element (non-voluntary transfer of population across an international border), which is not part of the crime of persecution. The AC reached the same conclusion with respect to the CAH of persecution and extermination, and the CAH of persecution and forcible transfer as an 'inhumane act' (the latter takes place in the territory of a State without crossing any border)[115].

4.3.3. The jurisprudence of Hybrid Courts

In case 002 before the ECCC, the TC found the defendants liable for the CAH of persecution, extermination and other inhumane acts. The TC found that each of these crimes have at least one materially distinct element. The CAH of persecution requires a discriminatory intent, the CAH of extermination requires a mass killing, and the CAH of other inhumane acts requires serious injury to physical or mental integrity or a serious attack on human dignity. Accordingly, the TC entered cumulative convictions for these three offenses[116].

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112 ICTY, the Prosecutor v. Dario Kordic & Mario Cerkez, Appeals Chamber, *Judgment,* December 18, 2004, Case No.: IT-95-14/2-A, par. 1043.

113 ICTY, the Prosecutor v. Milomir Stakic, Appeals chamber, *Judgment*, March 22, 2006, Case No.: IT-97-24-A, para. 359.

114 Ibid., par, 360.

115 Ibid., parrs. 360-364.

116 ECCC, the Prosecutor v. Nuon Chea & Khieu Samphan, Trial Chamber, *Judgment,* November 16, 2018, Case No.: 002/02, parrs., 1059-1060.

Likewise, the SCSL, in the CDF case[117], also entered cumulative convictions (together with a joint sentence) for collective punishment (provided for in Article 3(a) of the SCSL) and pillaging (contained in Article 3(f) of the SCSL) as war crimes committed in non-international armed conflicts (breaches of common Article 3 to the Geneva Conventions or Additional Protocol II).

As a result, although the relevant crimes are part of the same category of CAH or war crimes, they have materially distinct elements that make it possible to enter cumulative convictions[118].

4.4. Doctrine

The discussion on cumulative convictions is not limited to the case law of international and hybrid tribunals, but has also been dealt with by doctrine. According to Van den Herik, entering cumulative convictions in 'inter-category' cases is a way to show everything that happened in violent situations such as the Rwandan genocide. For her, cumulative convictions for genocide and CAH 'play[s] an important role in the vindication of crimes committed against Hutu individuals', allowing 'to describe the full criminal conduct of an accused'[119]. This is possible since both categories of offenses have different material elements[120], because, as Ambos and Wirth have emphasized

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117 SCSL, the Prosecutor v. Moinina Fofana & Allieu Kondewa, Trial Chamber I, *Judgment on the sentencing*, October 9, 2007, Case No.: SCSL-04-14-T-796. par. 97.

118 STL, the Prosecutor v. Salim Jamil Ayyash, The Trial Chamber, *Sentencing Judgment*, December 11, 2020, Case No.: STL-11-01/S/TC, parrs. 235-238.

119 This is reflected in criterion number three of the test proposed in the Akayesu case, which indicates that cumulative convictions may occur in the scenario in which they contribute to a complete understanding of the defendant's criminal conduct. See.: Van den Herik, L., 2005, 'The Contribution of the Rwanda Tribunal to the Development of International Law', *Developments in International Law,* Vol 53, p. 255.

120 Therefore, 'in the case of genocide, only those who belong to the group or are perceived as belonging to the group can be considered victims, while any individual can be a victim of an HLC regardless of his or her origin, provided that the individual is part of the civilian population. From this perspective, it is important that genocide and HLCs are cumulatively im-

in relation to the Kayishema and Ruzindana case, 'genocide is a crime committed against a group of people, whereas CAH targeted the basic rights of individuals on a vast scale'[121].

Regarding cumulative convictions in 'intra-category' cases, Boas, Bischoff and Reid also support their application when the same facts amount to two or more CAH (e.g., murder and persecution), each containing at least one materially distinct element. Nevertheless, other authors such as Erdei prefer to emphasize that the application of the Celebici test has left largely inconsistent results in the ICTY AC case law[122].

4.5. Entering 'cumulative convictions' for the crime against humanity of sexual slavery and other inhumane acts based on the same facts of forced marriage

As seen above, forced marriage is considered by international case law and doctrine as a CAH. Nevertheless, there is no agreement on whether it should be considered as CAH of sexual slavery or as CAH of other inhumane acts. Moreover, the question arises as to whether cumulative convictions for both sexual slavery and other inhumane acts could be entered in cases of forced marriage.

To address this question, it should be noted at the outset that when referring to crimes belonging to the same category (e.g. CAH), it is not necessary to analyze their contextual elements. Likewise, as international case law has repeatedly pointed out, the CAH of other inhumane acts '[…] serves as a residual category designed to punish acts or omissions not specifically listed as [CAH] provided these acts or omissions meet the following requirements: (i) inflict great suffe-

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puted, and that cumulative convictions are possible.' See.: Van den Herik, L., 2005, 'The Contribution of the Rwanda Tribunal to the Development of International Law', *Developments in International Law,* Vol 53, p. 255.

121 Idem.

122 Erdei, I., 2011, 'Cumulative Convictions in International Criminal Law: Reconsideration of a Seemingly Settled Issue', *Suffolk Transnational Law Review*, Vol. 34, No. 2, p. 335; ICTY, the Prosecutor v. Radislav Krstić, Appeals Chamber, *Judgment*, April 19, 2004, Case No.: IT-98-33-A, par. 231.

ring, or serious injury to body or to mental or physical health; (ii) are sufficiently similar in gravity to the acts referred to in Article 2.a to Article 2.h of the Statute; and (iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act'[123].

This means that sexual conduct inherent to forced marriage that constitutes sexual slavery will preferably be subject to conviction for this crime, while nonsexual conduct inherent to forced marriage could lead to a conviction for 'other inhumane acts'. This would make it possible to reflect as fully as possible the punishable conduct of the accused.

As we have seen, the CAH of sexual slavery has two main requirements under article 7 (1)(g) of the ICCS and in the EC: (a) exercising one of the attributes of the right of ownership (such as buying, selling, lending, bartering, or all of them) over the victims, or the imposition on the latter of some similar type of deprivation of their autonomy[124]; and (b) to force the victims to perform one or more acts of a sexual nature[125]. Consequently, as Ambos and Triffterer point out, the social values protected in this criminal offense are the right to sexual autonomy, as well as the right to change this situation[126].

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123 SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu, Appeals Chamber, *Judgment,* February 22, 2008, Case No.: SCSL-2004-16-A, par. 198; ICTY, the Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipović, Dragan Papić, Vladimir Santić, Kupreskic et. al., Trial chamber *Judgment,* January 14, 2000, Case No.: IT-95-16-T, par. 653; ICTY, Prosecutor v. Dario Kordic & Mario Cerkez, Appeals Chamber, *Judgment*, December 17, 2004, Case No.: IT-95-14/2-A, par. 117; ICC, the Prosecutor v. Alfred Rombhot Yekatom & Patrice-Edouard Ngaïssona, *Public Redacted Version of Yekatom Defence Reply to Prosecution Response to Defence Confirmation Submissions,* October 10, 2009, Doc. No.: ICC-01/14-01/18, 10, par. 44.

124 ICC, the Prosecutor v. Germain Katanga, Trial Chamber II, *Judgment pursuant to article 74 of the Statute*, March 7, 2014, Doc. No.: ICC-01/04-01/07, par. 975.

125 Ibid., par. 978.

126 Ambos, K. & Triffterer, O., 2016, supra no. 26, pp. 212 and 214.

According to the ICC trial judgment in the Katanga case, from an objective perspective, the accused must have exercised the 'powers attaching to right of ownership, which must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy'[127]. Furthermore, he must have compelled the victim to engage in one or more acts of a sexual nature. From a subjective perspective, this implies that the defendant 'must have been aware of individually or collectively exercising one of the attributes of the rights of ownership over a person and forced such person to engage in one or more acts of a sexual nature'[128]. Witness P-132 in the Katanga case clearly reflects this situation by stating the following: 'You know full well that when someone takes you for his wife, he can have sexual intercourse whenever and however he wishes. He told me that I had become his wife. I could not refuse'[129].

Recently, TC IX established in the Ongwen case that both the accused and Joseph Kony (supreme leader of the LRA) had the authority to designate the abducted female population as 'wives' of male members of the Sinia brigade. In particular, TC IX explains how Ongwen used his position as commander of this brigade to impose marriages. Moreover, as ceremonies to mark the alleged marriages were not frequent, the abducted women and girls were considered wives from the moment they were forced into sexual relations with the man whom they were assigned to and could not refuse under threat of death[130].

Compared to the CAH of sexual slavery, the CAH of other inhumane acts include not only sexual acts, but acts of other nature that entail severe suffering, such as domestic servitude[131], taking care of

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127 ICC, the Prosecutor v. Germain Katanga, Trial Chamber II, *Judgment pursuant to article 74 of the Statute*, March 7, 2014, Doc. No.: ICC-01/04-01/07, par. 975.

128 Ibid., par. 981.

129 Ibid., par. 1000.

130 ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, *Trial Judgment*, February 4, 2021, Doc. No.: ICC-02/04-01/15, par. 216.

131 SCSL, the Prosecutor v. Charles Ghankay Taylor, Trial Chamber II, *Judgment*, May 18, 2012, Case No.: SCSL-03-01-T, par. 425.

the children[132] and their captors, among other forced labor acts[133]. Additionally, the community was heavily affected: these unions caused the breaking of important social ties, the weakening of the emotional, familiar, cultural and spiritual structures of the people, and the impact on the way they relate to the spirits and their ancestors, thus cutting off their sense of predictability and security[134].

Furthermore, the institution of marriage is itself degraded and distorted, since the victims are not only forced to endure acts of rape, sexual slavery, forced pregnancy and torture (all of which are recognized as CAH), but are also indefinitely married to their perpetrators, which violates their right to freely choose their spouse, causing them intense psychological and moral suffering[135]. These criminal acts led to the stigmatization of all victims, considering that women who are abandoned, divorced, in a polygamous marriage or widowed are often discriminated against and excluded from the social circles of their communities, thus ultimately affecting their children[136].

In conclusion, there is no obstacle to entering cumulative convictions for the CAH of sexual slavery and other inhuman acts in cases of forced marriage. Undoubtedly, this allows a more comprehensive description of the convicted person's punishable conduct.

5. Conclusions

This research was catalyzed by the Ongwen appeal before the AC of the ICC, whereby the Defense considered that the application of cumulative convictions by the TC was erroneous, based on the argument that several convictions rest on the same facts. According to the Defense, this entails a violation of the principle of *non bis in idem*. Consequently, the Defense proposes that forced marriage char-

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132 Scharf, M. & Mattler, S., 2005, supra no. 51, p. 4.
133 Kerr, V., 2020, supra no. 54, p. 5.
134 LeVine, P., 2010, supra no. 37, pp. xvii-xviii.
135 Frulli, M., 2008, supra no. 48, p. 1037.
136 de Langis, T., Strasser, J, Kim, T. & Taing, S., 2014, supra no. 38, pp. 97-99.

ges should be considered as a CAH of sexual slavery. On the other hand, the OPCV submits that forced marriage fits better in the CAH of other inhumane acts.

The Defense's position is underpinned by SCSL's early case law and by authors such as Mazurana and Gong-Gershowitz, who are of the opinion that the sexual element inherent to forced marriage tends to dominate over the other aspects of this practice, including the forced labour and the physical and psychological mistreatment. This is due to the fact that the latter are a consequence of the natural coercion of a forced marriage (all acts of non-sexual mistreatment and forced labor are normally considered to be part of the role of a wife).

On the other hand, the OPCV's position is supported by the jurisprudence of the AC of the SCSL in the AFRC case and of the TC of the ECCC in case 002/02. It is also supported by authors such as Frulli, Scharf and Mattler and Mettraux who consider that mistreatment of a non-sexual nature is being minimized by convicting only for the CAH of sexual slavery, when in reality, forced marriage presents a much greater complexity. By not taking into account the continuity of the other transgressions, a veil is placed over these other forms of mistreatment that go far beyond the mere fact of being taken as wives, and that affect societal values other than those protected by the CAH of sexual slavery.

The analysis conducted in this paper, leads to the conclusion that the most appropriate way to resolve the issue in question is by integrating both approaches, as suggested by the STL. This can be achieved by entering cumulative convictions against Dominic Ongwen for the CAH of sexual slavery and other inhumane acts, based upon the same factual elements of forced marriage. This would provide greater specificity of all aspects of forced marriage without ignoring the acts of non-sexual mistreatment and forced labor suffered by the victims.

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13. Criminal responsibility under national law of current and former under-fifteen-child-soldiers who were forcibly recruited

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1. Introduction

The present work addresses two research questions in relation to the ICC case against Dominic Ongwen, the former commander of the Sinia Brigade of the Lord's Resistance Army (an organized armed group that has been involved in a non-international armed conflict against the Ugandan government since 1985)[1]. The first research

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* International Law Clinic (2021-2022).
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1 Dominic Ongwen was born in Northern Uganda in 1975. He was abducted as a child by the Lord's Resistance Army in 1987. He ascended through the LRA´s ranks and acquired more powerful command positions due to his operational performance. As a result, by 2002, he became the commander of the Oka battalion. In September 2003, he escalated to the position of second in command of the Sinia Brigade, and in March 2004 he became the Sinia Brigade's commander. As multiple attacks were carried out by the LRA against the civilian population from 2002 to 2005 on the territory

question refers to the kind of penalties that are provided for child soldiers under the age of 15 in specific national jurisdictions in which they can be held criminally liable for crimes committed during the period of their recruitment. The second deals with the relevance in sentencing of being a former under-fifteen-child-soldier when former child soldiers are convicted for crimes subsequently committed when they are adults. In relation to both research questions, the focus is on children that were forcibly recruited under the age of fifteen.

To address these issues a number of domestic jurisdictions from Africa (Egypt, Kenya, South Africa and Uganda), America (Colombia, El Salvador, Peru and the United States of America) and Europe (Germany, Hungary, Spain and the United Kingdom) were analysed. Four specific criteria were used when determining the national jurisdictions to be researched: (a) the need to cover national jurisdictions from different geographical and cultural areas, thus enhancing the scope of the research and enriching it with legal and judicial diversity; (b) the links of the relevant national jurisdictions with Uganda, the State in which the crimes charged in the Ongwen case were allegedly committed (the United Kingdom and its three constituent elements (England and Wales, Scotland and Northern Ireland) have been dealt with in a separate subsection due to its close links with Uganda); (c) the existence of an armed conflict that gave rise to the commission of mass crimes by children under the age of 15 (or by adults who were forcibly recruited when they were under 15); and (d) the possibility to access official information in English and/or Spanish.

Moreover, in carrying out the research, special emphasis has been made on national jurisdictions in which transitional justice systems have been set up because of peace negotiations (Colombia, Uganda

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of Uganda, ICC PTC II issued, at the request of the ICC OTP, a warrant of arrest against Dominic Ongwen in 2005. The charges of crimes against humanity and war crimes under Articles 7 and 8 of the ICC Statute were confirmed, and the trial began on December 6th, 2016. On February 4th, 2021, he was declared guilty by ICC Trial Chamber IX. In accordance with article 78 (1) of the ICC Statute, a sentencing decision is expected in April 2021.

and The Philippines). This is due to the special measures provided for recruited minors in transitional justice systems.

As a result, this work is divided into three main parts. In the first two, the criminal responsibility of current and former under-fifteen-child-soldiers who were forcibly recruited is analyzed, distinguishing between ordinary (section 4.2) and transitional (section 4.3) national justice systems. Finally, in the third part, the main conclusions of the research are presented (section 4.4).

2. Ordinary national justice systems

According to the Child Rights International Network (s.f.), only ten countries (Argentina, Cape Verde, Cuba, Equatorial Guinea, Guinea-Bissau, Luxembourg, Mozambique, Portugal, Sao Tome and Principe and East Timor) have set the minimum age for criminal responsibility above fifteen years. As a result, in most national jurisdictions under-fifteen-child-soldiers can be held criminally liable, although they usually receive lower penalties. Moreover, when former under-fifteen-child-soldiers are convicted for crimes subsequently committed as adults, national jurisdictions do not tend to provide any special treatment for them in sentencing.

2.1. National Judicial Systems in Africa: Egypt, Kenya and South Africa

Three national justice systems have been selected in Africa: Egypt, Kenya and South Africa. In Egypt, there is a four-tiered approach towards juvenile delinquency[2] depending on the minor's age at the time of the commission of the crime: (a) children under the age of 7 years are fully unimpeachable[3]; (b) children between 7 and 12 years old can be subjected in exceptional circumstances to the juvenile justice system (even though the minimum age for criminal responsibi-

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2 Egypt, Law No. 12, 1996, Child Law Amended, arts. 96, 101.

3 Idem.

lity is 12); (c) children between 12 and 15 years are criminally liable under the juvenile justice system; and (d) minors over 15 years are treated as adults. No legal provision or case law has been found in Egypt relating to any special treatment given to adults who committed crimes after having been initially recruited into armed organizations (be they criminal[4], terrorist[5], or any other category) when they were minors.

In Kenya, the minimum age for criminal responsibility has been set at eight years. Although children between eight and twelve are presumed not to understand the consequences of their actions, this presumption may be disproved by the prosecuting authority (in these cases, they are criminally liable)[6]. Nevertheless, the penalties for minors under the age of 18 (including, children between 8 and 12) are limited by juvenile law. As a result, the death penalty is prohibited and specific provisions for treatment in rehabilitation centers are provided for[7]. In this context, Criminal Case No. 239/2004 from the High Court of Kenya[8] is relevant. This case dealt with an armed criminal gang composed of, amongst others, Swaleh Kambi Chai (who was 15 at the time of the robbery, and became an adult by the time the judgment was issued). Mr. Kambi Chai and his co-accused were sentenced to death, which led the former to appeal the decision on the following basis: "The High Court erred in law in failing to consider the issue of the age of the 2nd appellant at the time of the alleged offense". Nevertheless, the Appeals Court rejected the appeal because the events of the case occurred before the entry into force of the prohibition of death sentences for minors contained in the 2001 Children Act. As a result, the age of the appellant was not discussed during the appeal proceedings.

Regarding recidivism of former under-fifteen-child-soldiers, it is noteworthy that Kenyan law does not regulate aggravating and miti-

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4 Egypt, Law No. 58, 1937, Penal Code.

5 Egypt, Law No. 88, 2015, Terrorist Entities Law.

6 Kenya, Penal Code, 2012, art. 14, pp. 6-21.

7 Kenya, Children Act, 2001, art. 190, pp. 91.

8 High Court of Kenya (Mombasa), Kazungu Kasiwa Mkunzo et. al. v. Republic, *Appeal Judgment,* June 21, 2006, Case No.: 239/2004.

gating circumstances in its Criminal Code. Rather, the only applicable rules in sentencing are those contained in the guidelines of the nation's judiciary, which do not consider forced recruitment as an aggravating or a mitigating factor. Nevertheless, as the guidelines are not binding, Kenyan judges have a broad margin of appreciation to decide on mitigating and aggravating circumstances.

Finally, in South Africa, the South Africa's Child Justice Act[9] set a minimum age of ten years for criminal responsibility. Moreover, children between 10 and 14 are considered to lack a minimum degree of awareness (a necessary *mens rea* element of all crimes). This presumption may nevertheless be disproved by the prosecuting authority. There are some general provisions relating to juvenile criminal law that are also applicable to under-fifteen-child-soldiers. Nevertheless, no special measure applicable to them could be found in South African legislation or case law. Finally, regarding recidivism, and akin to the system in Kenya, the South African High Court[10] has affirmed that there is no system of *numerus clausus* of aggravating or mitigating circumstances, since the presiding judge decides upon them on a case-by-case analysis. Therefore, South African law does not expressly rule out forcible recruitment as a possible mitigating or aggravating circumstance. Nevertheless, no South African case law on this matter has been found.

2.2. National Judicial Systems in America: El Salvador, Peru and the United States

Three national justice systems have been chosen in America: El Salvador, Peru and the United States. When analyzing national legislations in America, it is important to consider that the cornerstone of most national legal systems is the *nullum crimen sine legem* principle, according to which all factors that are relevant in sentencing must be set out in the Law. Moreover, as a general pattern, American national

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9 South Africa, Child Justice Act 75, 2008, art. 7(1).

10 High Court of South Africa, S v. Soni, *Judgment,* October 26, 2018, Case No.: CC 29/14P, ZAKZPHC 74, parrs. 14-15.

legislations tend not to have any specific provisions regarding the criminal responsibility of child soldiers.

In El Salvador, the minimum age for criminal responsibility has been set at 12 years. Although El Salvador[11] has specific criminal legislation for children between the ages of 12 and 18[12], it does not provide any special treatment for under-fifteen-child-soldiers. Indeed, Salvadorian Law only addresses child soldiers as victims, and does not attach to this circumstance any consequence for sentencing. Moreover, no Salvadorian case law dealing with forcibly recruited children who commit crimes has been found. Furthermore, adults, who were forcibly recruited when they were children under fifteen and subsequently engaged in criminal conduct, are not treated in a different way[13].

The Peruvian Criminal Codehas a three-tiered system when it comes to minors who commit crimes: (a) children under the age of 12 are not criminally liable[14]; (b) children between 12 and 13 are subject to special measures of protection; and (c) children between the ages of 14 and 18 are subject "socio-educative measures" under juvenile law[15] (in cases of serious crimes, such as sexual violence, these measures usually consist of internment for six to ten years)[16]. Moreover, Perú has no legal provision on specific mitigating or aggravating circumstances for individuals who were forcibly recruited as children and subsequently committed crimes as adults. Furthermore, no Peruvian case law addressing the research questions has been found.

Finally, the US Model Penal Code only applies to offenders above the age of 16[17]. Moreover, it contains no provision relating to child

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11 El Salvador, Decree No. 1030, 1997, Criminal Code, art. 17.

12 El Salvador, Decree No. 863, 1994, Youth Criminal Code, art. 22.

13 El Salvador's Supreme Court of Justice, Criminal Chamber, *Judgment,* February 22, 2019, Case No.: 364C2018; El Salvador's Supreme Court of Justice, Special Criminal Chamber, *Judgment,* May 20, 2019, Case No.: 889-890-APE-2018.

14 Peru, Law No. 27337, 2000, Code of Children and Adolescents, art. 184.

15 Peru, Legislative Decree No. 1348, 2017, Code of Teenager Criminal Responsibility, art. 1.

16 Ibid., art. 163.4.

17 United States of America, Model Penal Code, 1971, sections 4-10 and 210-4.

soldiers. Furthermore, the Model Penal Code does not deal with mitigating or aggravating circumstances, except for those contained in Section 210-4 with regard to the crime of murder. They do not refer to child recruitment. Nevertheless, this does not preclude States' criminal laws from (a) regulating the criminal liability of minors (including under-fifteen-child-soldiers), and (b) providing for a mitigating or aggravating circumstance in cases of former under-fifteen-child-soldiers who subsequently commit crimes when they are adults.

2.3. National Judicial Systems in Europe: Germany, Hungary and Spain

Three national justice systems have been chosen in Europe: Germany, Hungary and Spain. Criminal codes in these jurisdictions, as in most European jurisdictions, include provisions for minors, but not for recruited minors. This is especially relevant because most European national jurisdictions are civil law-based jurisdictions, hailing from a central European tradition of strong attachment to the legality principle. As a result, the pattern found in national jurisdictions from Africa and America is confirmed by European domestic jurisdictions: forcibly recruited minors (including under-fifteen-child-soldiers) are usually treated as juveniles in States that do not have transitional justice legislation.

In Germany, the German Criminal Code sets the minimum age for criminal responsibility at 14 years[18]. Moreover, as provided for in Section 3 of the Youth Courts Act, the following further condition is required for the criminal liability of minors between the ages of 14 and 18: "if, at the time of the act, [the person who commits the crime] has reached a level of moral and intellectual maturity sufficient to enable them to understand the wrongfulness of the act and to conduct themselves in accordance with such understanding"[19]. Nevertheless, German criminal law does not contain specific provisions on forcibly recruited minors. Furthermore, the German Criminal Code

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18 Germany, Criminal Code, 1998, Section 19.

19 Germany, Youth Courts Act, 1972, Section 3.

has no direct reference to being a victim of forced recruitment as a mitigating or aggravating circumstance for crimes later committed as adults. Nevertheless, this could be a relevant individual circumstance for the reduction of the sentence under the "special personal characteristics" provided for in section 28 of the German Criminal Code.

The Hungarian Criminal Code sets the minimum age for criminal responsibility at 14 years. Nevertheless, children between 12 and 14 who commit grave crimes and are aware of their actions can also incur in criminal responsibility[20]. Moreover, regarding the possibility of minors' forcible recruitment being treated as a mitigating or aggravating circumstance, it must be highlighted that Section 15 of the Hungarian Criminal Code makes no direct reference to this factor when defining the exonerating and mitigating circumstances[21]. Moreover, the Hungarian Criminal Code does not define aggravating circumstances of general application, as it only refers to certain circumstances relating to the specific crimes committed (none of which are related to minors' forcible recruitment). Nevertheless, the general principles of sentencing in Section 80 of the Hungarian Criminal Code establish that the sentence must be determined based on "its objective, ensuring that the punishment is appropriate for the material gravity of the criminal offence, the degree of guilt, the degree of danger the perpetrator poses to society, and other mitigating and aggravating circumstances". This may open the door for the consideration of under-fifteen forcible recruitment as a mitigating or aggravating factor[22].

Finally, in Spain, the Spanish Criminal Code[23] sets the minimum age for criminal responsibility at 14 years. It also establishes that minors under the age of 15 can only be sentenced to a maximum of 3 years' imprisonment[24]. Moreover, as shown by the case of Claudio, who was recruited into the Islamic State and captured while he was

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20 Hungary, Criminal Code, 2012, Section 16.

21 Ibid., section 15.

22 Ibid., section 80.

23 Spain, Organic Law 10, 1995, Criminal Code, art. 19.

24 Spain, Organic Law 5, 2000, Judgment on norms for the criminal responsibility of minors.

in Morocco seeking to join the organization (no charges pressed against him)[25], minors under 18 recruited into armed organizations usually avoid punishment. Nevertheless, sentences with significant imprisonment penalties have also occasionally been set[26]. This happened, for instance, in judgment 973/2018 of the Penal Chamber of the Spanish *Audiencia Nacional*, relating to a Spanish minor who was captured in Iraq after having joined the Islamic State and recruited other children into the organization[27]. Furthermore, there is no specific aggravating or mitigating circumstance under the Spanish Criminal Code relating to individuals, who were forcibly recruited when they were children, and later committed crimes as adults[28]. Nevertheless, general aggravating and mitigating circumstances may apply, such as the age of the convicted person, or grave alteration of personal situations.

2.4. Special Attention to the United Kingdom considering its strong ties with Uganda

Given the close links between the United Kingdom and Uganda (the State in which the crimes charged in the Ongwen case were allegedly committed), the legislation and case law of the United Kingdom is specifically dealt with in this subsection. Moreover, given the existence of three autonomous jurisdictions in the United Kingdom (England and Wales, Scotland and Northern Ireland), the analysis of each of them is carried out separately.

In England and Wales children under the age of 10 cannot be criminally prosecuted. When they break the law, other types of sanctions can be applied to them, such as filing charges against their parents,

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25 Supreme Court of Spain, Penal Chamber, *Judgment,* October 20, 2020, Case No.: 525/2020.

26 National Audience of Spain, Penal Chamber, *Judgment*, April 9, 2018, Case No.: SAN 973/2018.

27 Idem.

28 Art. 19 of the Spanish Criminal Code, supra no. 25. See also: National Audience of Spain, Penal Chamber, *Judgment,* September 25, 2018, Case No.: SAN 3462/2018.

or issuing child safety orders to be followed by their guardians. Children between the ages of 10 and 17 years can be prosecuted for the crimes that they commit under special measures designed for them, such as being judged by specialized minor's courts or being sentenced to pedagogical and community service measures. Furthermore, in the most complex cases minors between 10 and 17 can be also sent to special security centres for young people.

In Scotland, the minimum age for criminal responsibility is set at 12 years[29]. As a result, as the Criminal Justice and Licensing Act of 2010 indicates, minors below 12 may not be prosecuted for an offence[30]. Concerning children above 12 years, neither Scottish legislation, nor case law addresses the issue of children's participation in armed conflicts. Moreover, the International Criminal Court Act of 2001[31], the most relevant legal provision about international crimes, does not make any reference to minors who might commit them.

Notwithstanding this, there is some case law that might shed light on sentencing practice by Scottish tribunals when the convicted person is a minor. In this regard, the High Court of Justiciary has stated that its primary consideration when sentencing minors is the child's best interest. Thus, any conviction must aim to the reintegration and rehabilitation of the convicted child[32].

The High Court of the Judiciary has also established in several cases that the youth of the convicted child is a mitigating circumstance, including in those cases where the convicted person is an adult judged by crimes committed when he was a minor. In particular, in the Paul William Greig vs. Her Majesty's Advocate case, the Trial Chamber found that being a minor when the crimes took place is a relevant

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29 Scotland, Age of Criminal Responsibility Act, 2019.

30 Scotland, Criminal Justice and Licensing Act, 2010.

31 Scotland, International Criminal Court Act, 2001.

32 Scotland's Appeal Court, Adam McCormick Against Her Majesty's Advocate, High Court of the Judiciary, *Appeal Against Sentence,* April 12, 2016, Case No.: HCJAC 50, par. 4.

factor for sentencing. Therefore, the penalty cannot be the same as if the convicted person was an adult[33].

An exception to this case has been applied by Scottish courts in situations of defendant´s "irreparable corruption", as provided for in the Aaron Thomas Campbell case. In this case, the Appeal Chamber highlighted that "[…] were the appellant to have been sentenced when he was still a child, any sentence for these crimes would have been significantly less than if the crimes had been committed by an adult. In sentencing a person who is a child, regard must be had to the best interests of that child as a primary consideration"[34]. This finding was presented by Lady Hale as she insisted that "juveniles are generally less blameworthy and more worthy of forgiveness than adult offenders, although each case must depend on its own circumstances: there is a difference between the juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile offender whose crime reflects irreparable corruption"[35]. As a result, in the situations of defendant´s irreparable corruption, "[t]he nature of these appalling offences and what I have read in the reports make it clear to me that reintegration and rehabilitation, while these are important considerations, are remote possibilities and neither your best interests nor anyone else's will be served by a speedy return to the community"[36].

Finally, in Northern Ireland, the minimum age for criminal responsibility is set at 10 years. As there is no specific legislation or case law relating to child involvement in armed conflicts, the most relevant legislation is the Criminal Justice (Children) (Northern Ireland) Order of 1998, which regulates grave crimes committed by children. The Order determines that, when grave crimes are perpetrated, no

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33 Scotland's Appeal Court, Paul William Greig v. Her Majesty's Advocate, High Court of the Judiciary, *Judgment*, October 5, 2012, Case No.: HCJAC 127, par. 7.

34 Scotland's Appeal Court, *Adam McCormick Against Her Majesty's Advocate*, supra no. 34, par. 4.

35 Scotland's Appeal Court, Aaron Thomas Campbell against Her Majesty's Advocate, High Court of the Judiciary, *Appeal Against Sentence*, September 10, 2019, Case No.: HCJAC 58, par. 9.

36 Ibid., par. 7.

life imprisonment sentence shall be passed onto the child. Instead, the child shall be sentenced to be detained for the time the Minister of Justice considers appropriate[37].

The purpose of Juvenile Justice in Northern Ireland is to encourage children "[…] to recognize the effects of crime and to take responsibility for their actions", with special regard for the wellbeing of the child. Nevertheless, children can be taken from juvenile facilities to prisons when they turn 17.

Regarding mitigating and aggravating circumstances, it is important to highlight that the age of the offender is an important mitigating factor[38], as is "the capacity of understanding and responding in a socially appropriate manner." Reduced understanding of reality implies a more lenient process[39]. Furthermore, Northern Ireland tribunals have accepted that the effects of psychological distress experienced as a child can also be considered a mitigating circumstance[40]. Nevertheless, forcible recruitment into an armed group, or an analogous criminal organization, has not been considered so far as a relevant circumstance for sentencing.

2.5. Final remarks

Although all national justice systems analyzed set the minimum age for criminal responsibility under 15, children under this age are generally protected by legal provisions and juvenile justice legislation, which provide for more favourable conditions for them. In ex-

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37 Northern Ireland, The Criminal Justice (Children) Order, 1998.

38 Crown Court for Northern Ireland, The Queen v. Darren Larmour, *Decision on Tariff,* May 24, 2005, Case No.: [2004] NICC 4, parrs. 11, 17; Court of Appeals of Northern Ireland, The Queen v. Trevor McCandless (and others), *Judgement*, January 9, 2004, Case No.: CARF4076, parrs. 2-8, 13, 17.

39 Crown Court for Northern Ireland, The Queen v. A and B, *Judgement*, November 21, 2008, Case No.: GIL7324, parrs. 23-31.

40 Court of Appeals in Northern Ireland, Attorney General's Reference: Michael John Gilbert, *Appeals Judgement*, September 15, 2006, Case No.: [2006] NICA 36, parrs. 10, 15; The Court determined that youth was not a relevant factor to be considered when analyzing the mitigating circumstances.

ceptional cases, some jurisdictions have even abandoned a retributive justice system, favouring the adoption of rehabilitation measures for children under 15. As a result, sentences are usually replaced by temporary remands or "corrective measures".

International Law has endorsed and bolstered this approach, as the UN Convention on the Rights of the Child[41] recognizes that when children commit criminal offences, their submission to the criminal justice system should be a last resort mechanism by States.

Consequently, national jurisdictions do not appear to bestow special treatment (legal or procedural) to under-fifteen-child-soldiers due to their forcible recruitment. Instead, under-fifteen-child-soldiers usually benefit from general provisions related to juvenile justice.

Furthermore, no national jurisdiction bestows special treatment (legal or procedural) to under-fifteen-forcibly-recruited-children, who subsequently commit crimes when they are adults. The national justice systems that have been analyzed tend to consider the age of the accused person as a possible mitigating factor. Nevertheless, none of them have specifically considered forcible child recruitment as such.

3. Transitional Justice Systems

As shown by the case of Colombian and The Philippines, States with transitional justice systems tend to specifically deal with minors who have been recruited by organized armed groups (including children forcibly recruited under the age of fifteen) through amnesty laws passed at the end of armed conflict. As an exception, the Ugandan amnesty law makes no specific reference to LRA child soldiers.

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41 United Nations, General Assembly, Resolution 44/25, Convention on the Rights of the Child, November 20, 1989, UN Doc. No.: A/RES/44/25, Article 40.

3.1. Colombia

In Colombia, the Constitutional Court has established that it is not relevant whether recruited minors became willingly or not members of organized armed groups, since, in the Court's opinion, minors cannot be fully aware of the consequences that derive from enlisting into said groups, especially considering their social, cultural and educational background[42]. Thus, for the Colombian Constitutional Court, children under the age of eighteen are unable to make a well-informed decision when joining organized armed groups, and therefore their consent is never valid[43]. Therefore, forcefully recruited children are always victims in the conflict, which entails several judicial consequences.

The Law of Justice and Peace (2005) established a first transitional justice system for demobilized members of Colombian organized armed groups (especially, Colombian paramilitary groups). Nevertheless, it only referred to the demobilization of recruited minors, and not to their criminal liability for the (international) crimes they might have committed[44].

Law 1448 (2011) established a second system of transitional justice in Colombia, according to which forcibly recruited minors who demobilized from Colombian organized armed groups while they were under eighteen were considered victims of the armed conflict. Nevertheless, this Law did not specifically refer to the exemption or mitigation of criminal liability for the (international) crimes that they might have committed while being part of the organized armed group that forcibly recruited them[45].

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42 Constitutional Court of Colombia, *Demanda de inconstitucionalidad en contra del artículo 14 (parcial) de la Ley 418 de 1997, "Por la cual se consagran unos instrumentos para la búsqueda de la convivencia, la eficacia de la justicia y se dictan otras disposiciones"*, April 1, 2009, Case No.: C-240/09.

43 Idem.

44 Colombia, Law 975, 2005, art. 10(3).

45 Colombia, Law 144, 2011, Law of Victims, art. 3; González Ortiz, J. & Carrasquilla Baza, D**.,** 2017, *'Niños, niñas y adolescentes ¿víctimas o victimarios del conflicto armado en Colombia?'*, Justicia Juris, Vol. 13, No. 1, pp. 56-62.

The 2016 Peace Agreement between the Colombian Government and the Colombian Revolutionary Armed Forces (FARC) established a third system of transitional justice. The Amnesty Law that is part of it has addressed the issue of how to treat demobilized FARC child soldiers who have committed international crimes.

The regulation of this issue is two-fold. On the one hand, according to article 28 of the Amnesty Law[46], those responsible for international crimes during the armed conflict cannot be granted amnesty. On the other hand, the Amnesty Law tasks one of the Chambers of the Special Jurisdiction for Peace (the Chamber for the Definition of Judicial Situations) with deciding on whether charges will be pressed against demobilized FARC child soldiers who have committed international crimes. According to the Colombian Constitutional Court, Congress has the power to give the Special Jurisdiction for Peace (SJP) the mandate to determine what treatment should be given to demobilized FARC child soldiers. Moreover, even if the competent SJP Chamber decides to press charges against them, the Colombian Constitutional Court has made it clear that it must consider "the principles that guide the function of the penalty in the system of juvenile criminal responsibility, and the restorative and prospective focus of the sanctions of the Special Jurisdiction for Peace"[47].

Even though it is an important part of the Amnesty Law, out of over two hundred cases overseen by the Chamber for the Definition of Judicial Situations, only five of them have dealt with demobilized child soldiers that were active in the conflict. In all five cases, the Chamber dismissed their request and denied them the possibility to be exonerated from criminal responsibility under Article 28 of the Law 1820 of 2016[48].

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46 Colombia, Law 1820, 2016, Law of Amnesty, art. 28.

47 Constitutional Court of Colombia, *Control automático de constitucionalidad del Proyecto de Ley Estatutaria número 08 de 2017 Senado, 016 de 2017 Cámara, "Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz"*, August 15, 2018, Case No.: C-080/18.

48 Special Jurisdiction for Peace, 2020, *Relati JEP Buscador Especializado de la JEP*, https://relatoria.jep.gov.co

For all those cases of forcible recruitment of children under fifteen by organized armed groups or criminal organizations that are outside the scope of application of the three above-mentioned systems of transitional justice, the Colombian Criminal Code is applicable. It sets the age of criminal responsibility at 14 years. Nevertheless, no provision can be found in the Colombian Criminal Code which considers the forcible recruitment of minors as an exonerating, a mitigating or an aggravating circumstance (regardless of the age of demobilization)[49]. The same holds true concerning the lack of Colombian case law on this matter.

Finally, it is also worth mentioning that Article 188D of the Colombian Criminal Code criminalizes the use of minors for the commission of crimes[50]. The increasing number of children and adolescents belonging to gangs and urban cartels have led to the inclusion of this offence in the Colombian Criminal Code[51].

3.2. Uganda

The Ugandan Penal Code Act sets the minimum age for criminal liability at 12 years[52]. Nevertheless, under the Children Act (2001)[53], the penalties for minors who commit crimes are considered as remands or orders (as opposed to punishment)[54], and cannot be lon-

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49 Colombia, Law 599, 2000, Penal Code, arts. 32, 54.

50 Uganda, Penal Code Act, 1950, art. 188D.

51 According to the report of the Secretary General of the United Nations presented before the United Nations Security Council in 2002, cited in Sentence SP15870-2016 with File 44931; PJ Luis Antonio Hernández Barbosa, the main estimates indicated that for that time the figure of minors serving in the ranks of illegal armed groups operating in the national territory ranged from 11,000 to 14,000. Vid.: Supreme Court of Colombia, Criminal Cassation Chamber, PJ Luis Antonio Hernández Barbosa, *Judgment*, November 2, 2016, Case No.: SP15870-2016.

52 Uganda, The Penal Code Act, Supra No. 52.

53 Uganda, Children Act, 1997, arts. 88, p. 66.

54 Uganda, Children's (Amendment) Act, 2016, art. 19, p. 42.

ger than three years[55]. Moreover, the Amnesty Act (2000)[56], whose application has been extended until 2017[57] despite strong opposition[58], includes wide-ranging provisions for those who laid down their weapons[59].

The application of the Amnesty Act was dependent on the Ugandan Amnesty Commission, and in cases of grave crimes on the Attorney General of Uganda. They usually: (a) granted amnesty to LRA members who demobilized, or were detained by Ugandan security forces, including those who had been forcibly recruited by the LRA when they were children under the age of fifteen (regardless of their age at the time of demobilization or detention); and (b) referred them to the Acholi traditional community justice system of Mato Oput[60].

Nevertheless, there have been occasional instances of arbitrary application of the Amnesty Act. For instance, in 2002, the Ugandan Attorney General prosecuted two underage former child soldiers named Igama Charles and Oyoo David, in criminal cases JA004 and JA006[61]. Although they were eligible for amnesty, they were prosecuted. This investigation sparked international uproar and was eventually rescinded. According to James Awundo, clerk to the Amnesty

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55 Ibid., art. 91(5).

56 Uganda, Amnesty Act, 2000, art. 2.

57 Uganda, Amnesty Act (Extension of Expiry Period) Instrument, 2017.

58 Ugandan Law Reform Commission, Development of a model law on Amnesty for Uganda, 2016.

59 Leibig, A., 2005, "Girl Child Soldiers in Northern Uganda: Do Current Legal Frameworks Offer Sufficient Protection", *Northwestern Journal of International Human Rights,* Vol. 3, No. 1.

60 Acirokop, P., 2010, Addressing the Potential and Limits of the "Mato Oput" Process as a Basis for Accountability, Justice and Reconciliation for Children in Northern Uganda, Innocenti Research Centre, UNICEF; Odongo, O.G., 2004, "Child justice law reform developments in Africa and international standards on the rights of the child", *African Human Rights Law Journal*, Vol. 6, No. 2, art. 40, p. 8-12.

61 Human Rights Watch, 2003, Uganda: Letter to Minister of Justice. The criminal cases themselves were not retrieved, as they were not available in the Uganda Legal Information Institute (ULII) or in any other database online.

Commission, the investigation was stopped because: (a) they "could not see any difference in [their] story to that of other abductees [who have been amnestied]"; and (b) refusing amnesty, in this case, would provide an incentive to other LRA combatants to not seek demobilization. As a result, in April of 2003, both children applied for amnesty, which seems to have been granted to them[62].

A particularly contentious case was the case against Thomas Kwoyelo, who was allegedly forcibly recruited by the LRA when he was under fifteen[63]. He rose through the ranks of the LRA, reaching a fairly high level of command, until he was captured by the Ugandan military in the Democratic Republic of the Congo. Once captured, Kwoyelo requested the granting of amnesty under the provisions of the Amnesty Act, but the request was rejected by the Attorney-General[64]. A contentious judicial dispute in the Constitutional Court of Uganda initially led to this being recognized as an act of discrimination. However, the decision was eventually overruled[65], and the trial proceeded in 2018. The case is still ongoing. Throughout the case, the Defense has often made the argument that Kwoyelo was forcibly abducted and held against his will[66]. However, nor other witness, neither the Prosecution have stated a specific positions towards this theory. Instead, they have focused on the actions committed by the LRA under the leadership of Kwoyelo[67]. No other judicial decisions

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62 Weber, A., 2003, "Abducted and Abused: Renewed War in Northern Uganda", Human Rights Watch, Vol. 15, No. 12 (A); The Human Rights Watch report is unsure itself over whether Uganda actually applied the amnesty they promised, and the Ugandan amnesty document could not be retrieved.

63 The age at which Kwoyelo was recruited is disputed; however, the ICD has determined he was recruited at 17.

64 Constitutional Court of Uganda, Thomas Kwoyelo alias Latoni v. Uganda, *Judgement,* September 22, 2011, Case No.: UGCC10.

65 African Commission on Human and People's Rights, Kwoyelo v. Uganda, *Communication No.431/12*, October 17, 2018, Doc. No.: ACHPR 129.

66 Owor Ogora, L., 2019, Kwoyelo Trial Continues in Gulu; Prosecution to Call 130 Witnesses, International Justice Monitor.

67 Owor Ogora, L., 2019, Kwoyelo Trial Update: Trial Resumes*;* Court Denies New Investigations into Assault Claims, International Justice Monitor; Owor Ogora, L., 2019, Kwoyelo Trial Resumes After a Two Month Break; Two

issued by the International Crimes Division of the High Court of Uganda has dealt with LRA child soldiers under the age of fifteen, or with individuals forcibly recruited by the LRA when they were under fifteen[68] (even though most LRA members were forcibly recruited when they were under fifteen)[69].

It is important to highlight that the wide unpopularity of the LRA in Acholiland, and the great social stigma placed upon those who were abducted by the LRA when they were children under fifteen has made it difficult for former LRA members to reintegrate into society[70]. Ugandan experts consider that nearly 70% of all those impriso-

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Prosecution Witnesses Testify, International Justice Monitor; Owor Ogora, L., 2019, *Kwoyelo Trial Adjourned to January; Victims' Lawyer in Ongwen Case Dies in Gulu,* International Justice Monitor; Owor Ogora, L., 2020, *Judges Question Witness's Use of Voice Recognition to Identify Kwoyelo; Proceedings Adjourned Due to Presidential Decree on COVID-19*, International Justice Monitor; Owor Ogora, L., 2020, *Civil Society in Uganda Express Mixed Reactions Over Kwoyelo Trial as Proceedings Remain on Hold,* International Justice Monitor.

68 High Court of Uganda at Kampala-International Crimes Division, Uganda v. Hussein Hassan Agade & 12 others, *Judgment*, May 26, 2016, Criminal Session Case No.: 2010/1; High Court of Uganda at Kampala-International Crimes Division, Uganda v. Kamoga Siraje & 13 others, *Judgment*, August 21, 2017, Case No.: HCT-00-ICD-CR-SC-2015/4; High Court of Uganda at Kampala-International Crimes Division, Uganda v. Ahmad Ssebuwufu, *Judgment*, January 8, 2020, Case No.: HCT-OO-ICD-CM-2019/21; High Court of Uganda at Kampala-International Crimes Division, Uganda v. Musijjo Asuman, *Judgment*, December 30, 2019, Case No.: HCT-OO-ICD-CM-2018/19; High Court of Uganda at Kampala-International Crimes Division at Kololo, Uganda v. Kalule, *Judgment*, April 10, 2018, Case No.: Miscellaneous Criminal Application-2018/; High Court of Uganda at Kampala-International Crimes Division at Kololo, Uganda v. Umutoni, *Judgement*, October 16, 2014, Case No.: HCT-00-ICD-CR-SC-2014/3; High Court of Uganda at Kampala-International Crimes Division, Attorney General v. Gabula, *Judgement*, March 6, 2012, Case No.: HCT-00-CV-CS-2008/54.

69 Allen, T., Atingo, J., Atim, D., Ocitti, J., Brown, C., Torre, C., Fergus, C.A. & Parker, M., 2020, "What Happened to Children Who Returned from the Lord's Resistance Army in Uganda?", *Journal of Refugee Studies*, Vol. 33, No. 4, p.663–683.

70 Haer, R. & Böhmelt, T., 2016, "Child soldiers as time bombs? Adolescents' participation in rebel groups and the recurrence of armed conflict", *European Journal of International Relations*, Vol. 22, No. 2, p. 408-436.

ned in Gulu are former child soldiers[71] (although other studies find no differences in aggressive behaviour between former child soldiers and other members of the Acholi community)[72].

This issue has been addressed very few times in the Ugandan high courts. The only relevant case found in this regard is the case of Alfred Onen Kamdulu and others[73]. Kamdulu had been forcibly recruited by the LRA when he was a child under fifteen. After he was captured by the Ugandan military, he was granted amnesty. A year after his pardon, Kamdulu joined a criminal organization and carried out several armed robberies against people in Gulu. After being recaptured, Kamdulu was sentenced to 9 years in prison (under the Ugandan Penal Code, the penalty for armed robbery is up to 10 years or death).

Kandulu was treated as a first offender, which means that his previous condition as an LRA child soldier was not held either in favour or against him. For the Ugandan court who tried him, this was irrelevant. This shows how individuals who were forcibly recruited by the LRA when they were children under fifteen: (a) were granted amnesty after they demobilized or were detained by Ugandan security forces; and (b) were "reintegrated" into Ugandan society. When they later committed crimes, they were treated as any other Ugandan defendant, because their forcible recruitment and membership in the LRA as child soldiers played no role in sentencing.

3.3. The Philippines

At the end of the conflict between the Philippine Army and the Moro Islamic Liberation Front (MILF), The Philippines passed on10

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71 Akello, G., Richters, A. & Reis, R., 2006, "Reintegration of former child soldiers in northern Uganda: coming to terms with children's agency and accountability", *Intervention Journal*, Vol. 4, No. 3, p. 229-243.

72 Annan, J., Blattman, C., Mazurana, D. & Carlson, K., 2011, "Civil War, Reintegration, and Gender in Northern Uganda*"*, *Journal of Conflict Resolution*, Vol. 55, No. 6, pp. 877–908.

73 High Court of Uganda at Kampala, Col. Onen Kamdulu & Alfred Ayella v. Uganda, *Judgement*, May 22, 2008, Case No.: AA 243/2007.

January 2019 Act 11188, which provides for the special protection of children in situations of armed conflict (CIAC) and providing penalties for violations thereof[74]. According to its Section 28, on dismissal of criminal case, "[u]pon the effectivity of this Act, criminal cases against children involved in armed conflict shall immediately be dismissed and the child shall be referred to the LSWDO. Such office, upon thorough assessment of the child, shall determine whether to release the child to the custody of the parents, or refer the child to prevention, rehabilitation and reintegration programs as provided under this Act. Those with suspended sentences and undergoing rehabilitation at a youth rehabilitation center shall likewise be released: Provided, That the Family Court shall, in consultation with concerned agencies, determine and order the appropriate prevention, rehabilitation and reintegration programs the person shall undergo as provided under this Act".

As a result of applying Section 28, all proceedings concerning minors forcibly recruited by any of the parties to the conflict were dismissed and they were sent to the Local Social Welfare and Development Office (LSWDO), which adopted the most appropriate measures for their reintegration and rehabilitation. Nevertheless, Section 28 did not apply to individuals who were forcibly recruited when they were under fifteen years of age and only demobilized, or were detained, when they were already above 18.

Moreover, Section 28 of Act 11188 is a transitory provision that, and thus it does not apply to individuals forcibly recruited when they were under fifteen by organized armed groups and criminal organizations other than those involved in the armed conflict between the Philippine Army and the MILF. Regarding former child soldiers that are being persecuted as adults, the CIAC only assesses the situation when child soldiers were convicted before turning 18. To this possibility, the law establishes that the sentence and punishment imposed on them should be suspended[75]. In this sense, neither the CIAC nor

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74 Philippines, Republic Act 11188, 2008, An Act Providing for the Special Protection of Children in Situations of Armed Conflict and Providing Penalties for Violations Thereof, section 28.

75 Ibid., section 31.

do any other legal dispositions, establish the treatment that former child soldiers that are being prosecuted as adults should receive or if this situation must be taken into account.

Concerning the crimes committed by the latter, section 10 of the Philippine Criminal Code is applicable[76]. According to it, children over the age of 13 can be tried and sentenced as adults for particularly grave crimes. Moreover, they are entitled to no special treatment due to their forcible recruitment when they were children under fifteen, because mitigating circumstances under article 19 (2) of the Philippine Criminal Code are based on mental disabilities or voluntary surrender to certain judicial authorities[77].

Moreover, being forcibly recruited into a criminal organization or an organized armed group under the age of fifteen is not considered under Philippine Law as an aggravating circumstance, as section 19 of the Philippine Criminal Code limits all aggravating factors to circumstances that are directly related to the crimes, and not to the special circumstances of the convicted persons[78].

4. Conclusion

In national jurisdictions without transitional justice legislation there is a lack of legal provisions and case law relating to child soldiers that have been forcibly recruited under the age of fifteen. These cases are normally tried in the juvenile criminal justice system without any notable difference with the rest of criminal cases concerning minors. Furthermore, no special treatment is provided (in national legislation or case law) for adults who commit crimes after having been forcibly recruited when they were children under the age of fifteen. Indeed, none of the national jurisdictions that have been studied consider forcible recruitment as an exonerating, a mitigating or an aggravating circumstance.

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76 Philippines, Penal Code, 2014, Section 10.

77 Idem.

78 Ibid., Section 19.

As shown by the cases of Colombian and The Philippines, States with transitional justice systems tend to specifically deal with minors who have been recruited by organized armed groups (including children forcibly recruited under the age of fifteen) through amnesty laws passed at the end of armed conflict. Nevertheless, as seen above, the consequences derived from this are rather different in Colombia and The Philippines. Furthermore, Uganda is kind of an exception to the general trend as there is no specific reference to LRA child soldiers in Ugandan amnesty law. Finally, none of the three national jurisdictions with transitional justice systems that have been analyzed provide for a special treatment to adults who commit crimes after having been forcibly recruited when they were children under the age of fifteen.

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14. Is being a former child soldier a relevant circumstance for sentencing? Special attention to the Ongwen case before the International Criminal Court

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1. Introduction

Dominic Ongwen was born in Northern Uganda in 1975. He was abducted as a child by the Lord's Resistance Army in 1987[1]. He ascended through the LRA´s ranks and acquired more powerful command positions due to his operational performance. As a result, by 2002, he became the commander of the Oka battalion. In September 2003, he

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[1] ICC, the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II, *Fourth Public Redacted Version of "Defence Brief for the Confirmation of Charges Hearing", filed on January 18, 2016,* August 7, 2020, ICC Doc. No.: ICC-02/04-01/15, par. 1.

escalated to the position of second in command of the Sinia brigade, and in March 2004 he became the Sinia brigade's commander[2].

As multiple attacks were carried out by the LRA against the civilian population from 2002 to 2005 on the territory of Uganda, ICC PTC II issued, at the request of the ICC OTP, a warrant of arrest against Dominic Ongwen in 2005[3]. The ICC OTP charged Ongwen with crimes against humanity and war crimes under Articles 7 and 8 of the ICC Statute. The charges were confirmed, and the trial began on December 6th, 2016. The closing statements were presented on March 12th, 2020. TC IX delivered its verdict in early 2021[4] and is expected to pronounce a sentencing decision in accordance with Article 78 (1) of the ICC Statute in April 2021.

In this context, the Defense has raised several times the following argument with the aim to exonerate Ongwen from criminal responsibility: since the accused was abducted into the LRA at a young age and was forced to become a child soldier, he should benefit from the international legal protections provided for children in armed conflicts. According to the Defense, such protections include, as a matter of law, Ongwen´s exoneration from criminal liability for crimes under the ICC Statute. The Defense could also contend that being a former child soldier should, at the very least, be considered as a mitigating factor[5].

In light of this, the present research seeks to answer the following three questions which are specially relevant for the Ongwen case: (a) how does being a former child soldier affect the gravity of the crime?; (b) should the ICC consider being a former child soldier as an exonerating, mitigating or aggravating circumstance?; and (c) which is the most appropriate way to deal in sentencing with the fact that the convicted person was a former child soldier?

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2 ICC, the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, March 23, 2016, ICC Doc. No.: ICC-02/04-01/15, par. 58.

3 Idem.

4 ICC, the Prosecutor v. Dominic Ongwen, Trial Chamber IX, *Trial Judgment*, February 4, 2021, ICC Doc. No.: ICC-02/04-01/15-1762-Red.

5 ICC, Ongwen's Confirmation of Charges Decision, supra n. 2, par. 58.

To answer these questions, an analysis of the available international case law regarding child recruitment and its relevance for sentencing has been conducted. The scope of this analysis mainly relates to the case law of the ICC and the SCSL since these are the only two international criminal tribunals with case law that is somewhat related to this issue.

2. How does being a former child soldier affect the gravity of the crime?

2.1. The International Criminal Court

Article 78 (1) of the ICC Statute establishes two important factors that TCs ought to consider when determining a sentence: (i) the gravity of the crime, and (ii) the individual circumstances of the convicted person. Moreover, Rule 145 (1) (c) of the ICC RPE establishes an additional handful of elements that can be analysed through the lens of article 78 (1), including the nature of the unlawful behaviour, the means employed to execute the crime and the circumstances of manner, time and location, amongst others[6].

Thereupon, ICC case law has interpreted the notion of "gravity of the crime". In this regard, the Sentencing Judgment in the Ntaganda case[7] is particularly insightful, despite the fact that TC VI's gravity analysis was made on a crime *per* crime basis[8]. TC VI pointed out that TCs' gravity assessment must consider the particular circumstances of the acts constituting the elements of the offence and the mode of liability. Additionally, they must evaluate the extent of the damage

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6 According to the Rome Statute and the Rules of Procedure and Evidence of the ICC.

7 ICC, the Prosecutor v. Bosco Ntaganda, Trial Chamber VI, *Sentencing Judgement*, November 7, 2019, ICC Doc. No.: ICC-01/04-02/06, par. 16.

8 TC VI analysed count by count, respectively: (i) murder and attempted murder; (ii) rape and sexual slavery; (iii) pillage, attacking protected objects and destroying the adversary's property; (iv) forcible transfer of population; (v) persecution; and (vi) conscripting and enlisting children under the age of 15 into armed forces or groups.

caused, the harm caused to the victims and their families, the nature of the unlawful behaviour, the means employed to execute the crime, the circumstances of manner, time and location, the nature and degree of participation of the convicted person in the commission of the crime and his/her degree of intent[9]. A similar approach was also taken in the Judgment and Sentence in the Al-Mahdi case[10].

Furthermore, according to ICC case law, TCs' gravity assessment must be made *in concreto* in light of the particular circumstances of each case. Furthermore, such an assessment is to be done from both a quantitative and a qualitative standpoint[11]. As a result, ICC case law has not been fully consistent throughout its jurisprudence in relation to the weight attached to said relevant factors for assessing the gravity of the crime, since TCs' assessments have considered the specific circumstances of each case[12]. This means that TCs have a certain margin of appreciation for this purpose[13].

Finally, it is important to highlight that, prior to the Ongwen case, the ICC has never tried a former child soldier (regardless of whether

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9 TC VI found, for instance, in paras. 44-52 in relation to the crime of murder, that the two most important factors in the Ntaganda case were the harm/damage caused to the victims and their families, and the means employed by Mr. Ntaganda to execute the crime. According to the Chamber, the witnesses' testimonies demonstrated the cruelty and brutality that was used throughout the commission of the crimes, which in turn affected the victims and their families' health, since they sustained severe psychological trauma and devastating physical problems as a result of the attack. In light of this, and according to TC VI's analysis for this specific crime, the two outweighing factors were the ones which exposed the cruelty employed by Mr. Ntaganda in the commission of the murders in the territory of the Democratic Republic of Congo under the UPC/FPLC attacks.

10 ICC, the Prosecutor v. Ahmad Al Faqi Al Mahdi, Trial Chamber VIII, *Judgment and Sentence,* September 27, 2016, ICC Doc. No.: ICC-01/12-01/15, par. 76.

11 Idem.

12 ICC, the Prosecutor v. Germain Katanga, Trial Chamber II, *Sentencing Judgement*, May 23, 2014, ICC Doc. No.: ICC-01/04-01/07, para. 61; ICC, the Prosecutor v. Jean Pierre Bemba, Trial Chamber III, *Decision on Sentence pursuant to Article 76 of the Statute*, June 21, 2016, ICC Doc. No.: ICC-01/05-01/08, par. 16.

13 Idem.

he was forcibly recruited). As a result, ICC's case law has not had yet the opportunity to analyse whether being a former child soldier could be a relevant factor when analysing the gravity of the crime.

2.2. The Special Court for Sierra Leone

Much like the ICC, the SCSL Statute establishes two important factors that TCs ought to consider when imposing a sentence: (a) the gravity of the crime; and (b) the individual circumstances of the convicted person[14].

In the Sentencing Judgement in the RUF case, TC I established that the gravity assessment requires a consideration of the specific circumstances of the case, as well as the form and degree of participation of the accused in the crime. Furthermore, TC I listed several elements/circumstances that can be considered when determining the gravity of the crime: (a) the scale and brutality of the offences committed; (b) the role played by the accused in their commission; (c) the degree of suffering or impact of the crime on the direct victims and on their relatives; and (d) the vulnerability and number of victims[15]. Moreover, TC I stated that one key factor was particularly relevant for the analysis of the gravity of the crimes committed by Sesay, Kallon and Gbao: the brutality of the offenses and the consequent high degree of suffering by victims[16].

It is important to clarify that the list mentioned above is not exhaustive, and SCSL TCs can consider other elements related to the crime[17]. For instance, TC I in the CDF case made emphasis on the

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14 According to the Statute of the SCSL, Article 19(2).

15 SCSL, the Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao, Trial Chamber I, *Sentencing Judgement*, April 8, 2009, Case No.: SCSL-04-15-T, par. 19.

16 Ibid., parrs. 103-106.

17 As a result, TC I found in the CDF case that the analysis of the gravity of the crime requires to pay special attention to the following factors. See: SCSL, the Prosecutor v. Moinina Fofana & Allieu Kondewa, Trial Chamber I, *Judgement on the Sentencing of Moinina Fofana and Allieu Kondwa*, October 9, 2007, Case No.: SCSL-04-14-T, par. 33: "the scale and brutality of the of-

role played by the accused, stating that the assessment of the gravity is linked to his degree of liability, as well as the nature and the degree of his participation[18].

In the AFRC case, SCSL TC II highlighted that the gravity of the crime must be assessed on case-by-case basis, and that TCs might examine several types of circumstances, including: (a) the general nature of the underlying criminal conduct; (b) the form and degree of participation of the accused; (c) the degree of impact on the direct victims and on their relatives; (d) the vulnerability of the victims; and (e) the number of victims, amongst others[19]. TC II analysed each specific circumstance accordingly, and concluded that the crimes committed by the accused were heinous and of the utmost gravity, since Brima, Kamara and Kanu's criminal conduct was brutal and targeted a very large number of unarmed civilians, and had a catastrophic and irreversible impact on the lives of the victims and their families. For the chamber, the conduct of the convicted persons was deliberate, as they were the primary perpetrators and had effective control. The chamber paid special attention to the direct impact on the victim's lives and their vulnerability[20].

Finally, it is important to highlight that, as happens at the ICC, the SCSL has never tried a former child soldier (regardless of whether he was forcibly recruited). As a result, SCSL case law did not have the opportunity to address the specific question as to whether being a former child soldier could be a relevant factor when analysing the gravity of the crime.

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fences committed, the role played by the accused in their commission, the degree of suffering or impact of the crime on the immediate victim, as well as its effect on relatives of the victim, and the vulnerability and number of victims."

18 According to the Statute of the SCSL, Article 6.3.

19 SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzt Kamara & Santigie Borbor Kanu, Trial Chamber II, *Sentencing Judgement*, July 19, 2007, Case No.: SCSL-04-16-T, par. 19.

20 Ibid., parrs. 40-47, 68, 77.

3. Should the ICC consider being a former child soldier as an exonerating, mitigating or aggravating circumstance?

3.1. The International Criminal Court

Neither the ICC Statute, nor the ICC RPE, explicitly state that being a former child soldier amounts to an exonerating, mitigating or aggravating circumstance. Furthermore, ICC case law has not examined in detail this issue because it has never tried before a former child soldier. Indeed, Ongwen is the first defendant ever to request the ICC to consider being a former child soldier as an exonerating circumstance[21].

In this regard, it is important to highlight that Ongwen already made this request in the pre-trial proceedings of the case. As shown in its Pre-Trial Brief for the Confirmation of Charges Hearing, the Defense argued before PTC II that, since the accused was abducted into the LRA and was forced to become a child soldier, he should be exonerated from any crime that he might have committed while being a member of the LRA, as a result of applying the international legal protection provided for children in armed conflicts[22].

Nevertheless, PTC II dismissed the Defense's argument because, according to the PTC II, such international legal protection does not include the type of exemption from criminal liability requested by the Defense[23]. Consequently, for PTC II, Ongwen's forced recruitment into the LRA when he was a child could not automatically exonerate him from the crimes that he might have subsequently committed as part of the LRA[24].

As Ongwen´s request in the pre-trial proceedings was limited to the consideration of his being a former child soldier as an exone-

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21 ICC, the Prosecutor v. Dominic Ongwen, Pre-trial Chamber II, *Further Redacted Version of "Defence Brief for the Confirmation of Charges Hearing", filed on 18 January 2016*, March 3, 2016, ICC Doc. No.: ICC-02/04-01/15, parrs. 36-49.

22 ICC, Ongwen's Confirmation of Charges Decision, supra n. 2, para. 150.

23 Idem.

24 Idem.

rating circumstance, there is no ICC case law on the question as to whether this circumstance could be considered as a mitigating one.

Finally, in relation to the possible consideration of this circumstance as an aggravating factor for sentencing, Rule 145 (2) (b) of the ICC RPE contains a non-exhaustive list of circumstances that can be considered as aggravating factors, including: (i) defenseless victims; (ii) special cruelty in the commission of the crime; (iii) discriminatory intent; and (iv) abuse of power or official capacity.

In interpreting this provision, TC VIII has stated in the Al-Mahdi case that TCs can only take into consideration aggravating circumstances if they are convinced of their existence beyond reasonable doubt[25]. Moreover, TC VI has also highlighted that aggravating circumstances must relate to the crimes for which the accused is convicted or to the convicted person itself[26]. Additionally, although certain factors may reasonably be considered under more than one category, it is not possible to rely on the same factor more than once. Any factor taken into consideration to assess the gravity of the crime cannot be considered as an aggravating circumstance, and vice versa[27]. Furthermore, TC III in the Bemba Case stated that the absence of a mitigating circumstance does not serve as an aggravating circumstance[28].

As a result, it is the TCs' task to identify all relevant factors, and to give them appropriate weight in determining the sentence[29]. In doing so, no ICC TC has found so far that being a former child soldier may constitute per se an aggravating circumstance. In this regard, it is important to highlight that, although in the Lubanga case TC I considered the cruel treatment of children who had been forcibly recruited into the FPLC as an aggravating circumstance, the rea-

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25 ICC, Al Mahdi's Judgment and Sentence, supra n. 10, par. 73.

26 ICC, Ntaganda's Sentencing Judgement, supra n. 7, par. 18.

27 Ibid., par. 13.

28 ICC, Bemba's Decision on Sentence pursuant to Article 76 of the Statute, supra n. 12, par. 18; ICC, Katanga's Decision on Sentence pursuant to Article 76 of the Statute, supra n. 12, par. 34.

29 ICC, Ntaganda's Sentencing Judgement, supra n. 7, par. 13.

son for this finding was not the forcible recruitment of the children, but the intense violence to which they were subsequently subjected[30].

3.2. The Special Court for Sierra Leone

Neither the SCSL Statute, nor the SCSL RPE, explicitly state that being a former child soldier may amount to an exonerating, mitigating or aggravating circumstance. Furthermore, the SCSL case law has not dealt with this issue, as it has never tried former child soldiers, nor has it dealt with a defendant who has requested to consider such circumstance as an exonerating or mitigating factor.

Nevertheless, there is one ruling involving forced recruitment: the Sentencing Judgment in the RUF case (which involved three convicted persons: Sesay, Kallon and Gbao). In this ruling, TC I noticed that Sesay was forcibly recruited at the age of nineteen years by the RUF and considered whether such circumstance could constitute a mitigating factor[31]. Moreover, TC I also analysed whether Kallon's forced recruitment when he was an adult into the RUF mitigated the crimes which he later committed[32].

As shown in Sesay's Sentencing Brief, the Defense requested to consider Sesay's age, forced conscription and lack of training as mitigating factors. According to the Defense, the accused (who was only 19 years old at the time of his forced conscription, placing him into a war against his will) suffered the consequences of conscription and enslavement. As a result, his lack of free will, the loss of his youth to war and the brutalizing effects of armed conflict made him a victim. The Defense further contended that this ruinous and irredeemable loss of opportunity for a normal and peaceful life should mitigate the sentence. The argument underpinning this is that, once Sesay was conscripted, the choices he had available were irrevocably limi-

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30 ICC, the Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, July 10, 2012, ICC Doc. No.: ICC-01/04-01/06- 2901, par. 33.

31 SCSL, Sesay, Morris & Gbao Sentencing Judgment, supra n. 15, par. 220.

32 Ibid., par. 250.

ted, making him an impoverished and inexperienced 19/20-year-old, who wasn't brought up in a proper environment[33].

In its Sentencing Brief, the Prosecution stated that, even though Sesay was relatively young at the time the offences were committed, he was still reasonably well-educated, trained and had gained experience. Thus, according to the Prosecution, TC I should not mitigate Sesay's sentence[34].

After analysing the arguments raised by Sesay's Defense team and the Prosecution, TC I held that being forcibly recruited into the RUF could not mitigate *per se* the crimes which Sesay later committed. For TC I, he could well have chosen not to commit the crimes. As a result, according to TC I, being forcibly recruited (even at a young age, such as nineteen) cannot constitute a mitigating factor[35].

Finally, SCSL case law has also made several relevant findings concerning aggravating circumstances: (a) the Prosecution must prove beyond a reasonable doubt all aggravating factors, in accordance with Rule 101 of the SCSL RPE[36]; (b) only circumstances that are directly related to the commission of the crime for which the accused was convicted can be considered as aggravating factors[37]; (c) when a circumstance has already been considered in assessing the gravity of the offence, it cannot be considered as an aggravating factor[38]; and

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33 SCSL, the Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao, Trial Chamber I, Sesay Defence Sentencing Brief, March 17, 2009, Case No.: SCSL-04-15-T, parrs. 89-90.

34 SCSL, the Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao, Trial Chamber I, Public Prosecution Sentencing Brief, March 10, 2009, Case No.: SCSL-04-15-T, parrs. 204-205.

35 SCSL, Sesay, Morris & Gbao Sentencing Judgment, supra n. 15, parrs. 220, 250.

36 SCSL, the Prosecutor v. Charles Taylor, Trial Chamber II, *Sentencing Judgment*, May 30, 2012, Case No.: SCSL-03-01-T, par. 24; ICTY, the Prosecutor v. Mucić *et. al.*, Appeals Chamber, *Judgment*, February 20, 2001, Case No.: IT-96-21, par. 763.

37 SCSL, Sesay, Morris & Gbao Sentencing Judgment, supra n. 15, par. 24.

38 ICTY, the Prosecutor v. Miroslav Deronjić, Appeals Chamber, *Judgment*, July 20, 2005, Case No.: IT-02-61, parrs. 106-107.

(d) when a factor is an element of the underlying offence, it cannot be considered as an aggravating factor[39].

Based on the above, and despite the fact that SCSL case law has not dealt with cases involving former child soldiers, it is reasonable to conclude that being a former child soldier would not constitute *per se* an exonerating, mitigating or aggravating circumstance.

4. Which is the most appropriate way for the ICC to deal in sentencing with the fact that the convicted person was a former child soldier?

Neither the ICC Statute, nor the ICC RPE, nor the rules of any international criminal tribunal explicitly state that being a former child soldier is an exonerating, mitigating or aggravating circumstance. Furthermore, there is no case law on this issue as most international criminal tribunals have not tried former child soldiers[40], nor have they dealt with defendants requesting to consider such circumstance as an exonerating or mitigating factor.

Moreover, neither the ICC nor the SCSL have had so far, the opportunity to analyse whether being a former child soldier could be a relevant factor when analysing the gravity of the crime.

In light of this, it would be hard to reach any conclusion on whether being a former child soldier could affect the gravity of the crime, particularly if, as Ongwen, the convicted person was forcibly recruited when he was under the age of fifteen. Furthermore, in assessing whether this circumstance could be considered an exonerating, mitigating or aggravating factor, it is prudent to only draw conclusions from the two decisions somewhat related to this issue: (a) ICC PTC II´s decision on the confirmation of charges against

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39 ICTY, the Prosecutor v. Thomir Blaškić, Appeals Chamber, *Judgment*, July 29, 2004, Case No.: IT-95-14, par. 69.

40 Pananjung, D.P. & Poerana S.A., 2019, 'Former Child Soldiers Status: How the International Criminal Court Considers Its Significance in the Sentencing Process', *Padjadjaran Journal of International Law*, Vol. 3, No. 2, p. 4.

Dominic Ongwen (2016)[41]; and (b) the Sentencing Judgment issued by the SCSL TC I in the RUF case (2009)[42].

Both decisions agreed on a matter that is very relevant to address the issue at hand: any international legal protection for child soldiers in armed conflicts that may exist does not automatically exempt them from criminal liability for any international crime that they may commit subsequently[43]. Moreover, according to SCSL TC I, being forcibly recruited as a young adult (nineteen years old) does not constitute *per se* an exonerating or mitigating circumstance[44]. Based on the above, and considering that being a former child soldier (especially, a forcibly recruited child soldier) can hardly constitute an aggravating circumstance, Article 78 of the ICC Statute and Rule 145 of the ICC RPE only provide for two reasonable alternatives to deal with this factor in sentencing: to consider it as a mitigating factor, or as an individual circumstance of the convicted person.

In the Ntaganda case, TC VI has applied a two-tiered approach to sentencing. According to it, the gravity of the crimes is first addressed (crime-by-crime). Subsequently, TC VI deals with aggravating and mitigating circumstances. As a result, all individual circumstances are analysed through the lens of either aggravating or mitigating factors for the sentencing analysis[45]. In this context, the chamber has found that, having 28 to 30 years at the time when the crimes occurred cannot be considered as a mitigating personal circumstance. Moreover, for the TC VI, Ntaganda's experiences in the Rwandan Genocide do not constitute a mitigating circumstance. In TC VI´s view, "the alleged protection of one group through acts aimed at the destruction and disintegration of another cannot under any circumstance constitute a matter of mitigation"[46].

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41 ICC, Ongwen's Confirmation of Charges Decision, supra n. 2, par. 1.

42 SCSL, Sesay, Morris & Gbao Sentencing Judgment, supra n. 15, parrs. 220, 250.

43 ICC, Ongwen's Confirmation of Charges Decision, supra n. 2, par. 150.

44 SCSL, Sesay, Morris & Gbao Sentencing Judgment, supra n. 15, par. 220.

45 Ibid., par. 199.

46 ICC, Ntaganda's Sentencing Judgement, supra n. 7, par. 210.

The Katanga case does not follow the two-tiered approach to sentencing applied in the Ntaganda case. This is clearly shown by the way TC II dealt with the Defense's allegation that Katanga should have a reduced sentence because he was young, had a complicated family life and a traumatic personal history, and had "a reputation as a courageous man who helped his community"[47]. The chamber rejected the Defense´s submission to treat these circumstances as independent mitigating factors. Nevertheless, despite not treating them as mitigating factors, TC II took Katanga´s young age, his family circumstances, and his disposition towards the community into account to reduce the sentence, albeit in a "very limited manner"[48].

Finally, in the Al Mahdi case, TC VIII took a three-tiered approach to sentencing, distinguishing among: (a) the gravity of the crimes; (b) mitigating and aggravating circumstances[49]; and (c) individual circumstances[50]. In applying this approach, the chamber only considered as relevant mitigating circumstances: (i) Al Mahdi´s conduct in detention; (ii) his demonstration of regret; and (iii) his admission of guilt. Thus, Al-Mahdi's age, education and background were not considered as mitigating factors. As a result, they were treated exclusively as personal circumstances[51]. Moreover, TC VIII considered that this type of circumstances (age, education, and background) had no value for the purpose of reducing the sentence[52].

In light of the above-mentioned, considering being a former child soldier as an individual circumstance of the convicted person

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47 ICC, Katanga's Decision on Sentence pursuant to article 76 of the Statute, supra n. 12, par. 78.

48 Ibid., par. 87; In this case, the Chamber justified itself on the Rugambarara case of the ICTR.

49 The Chamber also defines the process to admit aggravating and mitigating circumstances; while aggravating circumstances must be proven beyond reasonable doubt, mitigating circumstances must be proven "on a balance of possibilities".

50 ICC, Al Mahdi's Judgment and Sentence, supra n. 10, par. 96.

51 Which are, in the Al Mahdi case, his initial reluctance to commit the crimes as well as the methods of execution, by which Al Mahdi sought to protect surrounding graves from the destruction of the shrines.

52 ICC, Al Mahdi's Judgment and Sentence, supra n. 10, par. 96.

is consistent with the ICC Statutory framework for sentencing, as it does not contain an exhaustive list of the relevant individual circumstances of the convicted person. Moreover, it is also consistent with the ample discretion given by ICC case law to TCs to determine the weight to be attached to such individual circumstances. Nevertheless, it is important to highlight that the Al-Mahdi and Katanga cases show that the value for sentencing reduction given so far to these type of circumstances by TCs is, at best, very limited.

As a result, the question remains as to whether the fact that the convicted person was forcibly recruited when he was under fifteen years (as happened with Ongwen) could eventually require a more important reduction of sentence by treating this circumstance as a mitigating factor. Nevertheless, ICC PTC II´s decision on the confirmation of charges against Dominic Ongwen (2016)[53], and the Sentencing Judgment issued by the SCSL TC I in the RUF case (2009), provide at least some *indicia* that this approach is not likely to be followed.

5. Conclusion

The Defence in the Ongwen case has argued that being a former child soldier should be considered as an exonerating circumstance. The ICC and the SCSL are the only two international criminal tribunals with case law that is somewhat related to the issue at hand. Nevertheless, neither the ICC nor the SCSL have yet had an opportunity to address the specific questions as to whether being a former child soldier (regardless of whether he was forcibly recruited) could be: (a) a relevant factor when analysing the gravity of the crime; or (b) an exonerating, mitigating or aggravating circumstance.

In light of this situation, and considering article 78 of the ICC Statute, Rule 145 of the ICC RPE and the existing case law of the ICC and the SCSL, there are only two reasonable alternatives to deal with this factor in sentencing: to consider it as a mitigating factor, or as an individual circumstance of the convicted person. The first option is

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53 ICC, Ongwen's Confirmation of Charges Decision, supra n. 2, par. 1.

consistent with both the ICC Statutory framework for sentencing and the ample discretion given by ICC case law to TCs to determine the weight to be attached to such individual circumstances. Nevertheless, the value for sentencing reduction given so far to these type of circumstances by ICC TCs is, at best, very limited.

Consequently, the fact that the convicted person was forcibly recruited when he was under fifteen years (as happened with Ongwen) could eventually require a more important reduction of sentence by treating this circumstance as a mitigating factor. Nevertheless, there are some indicia in the Ongwen and RUF cases that this approach is unlikely to be followed.

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Doctrine

Pananjung, D.P. & Poerana S.A., 2019, 'Former Child Soldiers Status: How the International Criminal Court Considers Its Significance in the Sentencing Process', *Padjadjaran Journal of International Law*, Vol. 3, No. 2.

15. Procedural issues concerning Trial Chamber I's no case to answers decision in the Gbagbo and Blé Goudé case

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1. Introduction

This research paper analyses a number of procedural issues that arose from the ICC Trial Chamber I's decision, by which, after the Prosecution's exposition of the evidence at the oral proceedings, a mistrial was declared in the case against the former President of Cote D'Ivoire, Laurent Gbagbo and his former Minister of Youth, Charles Blé Gudé. Accordingly, these issues are particularly relevant for the ongoing appeals process carried out against this decision.

Amongst the issues analysed, the first one emphasizes on whether ICC chambers have the power to define the applicable standard of proof after issuing its decision, or whether Trial Chamber I made an error of law and/or procedure because of not having appropriately articulated a clearly defined standard of proof and approach towards assessing evidence when deciding upon a mistrial[1]. In other words,

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1 ICC, the Prosecutor v. Laurent Gbagbo & Charles Blé Goudé, Appeals Chamber, Public redacted version of "Prosecution Document in Support of Appeal ", October 17, 2019, ICC Doc. No.: ICC-02/11-01/15, para 122.

the OTP's argument didn't refer to the Trial Chamber I's possible application of the wrong standard of proof, but rather argued that the Chamber erred by not establishing a clearly defined standard of proof in its decision[2].

In this context, it is important to clarify that Trial Chamber I issued its oral decision on January 15th, 2019 and only six months later, on July 16th, 2019, the Chamber provided its written decision, clarifying that the standard of proof that was used was that of 'No Case to Answers Motion' or NCTA, for the Prosecution had not built a strong enough case. Finally, the OTP of the ICC filed the appeal on September 17th, 2019.

Along with the first issue, this research paper will examine two additional procedural issues, namely, on whether the principles of fairness and expeditiousness of the proceedings are only in benefit of the accused, as well as the instances in which a declaration of mistrial is appropriate.

To fathom these three issues and giving due regard to Article 21 of the ICC Statute, the present research conducts an ample analysis on the available international jurisprudence, especially the ICC, the ICTY, the ICTR, the SCSL, the STL, the ECCC, the ECtHR and the IACtHR.

2. Does a Chamber have the power to define the applicable standard of proof after issuing its decision?

2.1. International Criminal Court

The ICC does not have a clear body of jurisprudence on the issue at hand, as it has only issued one ruling involving the content of the standard of proof: the 2018 Appeals Chamber judgment in the case against Jean-Pierre Bemba[3]. Nonetheless, the appeal judgment

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2 Ibid., par. 126.

3 ICC, the Prosecutor v. Jean-Pierre Bemba Gombo, Appeals Chamber, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Cham-

in this case did not address the issue of the establishment of the standard of proof *ex post facto*, i.e., after a decision has been issued, but rather its improper application.

In its judgment, the ICC Appeals Chamber assessed and verified whether the content and application of the standard of proof was correct and expeditious. It also clarified that it had the power to independently review the reasoning behind the Trial Chamber's judgment on the content and application of the standard of proof, as long as the accused had raised possible flaws in this regard. In such cases, the Appeals Chamber must provide the reasons why in its view the decision of the Trial Chamber contains an error in the definition and/or application of the standard of proof. The Appeals Chamber must do so independently, without any type of bias regarding the decision taken by the Trial Chamber[4].

2.2. International Criminal Tribunal for the former Yugoslavia

The ICTY does not have a clear body of jurisprudence on the issue in question. Nevertheless, it has dealt with the improper application of the standard of proof in some of its decisions. According to the Appeals Chamber, when this occurs, the Trial Chamber will have to articulate the correct legal standard and assess the evidence contained in the trial record to determine whether or not they are sufficient to establish the guilt of the accused beyond reasonable doubt[5].

The ICTY Appeals Chamber has also ruled on the admission of evidence indicating that under Rule 89(C) of the Rules of Procedure and Evidence (RPE), the Trial Chamber can admit any evidence that is relevant and has probative value[6]. Moreover, Rule 89(D) states that '[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

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ber III's "Judgment pursuant to Article 74 of the Statute", June 8, 2018, ICC Doc. No.: ICC-01/05-01/08-3636.

4 Ibid., parrs. 41-46.

5 ICTY, the Prosecutor v. Milan Lukic & Sredoje Lukic, Appeals Chamber, Judgment, December 4, 2012, Case No.: IT-98-32/1, par. 12.

6 Ibid., par. 566.

The way a Chamber establishes the probative value of the evidence presented at trial depends on various factors that go hand in hand with the circumstances of each case. Regarding oral testimony, the ICTY has established that Trial Chambers have the power to decide whether a witness, or any other types of evidence, is credible or not. Therefore, the Appeals Chamber gives ample margin of appreciation to Trial Chambers to assess the evidence presented at trial[7].

In conclusion, no decision has been found that responds directly to the problem in question, since the ICTY has not addressed situations where the standard of proof was established after the issuance of a decision. The ICTY Appeals Chamber's decisions only deal with how to correct the standard of proof when the Trial Chamber applied it incorrectly. In addition, the ICTY Appeals Chamber has also established rules for determining the guilt of the accused, which must be proven beyond reasonable doubt.

2.3. International Criminal Tribunal for Rwanda

The ICTR, much like the ICTY, does not have jurisprudence on the issue at hand. However, the ICTR Appeals Chamber has ruled in different opportunities about the improper application of the standard of proof. When this happens, the ICTR Appeals Chamber articulates the correct legal interpretation and reviews the relevant evidence in light of the "beyond reasonable doubt" standard of proof. In so doing, the Appeals Chamber not only corrects the legal error, but also applies the correct legal standard[8].

Similarly, the ICTR Appeals Chamber has established how the Trial Chamber must act pursuant to Rule 87 (A) of the RPE[9], which provides that a finding of guilt may be reached only when the majori-

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7 ICTY, the Prosecutor v. Zlatko Aleksovski, Appeals Chamber, Judgment, March 24, 2000, Case No.: IT-95-14/1, parrs. 62-63.

8 ICTR, the Prosecutor v. Simon Bikindi, Appeals Chamber, Judgment, March 18, 2010, Case No.: ICTR-01-72, para. 11.

9 ICTR, the Prosecutor v. Jean Paul Akayesu, Appeals Chamber, Judgment, June 1, 2001, Case No.: ICTR-96-4, par. 219.

ty of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.

In conclusion, the ICTR has not addressed the question at hand since it has not addressed situations where the standard of proof was established *ex post facto* i.e., after the issuance of a decision. The ICTR Appeals Chamber's decisions only deal with how to correct the standard of proof when the Trial Chamber applied it incorrectly. Moreover, the ICTR Appeals Chamber has also established rules for determining the guilt of the accused, which must be proven beyond all reasonable doubt.

2.4. The Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon and the Special Court for Sierra Leone

While no case law in the ECCC or the STL relating to the issue in question was found, the situation is fairly different when it comes to the SCSL; it is the only international tribunal that has addressed the situation where, in the Ayyash et. al. case (2006), a Chamber defined the applicable standard of proof after the issuance of a decision.

In this case, on June 1st, 2016, the Trial Chamber orally established that the defendant, Mustafa Amine Badreddine, had not died, and therefore the proceedings against him could not be terminated. Later, on June 7th of the same year, the Chamber issued the decision in writing, defining the standard of proof that was effectively applied[10]. In the wake of this, the Badreddine Defense argued that the Trial Chamber erred in failing to state what the requisite standard was in its Oral Decision and, only did so through the written decision, which was issued almost a week later. Consequently, the Badreddine

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[10] SCSL, the Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hassan Habib Merhi, Hussein Hassan Oneissi & Assad Hassan Sabra (The Prosecutor v. Ayyash and Others), Appeals Chamber, Decision on the Interlocutory Appeal of the Defense of Badreddine on the "Provisional Decision on the Death of Mr. Mustafa Amine Badreddine and the Possible Termination of Proceedings", July 11, 2016, Case No.: STL-11-01/T/AC/AR126.11.

Defense contended that this introduced a prejudicial lack of clarity in the decision-making process[11].

The Appeals Chamber, after a careful review of the Trial Chamber's decision and the Defence's contention at the appeal, established that the standard of proof cannot be determined after the decision has been issued, since it constitutes an error of law. Hence, according to the Appeals Chamber, the Trial Chamber made an error of law, which invalidated the decision[12].

As a result, for the SCSL Appeals Chamber, judges do not have the power to determine the applicable standard of proof *ex post facto,* that is, after issuing their decision. Thereupon, the standard of proof must be established before any decision is made at trial (e.g., before the issuance of a judicial order or a judgment). Otherwise, there would be no reliable standard on which to base the decision, and judges would be free to make decisions at their discretion and justify them afterwards.

2.5. European Court of Human Rights

The ECtHR has no jurisprudence on the matter in question as it has stated that procedural and evidentiary norms and the rules regarding the standard of proof are in principle within the purview of each State or member country. In other words, each State has the autonomy to determine its internal evidentiary and procedural rules and those concerning the standard of proof[13]. This autonomy is given in the context of the minimum requirements for a fair trial established in Article 6 of the European Convention on Human Rights (ECHR). Hence, States have autonomy to adopt their own rules, but they cannot go against the provisions of Article 6 of the ECHR.

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11 Ibid., par. 28.

12 Ibid., par. 41.

13 ECtHR, Garcia Ruiz v. Spain, Judgment, January 21, 1999, par. 28.

This means that the ECtHR does not act as a court of appeal in respect of the decisions taken by domestic jurisdictions[14]. It can only hear matters related to the application of procedural and evidentiary regulations, including provisions on the standard of proof, insofar as States, in applying their own norms may have infringed the rights and freedoms protected by Article 6 of the ECHR[15]. This happened in the Nachova et. al. v. Bulgaria case (2005), where the ECtHR established that, in criminal cases, the applicable standard of proof must be that of beyond reasonable doubt[16].

2.6. Inter-American Court of Human Rights

Finally, the IACtHR has not developed jurisprudence on the issue in question. Nevertheless, concerning the standard of proof, the IACtHR has repeatedly indicated that it does not deal with States' internal issues, much like the ECtHR. Likewise, the IACtHR has established that it will only hear domestic cases insofar as States infringe human rights protected by the American Convention on Human Rights (ACHR).

In this context, the IACtHR has clearly established that it is not a court of 'fourth instance'. As a result, it does not work as an appellate court to decide on disagreements between the parties as to the assessment of evidence or the application of domestic law in areas that are not directly related to the fulfilment of the obligations enshrined in the ACHR[17].

A key example of the IACtHR' jurisprudence on the issue, is the Noriega de Carvalho et. al. v. Brazil case (2006)[18], where the Court stated that domestic courts are expected to examine the facts and

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14 ECtHR, Melnychuk v. Ukraine, Decision on inadmissibility, July 5, 2005, par. 1.

15 ECtHR, Garcia Ruiz v. Spain, supra n. 13, parrs. 27-28.

16 ECtHR, Nachova and others v. Bulgaria, Judgment, July 6, 2005, par. 147.

17 IACtHR, Mémoli v. Argentina, Judgment, August 22, 2013 (Preliminary Objections, Merits, Reparations and Costs), para 140.

18 IACtHR, Nogueira de Carvalho et. al. v. Brazil, Judgment, November 28, 2006 (Preliminary Objections and Merits), par. 80.

evidence submitted in any given case, and that the IACtHR does not replace the national courts' functions.

3. Are the principles of fairness and expeditiousness of the proceedings only in benefit of the accused?

3.1. International Criminal Court

The ICC Statute establishes in Article 64(2) that a fair trial entails the possibility for the parties involved to adequately present their case, with a view to influencing the court's decision[19]. In the Lubanga case, the Appeals Chamber considered that the principle of fairness constitutes a fundamental right that ought to be present during trial[20], and that can be fulfilled through the extensive interpretation of other rights (such as equality of arms[21]) and the regulation of the ICC Chambers' actions[22].

ICC's Deputy Prosecutor James K. Stewart argues that the principle of fairness does not only benefit the accused and that all parties involved in the proceedings play an essential role for its application. Stewart argues that the concept of fair trial rights transcends the scope of the rights of accused persons, comprising the interests of victims, witnesses, and the OTP[23]. In support of his claim, he addresses

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19 ICC, Situation in Uganda, Pre-Trial Chamber II, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58, August 19, 2005, ICC Doc. No.: ICC-02/04-01/05-20, par. 30.

20 ICC, the Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, June 13, 2008, ICC Doc. No.: ICC-01/04-01/06-1401, par. 77.

21 Ibid., parrs. 77-79.

22 Ibid., par. 77.

23 Stewart, J.K., 2014, Fair Trial Rights under the Rome Statute from a Prosecution Perspective ICTR Symposium - Arusha, Tanzania, Compendium on the Legacy of the ICTR and the Development of International Law, United

the definition of 'fairness' provided by Pre-Trial Chamber I, pointing out the fact that the term comes from two other concepts: (i) balance; and (ii) equity, which are applicable to all parties involved in the proceedings[24].

According to Stewart, this means that: (i) victims and witnesses[25] should have the possibility to testify freely, contributing to the Trial Chamber's process to reach a sound decision; (ii) the OTP[26] must be granted the opportunity to present its case free of external influences; and (iii) the Defence[27] must be able to respond to the charges against the accused and present evidence to support its arguments, thus ensuring a fair trial through which a precise and credible decision is made[28].

Regarding the principle of expeditiousness of the proceedings, ICC jurisprudence highlights that expeditiousness must be respected

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Nations - International Residual Mechanism for Criminal Tribunals, p. 14-16.

24 ICC, Situation in the Democratic Republic of Congo, Pre-Trial Chamber I, Decision on the Prosecutor's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of Vprs1, Vprs 2, Vprs 3, Vprs 4, Vprs5 and Vprs6, March 31, 2006, ICC Doc. No.: ICC-01/04-135-tEN, para. 38.

25 ICC, the Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Appeals Chamber, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", July 12, 2010, ICC Doc. No.: ICC-01/04-01/07OA10, par. 45.

26 ICTY, the Prosecutor v. Zlatko Aleksovski, Appeals Chamber, Decision on the Prosecutor's Appeal on Admissibility of Evidence, February 16, 1999, Case No.: IT-95-14/1, para. 25; ICTY, the Prosecutor v. Jadranko Prlic et. al., Appeals Chamber, Decision on the Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, February 6, 2007, Case No.: IT-04-74-AR73.4, para. 24; ICTY, the Prosecutor v. Milan Martić, Appeals Chamber, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, September 14, 2006, Case No.: IT-95-11-AR73.2, para. 13; ICTY, the Prosecutor v. Duško Tadić, Appeals Chamber, Judgment, July 15, 1999, Case No.: IT-94-1-A, par. 48.

27 Rome Statute of the ICC, Article 67.

28 Stewart, J.K., 2014, supra n. 23, p. 16-17.

and ought to be present in all proceedings before the ICC Chambers[29]. The principle of expeditiousness of the proceedings transcends also the scope of the rights of the accused, encompassing the interests of victims, witnesses, and the OTP[30].

3.2. International Criminal Tribunal for the former Yugoslavia

The principles of fairness and expeditiousness of the proceedings are established in Article 20 of the ICTY Statute. According to this provision, Trial Chambers must, in accordance with the RPE, ensure that the trial is fair and expeditious, and that the proceedings are conducted with full respect for the rights of the accused, and due regard for the protection of victims and witnesses. Similarly, Article 21 of the ICTY Statute establishing the rights of the accused[31], states that observance of such rights is essential to guarantee a fair trial.

Likewise, ICTY's jurisprudence has determined that Article 23 is directly related to the principle of fairness[32], since it establishes that all judgments must be justified. Moreover, it has addressed the key elements of this principle, namely the fundamental right to be tried by an independent and impartial tribunal established by law[33].

ICTY's jurisprudence has also pointed out that, in order to guarantee a fair trial, Trial Chambers must effectively protect witnesses, for this principle favours them as well. Hence, in the event of witness intimidation, it is incumbent upon Trial Chambers to take all rea-

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29 ICC, the Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the Appeal of Thomas Lubanga Dyilo Against the Decision on the Challenge of the Defense Before the Jurisdiction of the Court, December 13, 2006, ICC Doc. No.: ICC-01/04-01/06-772, par. 37.

30 ICC, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58, supra n. 19, par. 31.

31 According to Article 21 of the Statute of the ICTY.

32 ICTY, the Prosecutor v. Anto Furundzija, Appeals Chamber, Judgment, July 21, 2000, Case No.: IT-95-17/1-A, par. 69.

33 Ibid., par. 177.

sonable measures to protect witnesses, either at the request of the parties or *proprio motu*[34].

Trial Chambers have ample powers to effectively protect witnesses, as established in Article 54 of the RPE, including the ability to issue orders, summonses, subpoenas, warrants and transfer orders, as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. Furthermore, Trial Chambers have the power to adopt any available measure for the protection of witnesses and to request that the presentation of evidence be made by videoconference. If these measures were to fail, Trial Chambers also have the power to postpone or suspend the trial at the request of the parties or *motu propio*[35].

The principle of expeditiousness of the proceedings is meant to ensure that proceedings do not suffer undue delays and the trial is completed within a reasonable time. Nevertheless, ICTY's jurisprudence has explained that it is important to maintain a balance between expeditiousness and fair trial, particularly in cases of significant scope and complexity[36]. In this regard, the ICTY Appeals Chamber has held that logistical considerations should not take priority over the Trial Chamber's duty to safeguard the fairness of the trial, thus implying the duty to comply with the established procedures and rules[37].

A jurisprudential analysis of the ICTY suggests that the accused is the one who benefits most from the principles of fairness and expeditiousness. Nevertheless, Tochilovsky considers that such principles, and the guarantees that stem from them, apply to the Prosecution as well. Likewise, the ICTY has established that the protection of wit-

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34 ICTY, the Prosecutor v. Ramush Haradinaj, Idriz Balaj & Lahi Brahimaj, Appeals Chamber, Judgment, July 19, 2010, Case No.: IT-04-84, para. 35.

35 Ibid., par. 36.

36 ICTY, the Prosecutor v. Nikola Sainovic, Nebojsa Pavkovic, Vladimir Lazarevic & Sreten Lukic, Appeals Chamber, *Judgment*, January 23, 2014, Case No.: IT-05-87, par. 101.

37 ICTY, the Prosecutor v. Zdravko Tolimir, Appeals Chamber, Judgement, April 8, 2015, Case No.: IT-05-88/2, para. 23.

nesses is essential to ensure a fair trial in the development of the proceedings[38].

Likewise, Tochilovsky affirms that, although Trial Chambers are obliged to ensure that a trial is fair and expeditious, with full respect for the rights of the accused[39], the accused is not the only one entitled to be treated fair and equitably[40]. Trial Chambers' obligation of protecting the integrity of the proceedings means ensuring fairness and expeditiousness in the conduct of the case as far as both parties are concerned[41]. According to Tochilovsky, it is very difficult to think how a trial could ever be considered fair where the accused is favoured at the expense of the Prosecution (which acts on behalf of the interests of the international community and of the victims)[42] beyond a strict compliance with statutory fundamental protections[43].

Based on the above, it is possible to conclude that although the principles of fairness and expeditiousness have been mostly developed in benefit of the accused persons, for it is more likely that their rights are transgressed, they also apply to victims, witnesses, and the Prosecution. Moreover, ICTY Trial Chambers have the obligation to protect victims and witnesses, in order to safeguard the integrity of the proceedings.

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38 Mcdermott, Y., 2012, 'Rights in reverse: A critical analysis of fair trial rights under international criminal law', In Schabas, W, Mcdermott, Y & Hayes, N. (Ed.), The Ashgate Research Companion to International Criminal Law: Critical Perspectives, Aldershot, Routledge, p. 4.

39 Tochilovsky, V., 2008, Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence, Leiden, Brill | Nijhoff, p. 276.

40 ICTY, the Prosecutor v. Milan Milutinović, Trial Chamber III, Decision on Prosecution's Request for Certification of Rule 73 bis Issue for Appeal, August 30, 2006, Case No.: IT–05–87–T, para. 10.

41 Tochilovsky, V., 2008, supra n. 39, p. 276.

42 Idem.

43 ICTY, Aleksovski Decision on the appeal of the Prosecutor on the admissibility of the evidence, supra n. 26, parrs. 24-25.

3.3. International Criminal Tribunal for Rwanda

At the ICTR, the principles of fairness and expeditiousness of the proceedings have been developed based on Article 19 of the ICTR Statute. This article establishes that Trial Chambers must ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the RPE, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. This is consistent with Article 20 of the ICTR Statute, which sets out the rights of the accused.

According to the ICTR's jurisprudence, the principle of fairness is composed by the following guarantees: (i) the Prosecution's obligation to disclose any exculpatory material[44]; (ii) the right to free legal assistance (which does not confer the right to choose one's counsel)[45]; (iii) the Trial Chamber's mandate to provide a reasoned opinion[46]; (iv) the right to cross-examine witnesses[47]; (v) the establishment of proceedings that ensure equality between the parties[48]; (vi) the independence and impartiality of the judges[49]; (vii) clear and precise information of the charges[50]; and (viii) the application of the same standard of proof in the assessment of Prosecution and Defence's evidence[51], amongst others.

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44 ICTR, the Prosecutor v. Calixte Kalimanzira, Appeals Chamber, Judgment, October 20, 2010, Case No.: ICTR-05-88-A, par. 18.

45 ICTR, the Prosecutor v. Jean Kambanda, Appeals Chamber, Judgment, October 19, 2000, Case No.: ICTR-97-23-A, par. 33.

46 ICTR, the Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse & Joseph Nzirorera, Appeals Chamber, Judgment, September 29, 2014, Case No.: ICTR-98-44, para. 26; ICTR, the Prosecutor v. Gregoire Ndhaimana, Appeals Chamber, Judgment, December 16, 2013, Case No.: ICTR-01-68, par. 14.

47 ICTR, Kalimanriza Appeals Judgment, supra n. 44, par. 40.

48 Ibid., par. 34.

49 ICTR, the Prosecutor v. Clement Kayishema & Obed Ruzindana, Appeals Chamber, Judgment, June 1, 2001, Case No.: ICTR-95-1, par. 55.

50 ICTR Statute, Article 20.

51 ICTR, the Prosecutor v. Tharcisse Renzaho, Appeals Chamber, Judgment, April 1, 2011, Case No.: ICTR-97-31-A, par. 540.

Similarly, the ICTR Appeals Chamber has underscored that the Trial Chamber's obligation to ensure the principles of fairness and expeditiousness of the proceedings, entails a delicate balancing of interests, particularly in cases where there are multiple accused[52]. Furthermore, according to the ICTR Appeals Chamber, the elements and complexity of the case are to be considered when ensuring that the proceedings do not suffer from an undue delay. For this reason, the Appeals Chamber has recognized that it is unreasonable to expect that ICTR proceedings will always be as expeditious as national proceedings, since their gravity and complexity do not permit it[53]. Likewise, the Appeals Chamber has highlighted that cases heard before the ICTR may be conducted differently, considering their characteristics and complexities[54].

Even though these principles have been mostly developed in benefit of the accused, Tochilovsky clarifies that the right to a fair trial applies both to the Defence and the Prosecution[55], as evidenced in the Prosecutor vs. Karemera case[56]. Thus, it is fundamental to comprehend that the Prosecution is undoubtedly entitled to a fair opportunity to present its case and evidence.

Regarding the principle of expeditiousness of the proceedings, McDermott highlights that several ICTR's rulings are very illustrative as to the enormous barriers defendants face when attempting to assert their right to a trial without undue delay. This is because Trial Chambers may justify undue delays due to the complexity of the case, thus prioritizing a fair trial[57].

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52 ICTR, the Prosecutor v. Aloys Ntabakuze, Appeals Chamber, Judgment, May 8, 2012, Case No.: 98-41A-A, par. 21.

53 ICTR, the Prosecutor v. Justin Mugenzi & Prosper Mugiranzea, Appeals Chamber, Judgment, February 4, 2013, Case No.: ICTR-99-50-A, par. 32.

54 Idem.

55 Tochilovsky, V., 2008, supra n. 39, p. 276.

56 ICTR, the Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera & Andre Rwamakuba, Trial Chamber III, Decision on Severance of André Rwamakuba and Amendments of the Indictment, December 7, 2003, Case No.: ICTR–98–44–PT, par. 26.

57 Mcdermott, Y., 2012, supra n. 38, p. 12.

In conclusion, according to ICTR's jurisprudence, the principles of fairness and expeditiousness of the proceedings are meant to ensure the respect for the accused's rights. Nevertheless, this doesn't exclude the fact that both fairness and expeditiousness also apply in favour of the Prosecution, the victims and witnesses.

3.4. The Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon and the Special Court for Sierra Leone

In the ECCC, the principles of fairness and expeditiousness of the proceedings have been developed pursuant to Article 33 of the law that creates and regulates the ECCC[58]. According to this provision, Chambers must ensure that trials are fair and expeditious and are conducted in accordance with existing procedures. Likewise, this provision determines that trials must be conducted with full respect for the rights of the accused and for the protection of victims and witnesses. Article 33 establishes also that Trial Chambers must exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.

The ECCC has focused on the Chambers' obligation to ensure a fair trial and the expeditiousness of the proceedings[59]. In the Appeal Judgment of Khieu Samphân & Nuon Chea, the Appeals Chamber has established that the aforementioned principles are part of the due process principle, which has two main elements: the right of the accused to be tried without undue delay, and the right to obtain the attendance and examination of witnesses on his behalf[60].

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58 ECCC, 2011, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, August 10, 2011.

59 ECCC, the Prosecutor v. Khieu Samphân & Nuon Chea, Supreme Court Chamber, Appeal Judgment, November 23, 2016, Case No.: 002/19-09-2007-ECCC/SC, par. 162.

60 Idem.

Based on the above, it can be stated that the principles of fairness and expeditiousness of the proceedings have been mostly developed in benefit of the accused, even though the law that creates and regulates the ECCC has established that victims and witnesses must also be protected during the proceedings.

Regarding the STL, the principle of fairness is established in Article 16(2)[61] and 17[62] of the STL Statute, as an essential component of the rights of the accused and of the victims. It is also embedded in the process to ensure a fair trial for all the parties involved. Regarding the principle of expeditiousness of the proceedings, it is contained in Article 28 of the STL Statute[63], which underscores that judges must be guided by the RPE during all procedural stages, in order to have an expeditious trial that respects and guarantees the principle of fairness for all parties involved.

Finally, the SCSL points out that the principles of fairness and expeditiousness of the proceedings are guarantees of the accused, stemming from Article 17 of the Statute. Such guarantees include the principles of equality before the Special Court, a fair and public hearing, presumption of innocence and minimum judicial guarantees (namely, the right to be informed of the charges promptly and in detail in a language that the accused understands, the right to have adequate time and facilities for the preparation of the defence and the right to communicate with counsel of his or her own choosing).

McDermott has compiled the arguments favouring that the right to a fair trial does not favour the accused exclusively, but it protects also the other parties involved in the proceedings, based on the principle of equality and articles 18, 20 and 21 of the SCSL' Statute[64].

Regarding the principle of expeditiousness of the proceedings, it is contained in Article 17 of the SCSL Statute, as part of the mini-

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61 Statute of the STL, Resolution 1757 of the Security Council of the United Nations, article 16(2). See: United Nations, Security Council (2007), Resolution 1757, Statute of the Special Tribunal for Lebanon, May 30, 2007, UN Doc. No.: S/RES/1757.

62 Ibid., article 17.

63 Ibid., article 28.

64 Mcdermott, Y., 2012, supra n. 38, p. 4.

mum judicial guarantees of the accused and establishes his right to be tried without undue delay. A strictly literal reading of the Statute seems to indicate that this right is intended to protect the accused only. Nevertheless, the Appeals Chamber has stated in the Norman and others (2004) case that the principle of expeditiousness favours the victims and their relatives as well, because they may not overcome the trauma or achieve personal closure until the proceedings conclude[65].

3.5. European Court of Human Rights

The principles of fairness and expeditiousness of the proceedings are provided for in Article 6 of the ECHR, which indicates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The ECtHR has developed the principle of fairness, indicating that it is closely related to the following guarantees: (i) effective participation in the proceedings[66]; (ii) equality of arms and adversarial proceedings[67]; (iii) reasoning of judicial decisions[68]; (iv) proper administration of evidence[69]; and (v) the principle of immediacy[70], amongst others. It is reasonable to affirm that these principles have been mostly developed in benefit of the accused. Nevertheless, the ECtHR has also highlighted that the principles of equality of arms and adversarial proceedings benefit all parties in the proceedings.

This is exemplified in the Dombo Beheer BV c. The Netherlands[71] (1993) case, in which the ECtHR found that: (a) each party must be

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65 SCSL, the Prosecutor v. Norman et. al., Appeals Chamber, Decision on the applications for a stay of proceedings and denial of right to appeal, November 4, 2003, Case No.: SCSL-2003-09-PT, par. 8.

66 ECtHR, Murtazaliyeva v. Russia, Judgment, December 18, 2018.

67 ECtHR, Dombo Beheer BV v. The Netherlands, Judgment, October 27, 1993.

68 ECtHR, Hadjianastassiou v. Greece, Judgment, December 16, 1992.

69 ECtHR, Khan v. United Kingdom, Judgment, May 12, 2000.

70 Idem.

71 ECtHR, Dombo Beheer BV v. The Netherlands, supra n. 67.

afforded a reasonable opportunity to present their case under equal conditions; and (b) national courts have the obligation to ensure that each individual case fulfils the requirements contained in the ECHR regarding the fair administration of justice, with full respect to the rights and guarantees of the parties to the proceedings[72].

Similarly, Rainey, Wicks & Obey, illustrate, when analysing this case, that in order to provide equality of arms, it is required a fair balance between the parties both in civil and criminal cases. Furthermore, what essentially matters is that the parties are afforded a reasonable opportunity to present their case, including their evidence, under conditions that do not place them at substantial disadvantage *vis-a-vis* their opponent[73]. Moreover, Tochilovsky adds that the right to an adversarial trial also means that both Prosecution and Defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party, with a view to influencing the Court's decision[74].

Regarding the principle of expeditiousness of the proceedings, it has been developed by the ECtHR in several cases within the framework of the proper administration of justice. Amongst these cases, the Zimmermann & Steiner v. Switzerland[75] case stands out. In this case, the ECtHR found that the reasonableness of the length of the proceedings must be assessed in each case according to its specific circumstances. In other words, for the ECtHR there is not a specific length or time limit under which the principle of expeditiousness is fulfilled, for it is necessary to assess and evaluate each case in its integrity and in light of its specific circumstances (including the complexity of the case and the amount of evidence to be assessed, amongst others).

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72 Ibid., par. 33.

73 Rainey, B., Wicks, E. & Ovey, C., 2017, Jacobs, White, and Ovey: The European Convention on Human Rights, Oxford, Oxford University Press, 7th Ed., p. 291-292.

74 Tochilovsky, V., 2008, supra n. 39, p. 275-276.

75 ECtHR, Zimmermann & Steiner v. Switzerland, Judgment, July 13, 1983, par. 24.

In this regard, Tochilovsky highlights that the reasonableness of the length of the proceedings must be assessed in each instance, in light of the particular circumstances of the case and its complexity. Thus, the Convention's approach consists in examining the overall length of the proceedings, covering all its stages[76].

In conclusion, although the ECtHR' jurisprudence has been mostly focused on the interpretation of the applicants' guarantees (normally, the accused in domestic criminal proceedings), it is nonetheless true that the ECtHR has also provided clear guidelines establishing that the principles of fairness and expeditiousness of the proceedings favours all parties involved in them.

3.6. The Inter-American Court of Human Rights

Lastly, in the IACtHR, the principle of fairness has been adopted by an extensive interpretation of Articles 8 (judicial guarantees) and 25 (judicial protection) of the ACHR. As a result, the IACtHR's jurisprudence[77] considers that Article 8 includes, *inter alia*, the following rights that emanate from the principle of fairness: (i) the right to a hearing[78]; (ii) the right to an effective judicial investigation[79]; (iii) the right of due diligence[80]; and (iv) the right to an independent,

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76 Tochilovsky, V., 2008, supra n. 39, p. 296.

77 IACtHR (s.f.), *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos N°12: Debido Proceso*, https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo12.pdf

78 IACtHR, Apitz Barbera et. al. ("First Court of the Contested Administratif") v. Venezuela, Judgment, August 5, 2008 (Preliminar Exception, Case, Reparations and Costs), para. 75; IACtHR, Barrios Altos v. Peru, Judgment, March 14, 2001 (merits), par. 42.

79 IACtHR, "Niños de la Calle" (Villagrán Morales et. al.) v. Guatemala, Judgment, November 19, 1999 (Merits), paras. 230 - 233; IACtHR, Durand & Ugarte v. Peru, Judgment, August 16, 2000 (Merits), par. 130.

80 IACtHR, Anzualdo Castro v. Peru, Judgment, September 22, 2009 (Preliminary Exceptions, Case, Reparations and Costs), paras. 135, 154; IACtHR, Favela Nova Brasília v. Brasil, Judgment, February 16, 2017 (Preliminary Exceptions, Case, Reparations and Costs), par. 174.

impartial and competent tribunal[81]. Moreover, the IACtHR considers that the first three rights mentioned above are also contained in Article 25 of the ACHR.

These fair trial rights have been developed by the IACtHR, mostly in benefit of the applicants (normally, victims of severe violent acts). This can be shown in cases such as the Barrios Altos v. Peru case[82], where the IACtHR found that the State breached the right of the victims and their relatives to be heard. The application of these principles in favour of the applicants can also be seen in the Durand and Ugarte v. Peru[83], where the right to an effective judicial investigation was breached by the State since it didn't investigate the disappearance of the victims. One last example can be found in the Favela Nova Brasília v. Brazil case[84], where the IACtHR recalled that States Parties are obligated to provide effective judicial remedies, which are to be substantiated in accordance with the due process principle.

Regarding the principle of expeditiousness of the proceedings, the IACtHR has also found it included in Articles 8 and 25 of the ACHR. Likewise, in the Favela Nova Brasília v. Brazil case[85], the IACtHR stated that a judicial decision should be produced within a reasonable time, since a prolonged delay may constitute a violation of judicial guarantees established in Article 8 of the ACHR. Accordingly, in the Claude-Reyes et al. v. Chile case[86], the IACtHR pointed out that States must provide a simple, prompt and effective remedy, so that they comply with the necessary expeditiousness in delivering indispensable information. If they fail to do so, the judicial protections enshrined in the ACHR would be breached.

Hence, it can be concluded that the IACtHR's jurisprudence, unlike the ECtHRs', has developed the principle of fairness and expedi-

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81 IACtHR, Las Palmeras v. Colombia, Judgment, December 6, 2001 (merits), parrs. 53 - 54.

82 IACtHR, Barrios Altos v. Peru, supra n. 78, par. 42.

83 IACtHR, *Durand & Ugarte* v. Peru, supra n. 79, par. 130.

84 IACtHR, Favela Nova Brasília v. Brasil, supra n. 80, par. 174.

85 Ibid., par. 217.

86 IACtHR, Claude Reyes et. al. v. Chile, Judgment, September 19, 2006 (Merits, Reparations and Costs), par. 137.

tiousness of the proceedings only in favour of the applicants (victims of severe violent acts) who are often seeking protection[87].

4. In which instances a declaration of mistrial is appropriate?

4.1. International Criminal Court

Neither the ICC Statute, nor the ICC RPE, explicitly regulate the declaration of a mistrial, meaning the termination of the proceedings before the end of the trial because of an error that renders it null.

Nevertheless, this did not prevent the majority of Trial Chamber V in the Ruto and Sang case (carried out against William Ruto, former President of Kenya and former general secretary of the Orange Democratic Movement, and Joshua Arap Sang, former operations director Kass FM station), to terminate the proceedings of the case before the end of the trial, as a result of a mistrial[88]. In this case, the Chamber agreed that: (i) there had been inappropriate political meddling during the trial in an attempt to impact the trial's results; (ii) there had been a lack of cooperation from the witnesses, caused by an environment of intimidation, interference, and generalized pressure, fuelled by hostility and rejection of the proceedings by the government, local communities and media in Kenya, amongst others; and, as a result (iii) the OTP had been unable to present sufficient evidence to continue with the trial.

As a consequence, Trial Chamber V decided to terminate the proceedings, vacate the charges and discharge the accused, without pre-

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87 However, authors like Laurence Burgorgue-Larsen and Amaya Ubeda de Torres have stated that the applicants and State Member's procedural guarantees should always be interpreted in light of the principle of fair trial. See: Burgorgue-Larsen, L. & Ubeda de Torres, A. (2011), Inter-American Court of Human Rights: Case Law and Commentary, Oxford, Oxford University Press, Vol. 1, p. 656.

88 ICC, Public Information and Communication Section (2016), ICC Press Release: Ruto and Sang case*: ICC* Trial Chamber V(A) terminates the case without prejudice to re-prosecution in future, April 5, 2016, https://www.icc-cpi.int/pages/item.aspx?name=pr1205

judice to re-prosecution in the future for the same charges[89], based on Article 64(2) of the ICC Statute, which indicates that the Trial Chamber shall ensure a fair and expeditious trial. The argument underpinning this decision was that the actions against the witnesses (intimidation and pressure) casted major doubts as to their freedom and willingness to testify.

Thus, in the Ruto and Sang case, the Chamber sought to ensure compliance with the principle of fair trial and the guarantees that stem from it, in accordance with article 64(2) of the ICC Statute. This case underscores that an ICC Chamber could declare a mistrial when there's an impossibility to ensure the principle of fair trial

4.2. International Criminal Tribunals for the former Yugoslavia and Rwanda

Much like the ICC Statute, the ICTY Statute and its RPE, nor the ICTR Statute and its RPE contain any provision that explicitly regulates the declaration of a mistrial. Nevertheless, ICTY and ICTR trial and appeals chambers have the implicit power to declare it, according to Rule 54 and 107 of the ICTY and ICTR RPE[90]. According to the ICTY's jurisprudence, a mistrial is a remedy that must be declared during the trial stage, given that it is an interlocutory decision that declares the early termination of the trial because of an error that renders it null[91]. As a result, it must be requested during the trial and not during the appeals proceedings[92], given that it is essential for the determination of appropriate and fair relief, and indispensable to avoid the existence of errors that will render it null; in contrast,

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89 ICC, the Prosecutor v. William Samoei Ruto & Joshua Arap Sang, Trial Chamber V(A), Scheduling Order for Oral Hearings on the Defence 'No Case to Answer' Motions, November 6, 2015, ICC Doc. No.: ICC-01/09-01/11-1999.

90 ICTY, Furundzija Appeals Judgment, supra n. 32, par. 20.

91 Ibid., para. 19; ICTY, the Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landžo, Appeals Chamber, Judgment, February 20, 2001, Case No.: IT-96-21-A, par. 645.

92 ICTY, Furundzija Appeals Judgment, supra n. 32, par. 33.

allegations of violation of the fair trial principle during the appeals process are considered errors of law that will ultimately manifest in the appeals judgment.

Unlike the ICC and the ICTY, the ICTR has no case law on the declaration of a mistrial.

4.3. Extraordinary Chambers in the Courts of Cambodia, Special Tribunal for Lebanon and Special Court for Sierra Leone

No case law regarding the declaration of a mistrial has been found in the ECCC, the STL or the SCSL, since these tribunals have never dealt with circumstances of this manner.

4.4. European Court of Human Rights and the Inter-American Court of Human Rights

Finally, regarding the ECtHR, and as indicated above in the response to the question 2.2., the European Court System does not have the mandate to resolve internal issues related to procedural or evidential matters, such as the declaration of a mistrial. As a result of this, the ECtHR is not an appeals court for decisions made by domestic jurisdictions[93], it is not within its purview to deal with errors of fact or law allegedly committed by national courts, unless and only insofar as they may have infringed rights and freedoms protected by the ECHR (Article 6, in particular)[94]. Hence, the ECtHR does not have the mandate to resolve domestic issues relating to procedural or evidential matters, such as the declaration of a mistrial.

The IACtHR, much like the ECtHR, does not have the mandate to resolve domestic issues, including those relating to ordering specific ways for investigating and judging domestic cases or the establishment of specific rules to be applied in domestic proceedings.

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93 ECtHR, 2020, Rules of Court, January 1, 2020, https://www.echr.coe.int/documents/rules_court_eng.pdf, p. 58.

94 ECtHR, Garcia Ruiz v. Spain, supra n. 13, par. 28.

Accordingly, the preamble of the ACHR and the IACtHR's jurisprudence clarify that the IACtHR does not act as a court of fourth instance[95]. This is explicitly set out in the Palma Mendoza et. al. v. Ecuador case (2012)[96]. As a consequence, the IACtHR has not dealt with the question of in what instances the declaration of a mistrial is appropriate.

5. Conclusion

This research paper has analysed the following three procedural issues relating to the January 15th, 2019 ICC Trial Chamber I's No Case To Answer Decision in the Gbagbo and Blé Goudé case, that is currently under appeal: (i) whether ICC chambers have the power to define the applicable standard of proof or approach to evidence *ex post facto*; (ii) whether the principles of fairness and expeditiousness of the proceedings are only in benefit of the accused, or whether they also benefit the Prosecution, the witnesses and the victims; and (iii) the instances in which a declaration of mistrial is appropriate.

The analysis has been conducted with due regard to Article 21 of the ICC Statute. As a result, it aims at providing a broad overview of the available jurisprudence on said procedural issues by different international courts and tribunals, including the ICC, the ICTY, the ICTR, ECtHR, the ICtHR, the ECCC, the STL and the SCSL.

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95 Preamble of the American Convention on Human Rights adopted at the Inter-American Specialized Conference on Human Rights. See: Organization of American States (1969), American Convention on Human Rights (adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November,1969), November 22, 1969.

96 IACtHR, Palma Mendoza et al. v. Ecuador, Judgment, September 3, 2012 (Preliminary Objection and Merits), par. 16.

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16. Content and mandatory nature of the requirements under article 74 (5) of the ICC Statute in relation to no case to answer decisions

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1. Introduction

This paper analyzes the question of whether or not decisions to dismiss a case rendered by the ICC TCs at the end of the presentation of the Prosecution's evidence at the oral trial (on the grounds that, even if they were all attributed the highest possible probative value, it would not be sufficient to meet the "beyond reasonable doubt" standard with respect to the guilt of the accused), have to comply with the requirements of Art. 74 (5) of the ICC Statute, which states: "The judgment shall be in writing and shall include a reasoned and full statement of the evaluation of the evidence and the findings. The CPS shall render a decision. Where there is no unanimity, the TC's decision shall include the majority and minority opinions. The

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reading of the decision or a summary thereof shall be made in public session".

Based on the content of Art. 74 (5) ICC Statute, authors such as Terrier consider that this provision requires the CPS to issue its judgment in writing, which must contain a full and reasoned statement of the evidence, the facts proved and the conclusions reached, as well as a clear response to the charges presented by the Prosecution and to requests made by the defense[1]. According to this author, taking into account that its central objective is to explain to the parties and the general public the reasons that lead the Chambers to make its decision, the reasoning must be: (i) based on a demonstrative logic; (ii) without contradictions; and (iii) precise and complete. In addition, it must not leave any of the arguments raised by the parties unresolved[2].

Other authors, such as Klamberg, emphasize that Art. 74 (5) of the ICC Statute is one of the few procedural aspects of ICC proceedings that is regulated in detail, in order to satisfy the principles of public hearing, fairness and the right to appeal[3]. As a result, while other procedural issues (e.g., the presentation of evidence) are left to the discretion of the CPS, all the requirements of Art. 74 (5) ICC Statute are of a binding nature[4]. Moreover, for Klamberg, while Art. 23 of the ICTYS and Art. 22 of the ICTR refer specifically to "judgments", Art. 74 (5) of the ECPI uses the term "decision" in its English version[5], which may be understood to include, inter alia, decisions of dismissal issued by the ICC's TCI.

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1 Terrier, F., 2002, 'The Procedure before the Trial Chamber'. In Cassese, A., Gaeta, P. & Jones, J.R.W.D. (Eds.), The Rome Statute of the International Criminal Court: A Commentary, New York, Oxford University Press, Vol. II., Cap. 31.2.

2 Ibid., par. 1315E.

3 Klamberg, M., 2007, Commentary on the Law of the International Criminal Court., Brussels, Torkel Opsahl Academic EPublisher. pp. 565-569.

4 Ibid., par. 554.

5 Ibid., par. 555.

However, ICC case law has so far only addressed the binding nature of the second requirement under the ECPI (the obligation of the TCs to provide a full and reasoned account of the evaluation of the evidence and the conclusions reached) and how its non-compliance constitutes a procedural error. These issues have been addressed in the June 8, 2018 judgment of the ICC SA in the case against Jean Pierre Bemba. In addition, ICC case law has also not ruled on whether this second requirement applies only to judgments, or is also applicable to all, or some, interlocutory decisions, such as dismissal decisions.

In light of the above, Sections 2 to 4 of this paper address the requirements under Art. 74 (5) ECPI, namely: (a) that the judgment be in writing (section 2); (b) that the judgment include a reasoned and complete statement of the evaluation of the evidence and the conclusions reached (section 3); and (c) that the CPS issue a judgment including the majority and minority opinions when there is no unanimity, and read it in full, or at least a summary thereof, in open court (section 4). For this purpose and considering Art. 21 (1) (b) and (3) of the ICCPR, the jurisprudence of the ICTY, the ICTR, the HRC, the ECtHR and the IACHR is analyzed.

2. The decision shall be in writing

2.1. International Criminal Tribunals for the former Yugoslavia and Rwanda

The first requirement under Article 74(5) of the ICC Statute is that '*the decision shall be in writing*'. A similar provision is contained in relation to judgments in Article 23 of the ICTY Statute, Rule 98 Ter (c) of the ICTY Rules of Procedure and Evidence, Article 22 of the ICTR Statute and Rule 88 (c) of the ICTR Rules of Procedure and Evidence. Similar provisions can also be found for appellate proceedings in Rule 117 (b) of the ICTY Rules of Procedure and Evidence and 118 (b) of the ICTR Rules of Procedure and Evidence.

When addressing this requirement, the ICTY and the ICTR case law has affirmed that a written judgment is needed in order to guar-

antee that the judgment rendered fulfils the requirement of a reasoned opinion[6].

Furthermore, the ICTY Appeals Chamber in the Kvočka case has specifically stated that the requirement to deliver the judgment in writing can also be applied to all other decisions that are essential for the determination of responsibility[7]. This would include 'no case to answer decisions' issued by Trial Chambers because they are essential for the determination of responsibility, as its main effect is to end the trial due to the insufficient evidence put forward by the Prosecutor during her case.

2.2. Human Rights Committee

Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to 'a fair and public hearing'. Nevertheless, neither this provision, nor HRC's General Comment 32 on Article 14 of the ICCPR, refer explicitly to the oral or written nature of judgments and other decisions.

The requirement for decisions to be delivered in writing can only be explicitly found in Article 14 (3) of the ICCPR in relation to the accused's right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him. In this context, the HRC highlights in its General Comment 32 that this requirement can be "met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based"[8].

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6 ICTR, the Prosecutor v. Kayishema, Trial Chamber, Judgment, June 1, 2001, Case No.: ICTR-95-1-A, par. 165; ICTY, the Prosecutor v. C. Furundzija., Trial Chamber, Judgment, July 20, 2000, Case No.: IT-95-17/1-T, par. 69.

7 ICTY, the Prosecutor v. Kvočka *et al.*, Appeals Chamber, Appeals Judgment, February 28, 2001, Case No.: IT-98-30/1-A, par. 286.

8 See: United Nations, Human Rights Committee, General Comment No. 32 (2007) - Article 14: Right to equality before courts and tribunals and to a fair trial, August 23, 2007, UN Doc.: CCPR/C/GC/32, par. 31.

Moreover, in Pratt and Morgan v. Jamaica (Communication Num. 210/1986), where a Jamaican Appeals Court did not disclose the reasons why it dismissed the applicants' appeal until almost four years later, the HRC found undue delay in the judicial proceedings constituting a violation of the applicants' rights to be tried within a reasonable period of time.

The HRC agreed with the applicants that the delay of the Jamaican Appeals Court to formulate its decision and its reasons in writing could be the cause of serious injustice because it prevented the applicants from exercising their right to appeal before the Privy Council. As a result, the HRC ordered the commutation of the sentence, the reimbursement of any legal costs incurred by the applicants in the proceedings before the HRC, and monetary compensation[9].

2.3. European Court of Human Rights

The ECtHR has stated that the State Parties ought to comply with the requirements established in article 6 of the European Convention on Human Rights (ECHR) on the right to a fair trial. According to the ECtHR, there is no specific requirement under this provision for judgments or other decisions to be delivered in writing. Moreover, State Parties to the ECHR enjoy a wide margin of appreciation on the way in which they comply with their obligations under the ECHR.

Nevertheless, the ECtHR, in the case of Cerovšek And Božičnik v. Slovenia (2017), has found that, in light of Slovenian penal and procedural laws and regulations, any Slovenian Judge or Court that conducts a trial and examines the evidence must provide a written judgmentin which the grounds that justify the verdict are addressed[10]. As no written reason was provided for almost three years, the ECtHR found that Slovenia had breached the applicants' right to a fair trial.

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9 OHCHR, Pratt & Morgan v. Jamaica, Communication *No. 210/1986*, April 6, 1989, U.N. Doc. CCPR/C/35/D/210/1986.

10 ECHR, Cerovšek & Božičnik v. Slovenia, Judgment, March 7, 2017, Case No.: 68939, par. 43.

As a result, the ECtHR declared that Slovenian higher courts should have ordered a retrial and should have remitted the case to a new first-instance court for a new hearing. Nevertheless, as Slovenian higher courts did not provide for a proper remedy to overcome the violation, and the sentence had already been served by the applicants, the ECtHR condemned Slovenia to pay each of the applicants the sum of 5.000 Euros for non-pecuniary damage and 2.500 Euros for the legal costs of the proceedings held before the ECtHR[11].

As a result, according to the ECtHR, when determining the fairness of a process, it is essential to consider the proceedings as a whole, in light of the specific statutory requirements, the circumstances of the case[12] and the decisions of the appellate courts[13]. Thus, if there is a statutory provision requiring a judgment - or even an interlocutory decision - to be in writing, the Court or Judge must comply with that requisite, in order to ensure the proper administration of justice and prevent arbitrariness.

2.4. Inter-American Court of Human Rights

According to Article 8(1) of the American Convention on Human Rights (ACHR), '[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.'

The IACtHR has interpreted this provision in relation to the requisite of providing judgements and other decisions in writing in the Claude-Reyes et. al. v. Chile case[14]. According to the facts of the case, the applicants formally requested in 1998 to the Vice-President of

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11 Ibid., par. 45.

12 ECHR, Ruiz Torrija v. Spain, Judgment, December 9, 1994, Case No.: 303-A, par. 29.

13 ECHR, Cerovšek & Božičnik v. Slovenia, supra n. 10, par. 37.

14 IACtHR, Claude-Reyes et al. v. Chile, Judgment, September 19, 2006 (Merits, Reparations and Costs).

the Foreign Investment Committee ('the Committee'), a Chilean State body, to provide information on *inter alia*: (i) whether the Vice-President of the Committee had requested all companies in the public and private sectors the reports required for the fulfilment of the Committee's mandate; and (ii) any infraction or crime committed by companies under the oversight of the Committee[15]. The Vice-President of the Committee refused to provide such information. Moreover, he also refused to provide, at the request of the applicants[16], a reasoned written decision explaining why he refused to provide the information requested by the applicants[17].

Based on the above-mentioned, the IACtHR found that, by not providing a written and reasoned decision, the applicants' rights under article 8 (1) of the ACHR had been breached by Chile. Thus, for the IACtHR, the decision of the Vice-President of the Committee was arbitrary and unfounded, thus unacceptable[18]. As a result, the IACtHR condemned Chile to provide reparations to the applicants for non-pecuniary damage by: (i) providing the information requested by the applicants, if appropriate, or adopting a reasoned decision in this regard; (ii) publishing in the official gazette and in another newspaper with extensive circulation, the chapter on proven facts of the IACtHR's decision in this case; (iii) adopting the necessary measures to ensure the right of access to State-held information; and (iv) providing training on the law and regulations governing this right to public entities, authorities and agents responsible for deciding on requests for access to State-held information[19].

In reaching its decision, the IACtHR found that Article 8(1) of the ACHR requires that all decisions made by domestic bodies must be delivered in a written form, no matter the nature of the decision or of the State body making it.

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15 Ibid., par. 57.13.
16 Ibid., par. 57.16.
17 Ibid., par. 122.
18 Idem.
19 Ibid., paras. 156 et. seq.

3. The decision shall contain a full and reasoned statement of the trial chambers' findings on the evidence and conclusions

3.1. International Criminal Court

The second requirement under Article 74(5) of the ICC Statute is that 'the decision shall contain a full and reasoned statement of the Trial Chamber findings on the evidence and conclusions.' In the Bemba Appeals Judgement, the ICC Appeals Chamber has affirmed that Article 74(5) of the Statute requires the Trial Chamber to provide a full and reasoned statement on its findings on the evidence and conclusions[20]. For the ICC Appeals Chamber, the Trial Chamber's obligation aims at protecting the rights of the parties to appeal the Trial Chamber's judgment, as this right can only be properly exercised when the Trial Chamber provides in a clear way the factual and legal basis of the judgment[21]. Moreover, the ICC Appeals Chamber has established that, in order to fulfil this requirement, it is not necessary to consider every single factor, but only those factors that were relevant to come to the Trial Chamber's conclusion[22].

According to the ICC Appeals Chamber, if the Trial Chamber fails to provide a full and reasoned statement on its findings on the evidence and conclusions, it would amount to a procedural error[23]. Nevertheless, the Appeals Chamber has also made clear that the appropriate remedy will depend on the specific circumstances of the case[24]. For the ICC Appeals Chamber, when the lack of reasoning is extensive, the Appeals Chamber may decide to order a new trial before a different Trial Chamber[25]. In turn, when the reasoning is merely insufficient, the Appeals Chamber may remand some factual findings

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20 ICC, the Prosecutor v. Jean Pierre Bemba, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", June 8, 2018, ICC Doc. No.: ICC-01/05-01/08-3636-Red, parrs. 49-50.

21 Ibid., par. 51.

22 Ibid., par. 49.

23 Ibid., par. 56.

24 Idem.

25 Idem.

to the original Trial Chamber with instructions to (i) strengthen the reasoning in support of them; and (ii) send the judgment back to the Appeals Chamber. The Appeals Chamber case law has not addressed the issue of whether this second requirement applies only to judgments, or whether it is also applicable to other decisions, such as the TC I's no case to answer decision.

3.2. International Criminal Tribunals for the former Yugoslavia and Rwanda

The Trial Chamber's obligation to provide a full and reasoned statement is also found in relation to judgements in Rule 98 Ter (c) of the ICTY Rules of Procedure and Evidence and in Rule 88 (c) of the ICTR Rules of Procedure and Evidence. Similar provisions can also be found for appellate proceedings in Rule 117 (b) of the ICTY Rules of Procedure and Evidence and 118 (b) of the ICTR Rules of Procedure and Evidence.

In the Kuranac et. al., Limaj et. al. and Krajisnik cases, the ICTY Appeals Chamber has found that a full and reasoned opinion by the Trial Chamber is a key safeguard for the right to a fair trial, as it ensures the parties' effective exercise of their right to appeal. Therefore, not only the judgements, but also all decisions relating to the central issues of the case ('no case to answer decisions' would fall within this category), must contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions[26]. In reaching its conclusion, the ICTY Appeals Chamber has taken into consideration the ECtHR decision in the Hadjianastassiou v. Greece case[27].

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[26] ICTY, the Prosecutor v. Kunarac, et. al., Appeals Chamber, Judgment, June 12, 2002, Case No.: IT-96-23/1, parrs. 41-42; ICTY, the Prosecutor v. Fatmir Limaj, Appeals Chamber, Judgment, September 27, 2007, Case No.: IT-03-66/1, par. 81.

[27] ECHR, Hadjianastassiou v. Greece, *Judgment,* December 16, 1994, Case No.: 202-A, par. 29.

In the Karera case, the ICTR Appeals Chamber has taken the same approach than the ICTY Appeals Chamber, as it has explicitly found that '[a] reasoned opinion ensures that the accused can exercise his right of appeal and that the Appeals Chamber can carry out its statutory duty under Article 24 of the Statute'[28].

For the ICTR Appeals Chamber (Ndindiliyimana case), in order to fulfil the requirements provided for in Article 22(2) of the ICTR Statute and Rule 88(C) of the ICTR Rules of Procedure and Evidence, the Trial Chamber 'should set out in a clear and articulated manner the factual and legal findings on the basis on which it reached the decision to convict or acquit an accused. In particular, a trial chamber is required to provide clear, reasoned findings of fact as to each element of the crime charged'[29].

The ICTR Appeals Chamber has also highlighted in the Karera case that the reasoned opinion requirement is applicable to all decisions addressing central issues of the case[30], which is clearly consistent with the above-mentioned case law of the ICTY Appeals Chamber.

3.3. Human Rights Committee

There is one relevant communication before the HRC in relation to the second requirement. In Lenford Hamilton v. Jamaica (Communication Num. 333/1988), the HRC found that the lack of a reasoned judgment in writing by a Jamaican appeals court violated the applicant's rights under Article 14 (3)(c) and (5) of the ICCPR, as it materially deprived the applicant from exercising his right to appeal before the *Privy Council*. As a result, the HRC requested Jamaica to commute the sentence, reimburse any legal costs incurred by the

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28 ICTR, the Prosecutor v. Francois Karera, Appeals Chamber, Judgment, February 2, 2009, Case No.: 01-74-A par. 20; ICTR, the Prosecutor v. Tharcisse Muvunyi, Appeals Chamber, Judgment, August 29, 2008, Case No.: 00-55, par. 144.

29 ICTR, the Prosecutor v. Augustin Ndindiliyimana, Appeals Chamber, Judgment, February 11, 2014, Case No.: 00-56-A, par. 293.

30 Idem.

applicant in the proceedings before the HRC, and provide monetary compensation[31].

3.4. European Court of Human Rights

The ECtHR has dealt with the second requirement in several cases, starting with Hadjianastassiou v. Greece case (1992)[32]. In this case, a Greek aeronautical engineer was sentenced to prison for disclosing military secrets. The Greek military Appeals Court failed to provide reasons in the judgment, that was read out in a public hearing. The applicant only found the specific reasons for his conviction two months after the public hearing. As a result, for the ECtHR, the applicant's appeal was bound to fail because he did not have enough elements to prepare a well-grounded appeal[33]. As a result, the ECtHR found that Greece had breached Article 6 of the ECHR and had to provide monetary compensation to the applicant (this was the only remedy granted by the ECtHR in this case, because the applicant had already served his time in prison, and his claim aimed at obtaining pecuniary compensation)[34].

The ECtHR has followed its conclusion in more than 20 subsequent cases, including *inter alia* the Taxquet v. Belgium (2010)[35] and the Nikolay Genov v. Bulgaria (2017) cases[36]. In this last case, the ECtHR also emphasized that it must be clear in national courts' judgments that all essential issues of the case have been addressed[37].

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31 OHCHR, Lenford Hamilton v. Jamaica, Communication No.: 333/1988, March 25, 1994, U.N. Doc. CCPR/C/50/D/333/1988.

32 ECHR, Hadjianastassiou v. Greece, supra n. 27, par. 28.

33 Ibid., par. 29.

34 Ibid., par. 49.

35 ECHR, Taxquet v. Belgium, Judgment, November 16, 2010, Case No.: 5380, para. 23.

36 ECHR, Nikolay Genov v. Bulgaria, Judgment, July 13, 2017, Case No.: 3320, para. 88.

37 Ibid., par. 27.

Finally, in the Suominen v. Finland case[38], the applicant claimed that she did not receive a fair hearing, as she was prevented from presenting all the evidence she requested to be admitted at trial. The Finish District Court refused to admit the evidence without giving a reasoned written decision. It just made an interlocutory oral decision not to accept the evidence at a preparatory hearing[39]. For the ECtHR, this constituted a violation of article 6 of the ECHR because, although the impugned decision was not a judgment, national courts have an obligation to deliver a reasoned decision in order to allow applicants to effectively exercise their right to appeal against interlocutory decisions[40].

3.5. Inter-American Court of Human Rights

The IACtHR has dealt with the second requirement in several cases, starting with the Yatama v. Nicaragua case (2005)[41]. According to the facts of this case, the Yatama indigenous group was not allowed to participate in the 2000 elections in Nicaragua. The decision was made by the Nicaraguan Supreme Electoral Council (a Nicaraguan administrative body) without apparent justification and no proper notification. It simply issued an unreasoned resolution stating the decision[42].

The IACtHR found that Nicaragua failed to duly justify the decision, thus violating the Yatama indigenous group's judicial guarantees and its right to due process[43]. As a result, the IACtHR condemned Nicaragua: (i) to compensate the applicants with 80.000 US dollars; (ii) to publish the relevant paragraphs of the IACtHR's decision in (a) the official national gazette and in another newspaper

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38 ECHR, Suominen V. Finland, Judgment, July 24, 2003, Case No.: 3345, para. 34.

39 Ibid, para. 25.

40 Ibid, parrs. 35-37.

41 IACtHR, Yatama v. Nicaragua, Judgment, June 23, 2005 (Preliminary Objection and Merits).

42 Ibid., par. 154.

43 Ibid., parrs. 152, 164.

with widespread national circulation; and (b) a radio station with broad coverage in the Atlantic Coast; (iii) to adopt the necessary legislative measures to establish a simple, prompt and effective judicial recourse against the decisions made by the Nicaraguan Supreme Electoral Council (this included the derogation of any norm that could be an obstacle for the effective exercise of such judicial recourse); and (iv) to reform Electoral Act No. 331 of 2000 to ensure that members of indigenous and ethnic communities may participate in electoral processes effectively. Moreover, the IACtHR stated that the judgment also constituted, *per se,* a form of reparation[44]. The Yatama precedent has been followed by the IACtHR since 2005 in more than 15 cases[45], the last one being the Rico v. Argentina case (2019)[46].

Moreover, over the years, the IACtHR has elaborated, based on the Yatama precedent, the State Parties' duty to state grounds (also known as the 'duty to motivate'). In this regard, it is particularly relevant the Apitz Barbera et. al. v. Venezuela case (2008)[47]. According to the facts of the case, the five applicants were appointed in September 2000 by the Judicial Commission of the Supreme Court of Justice of Venezuela as provisional judges for the 'First Court of Administrative Disputes'. Three years later, in October 2003, three of the five judges were deemed by an administrative decision of the said Judicial Commission to have committed a 'serious legal error of an inexcusable character', as a result of approving a request against an administrative decision related to the sale of real estate[48]. No grounds were stated for this decision. As a consequence, they were subjected to criminal

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44 Ibid., par. 230-260.

45 IACtHR, Chaparro Álvarez & Lapo Íñiguez v. Ecuador, Judgment, November 21, 2007 (Preliminary Objection and Merits); IACtHR, Apitz Barbera et. al. ("Corte Primera de lo Contencioso Administrativo") v. Venezuela, Judgment, August 5, 2008 (Preliminary Objections, Merits, Reparations and Costs).

46 IACtHR, Rico v. Argentina, Judgment, September 2, 2019 (Preliminary objections and merits).

47 IACtHR, Apitz Barbera et. al. *("Corte Primera de lo Contencioso Administrativo") v. Venezuela*, supra no. 45.

48 Ibid., par. 33.

proceedings, a disciplinary investigation, precautionary suspension and removal from office[49].

In subsequent cases, such as in the Chocrón Chocrón v. Venezuela case (2011)[50], the IACtHR has elaborated on the content of the States Parties' duty to state grounds by making clear that State bodies (including national courts) have the obligation to provide in their decisions the facts, the grounds, and the legislation on which their decisions are grounded, no matter the nature of the State Body that issues the decision[51].

According to the IACtHR, the duty to motivate is a fundamental one, since it is related to the exteriorization of the reasoned justification that allows a conclusion to be reached. Its fulfilment brings credibility to the decisions of State bodies and shows their lack of arbitrariness in decision making[52]. Its lack of fulfilment constitutes a violation of the right to due process under Article 8(1) of ACHR[53].

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49 Ibid., parrs. 77-91, 136.

50 IACtHR, Chocrón Chocrón v. Venezuela, Judgment, July 1, 2011 (Preliminary Objections, Merits, Reparations and Costs), par. 118.

51 In the Chocrón Chocrón v. Venezuela case, Mercedes Chocrón Chocrón was appointed as a temporary judge by the Judicial Commission of the Supreme Court of Justice of Venezuela. Nevertheless, after merely three months, the same Commission, through an administrative decision, with no full or reasoned explanation, removed judge Chocrón from her position.

52 IACtHR, Apitz Barbera et. al. *("Corte Primera de lo Contencioso Administrativos") v. Venezuela,* supra no. 45, par. 77.

53 Ibid., par. 78.

4. The requirements to issue a ruling that includes majority and minority opinions and to read the ruling or a summary of the ruling at a public hearing

4.1. The requirement to issue a ruling that includes both majority and minority opinions

The third requirement of Art. 74 (5) ICC Statute provides that "[t]he Trial Chamber shall render a judgment. Where there is no unanimity, the Trial Chamber's decision shall include the views of the majority and the minority". In this regard, Rules 98 ter (c) and 88 (c) (trial proceedings) and 117 (c) and 118 (c) (appeals procedure) of the ICTY and ICTR RPE contain the duty of the CPS to render a judgment, to which separate opinions and dissenting opinions are appended.

However, it is not possible to identify jurisprudence of either of these two tribunals with respect to the content of this requirement. The same situation has arisen in relation to the ICC, the HRC, the ECtHR and the IACHR.

4.2. The requirement to read the judgment or a summary thereof at a public hearing

The fourth and last requirement of Art. 74 (5) of the ICC Statute refers to the fact that "[t]he reading of the judgment or a summary thereof shall take place in public session".

4.2.1. International Criminal Tribunals for the former Yugoslavia and Rwanda

Rules 98 Ter (a) and 88 (a) of the ICTY and ICTR RPE provide respectively that the judgment must be pronounced in a public hearing, at which the parties and their representatives are entitled to be present and for which they shall be notified in advance. Similar provisions can be found in rules 117 (d) and 118 (d) of the ICTY and ICTR

RPE, in relation to appeal decisions. However, no ICTY or ICTR case law has been identified where this requirement is expressly discussed.

4.2.2. Human Rights Committee

The HRC analyzes in its General Comment No. 32 the link between the obligation of judicial bodies to read their judgments and decisions in open court and the interest of the parties to the proceedings that must be protected in order to guarantee their right to a public hearing. However, no specific pronouncements of the HRC have been identified in contentious cases on the specific content of this requirement.

4.2.3. The European Court of Human Rights and the Inter-American Court of Human Rights

The ECtHR has addressed this fourth requirement in several cases, including Pretto et. al. v. Italy (1983)[54], Axen v. Germany (1983)[55] and Ryakib Biryukov v. Russia (2008)[56]. The latter case is particularly relevant to this chapter. According to the facts of the case, the applicant initiated a suit for damages against the first aid hospital where he was treated, because the medical staff of the hospital failed to provide him with proper medical care, and this negligence caused him to lose an arm. The first instance judgment denied his claims but was appealed by the applicant on the grounds that it had not been "publicly pronounced" at a hearing, as required by Art. 6 (1) of the ECHR[57]. Russia rejected these allegations, stating that the factual and legal grounds of the judgment had been read at a hearing in the presence of the applicant, and that a copy of the judgment was delivered to him some time later.

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54 ECHR, Pretto et. al. v. Italy, Judgment, December 8, 1983, Case No.: 1865.

55 ECHR, Axen v. Germany, Judgment, December 8, 1983, Case No.: 1868.

56 ECHR, Ryakib Biryukov v. Russia, Judgment, January 17, 2002, Case No.: 8843.

57 Ibid., par. 7.

Based on the above, the ECtHR decided in favor of the applicant because, although States Parties to the ECHR enjoy a wide discretion in designing their judicial systems to comply with the standards of the ECHR and, in particular, Art. 6, it is essential that they provide for a minimum threshold of publicity when issuing judgments[58]; the latter being an essential component of the right to a fair trial under Art. 6 (1) of the ECHR.

Likewise, for the ECtHR, the decision in this case constituted sufficient compensation for the applicant for the non-pecuniary damages suffered[59], because the declaration of the violation by the ECtHR is an appropriate remedy when States Parties violate the duty to pronounce the judgment publicly.

Finally, unlike the ECtHR, no relevant jurisprudence of the IACHR has been identified as to the specific content of the requirement to read the judgment, or a summary thereof, in a public hearing.

5. Conclusion

Although authors such as Terrier consider that Art. 74 (5) of the ICC Statute binds the TC's to issue a written judgment containing a full and reasoned statement of the evidence, the facts proved and the conclusions reached (in addition to responding clearly to the charges presented by the Prosecution and the requests of the defense), the TCI is not obliged to issue a written judgment, which must contain a full and reasoned statement of the evidence, the facts proved and the conclusions reached)[60], and although Klamberg points out that the English version of Art. 74 (5) of the ICC Statute uses the term "decision" instead of "judgment" (which could include dismissal decisions), the fact is that, of the four requirements of Art. 74 (5) of the RS, the last two relating to the issuance of a judgment that includes the majority and minority opinions, and its full reading (or a sum-

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58 Ibid., par. 30.

59 Ibid., par. 51.

60 Terrier, F., 2002, supra no. 1, p. 31.2

mary thereof in open court), do not have a public hearing. 74(5) of the ICC Statute, the last two relating to the issuance of a judgment including the opinions of the majority and the minority, and its reading in full (or a summary thereof) in open court, have no jurisprudential development in the international criminal tribunals analyzed (including the ICC), and only the ECtHR addresses in depth the issue of the public reading of the judgment.

Moreover, with respect to the requirement to provide a full and reasoned account of the evaluation of the evidence and the conclusions reached in the judgment, the TC's of the ICC in the Bemba case has affirmed its mandatory nature, and how its non-compliance constitutes a procedural error. However, unlike the ICTY, the ICTR, the ECtHR and the IACtHR, which extend this requirement to all decisions relating to the central issues of the cases, including decisions to dismiss, the ICC case law has not yet pronounced itself on this issue.

Finally, with regard to the first requirement concerning the written nature of the judgment, ICC jurisprudence has not yet pronounced itself on this issue either, although both the ICTY and the ICTR have affirmed its mandatory nature and its extension to decisions relating to the central issues of the case, including decisions to dismiss the case. This approach varies, however, in the case law of the ECtHR and the IACHR because, while the former only requires writing when the national procedural rules so require, the latter affirms the need for all judgments and all judicial and administrative decisions to be issued in writing, in order to allow the effective exercise of the right to a remedy by those to whom they are addressed.

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17. Reparations to victims in the Bemba case through the Trust Fund for Victims of the International Criminal Court

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1. Introduction

This work addresses the question of whether victims participating in the Bemba case may get redress through the Trust Fund for Victims of the International Criminal Court in the case of an acquittal. To answer this question, the present work is divided in into four main sections: first, the two-fold mandate of the TFV is analysed; second, within the general assistance mandate, the different projects that have been implemented by the TFV since 2008 through its assistance programs are explained; third, the question concerning the possibility of using the assistance mandate of the TFV to adopt this type of project in favour of victims in the Bemba case will be answered; and,

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[*] International Law Clinic (2018-2019).
[*] International Law Clinic (2018-2019).

finally, the scope and extent of interaction between the legal representatives of the victims and the TFV will be analysed.

2. The double mandate of the Trust Fund for Victims

The TFV is an autonomous organ of the ICC, which was created in 2004 by the Assembly of States Parties, in accordance with Article 79 of the ICC Statute. The TFV seeks to benefit victims and their families of crimes that fall within the jurisdiction of the Court. The TFV's activity is framed by a double mandate: first, to comply with the orders of reparation issued by the ICC chambers (including individual and collective reparations); and second, the provision of general assistance to victims of ICC crimes committed in the territory of States under investigation, using contributions made by voluntary donors, in order to achieve their physical and psychological rehabilitation and to provide them with material help[1].

It is important to emphasize that the TFV is not limited to implementing the decisions issued by the ICC in order to offer reparations to victims because, according to its second mandate of general assistance, the TFV can use its resources to offer such aid to those who are given the status of victim following a preliminary examination.

In fact, the second mandate was designed precisely to ensure that those who suffered damage caused by ICC crimes receive some sort of aid, even if the person responsible is not convicted, charged, or even identified. Although the goal of the TFV is to provide aid to the victims and their families, as has been pointed out by Dannenbaum, this assistance is not dependent upon a guilty verdict[2].

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1 Coalition for the International Criminal Court (n.d.), Delivering on the promise of a fair, effective and independent Court: Trust Fund for Victims, http://iccnow.org/?mod=trustfund [last visit: November 18, 2019].

2 Dannenbaum, T., 2010, 'The International Criminal Court, article 79, and transitional justice: the case for an independent Trust Fund for Victims', Wisconsin Journal of International Law, Vol. 28, No. 2, pp. 234-298, p. 236.

Moreover, the assistance mandate does not have the same scope and extent as the reparation mandate. The essential purpose of the reparation mandate is to provide redress to individuals and legal persons: (i) affected by ICC crimes for which accused persons have been convicted beyond reasonable doubt; and (ii) recognized as victims, pursuant to Rule 85 of the ICC RPE, in subsequent reparation proceedings that are carried out under Article 75 of the ICC Statute and Rules 94 to 99 of the ICC RPE. This means, therefore, that those victims can be individually (and/or collectively) offered reparation because the specific damage caused to them has been considered proven by an ICC judicial decision.

On the contrary, individual reparations cannot be granted through the assistance mandate, because its implementation is only based on TFV's preliminary studies to determine which communities and groups of people can be attributed victim status under Rule 85 of the ICC RPE. As a result, individual monetary compensation has no place in the TFV's assistance mandate. Therefore, the TFV can only adopt measures of physical and psychological rehabilitation and material support to those communities or groups of people under its assistance mandate.

3. Implementation of assistance programs through the Trust Fund for Victim

Since its creation, the TFV has carried out assistance programs for victims of ICC crimes and their families in different countries that are under investigation by the ICC Office of the Prosecutor. More specifically, these programs have been executed in Uganda and the Democratic Republic of the Congo, and with Ivory Coast anticipated as being a future recipient[3].

The first assistance program took place in Uganda in 2008, and different projects have been implemented since then across 18 dis-

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[3] ICC, Trust Fund for Victims (n.d.), Assistance programmes, https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes [last visit: November 18, 2019].

tricts in the northern part of the country[4]. In 2017, the first of these projects was completed, which focused specifically on physical and psychological rehabilitation, as well as providing relief and reparation to the victims of the armed conflict.

The TFV has worked jointly with the Ugandan Ministry of Health, local authorities in each of the affected districts, other public entities, private organizations, social leaders and other professionals to provide the necessary services, all with the critical purpose of aiming to remedy the damages related to the conflict[5].

In terms of physical rehabilitation, the programs have facilitated access to reconstructive surgery (to treat cases of mutilation, sexual assault and severe burns), as well as surgical orthopaedic therapy, prostheses (for amputees), physiotherapy, treatment for sexually transmitted diseases, removal of bullets or other foreign objects from the body[6], as well as early detection of diseases and general medical attention[7].

Moreover, resources have been used to hire entities and professionals to provide psychological treatment for victims, suffering mainly from post-traumatic stress and other long-term psychological conditions related to the war[8]. In addition to this, psychological support has been provided to victims of sexual and gender-based violence, since this was one of the main forms of violence during the conflict[9]. Not only is individual support provided, but different support groups

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4 ICC, Trust Fund for Victims, 2017, *Newsletter#3 - May 2017*, https://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Newsletter%20May%202017%20ENG.pdf [last visit: November 18, 2019].

5 Centre for Children in Vulnerable Situations, 2015, Trust Fund for Victims launches new assistance projects in Northern Uganda, July 11, 2015, available at: http://www.centreforchildren.be/support-centres/trust-fund-for-victims-launches-new-assistance-projects-in-northern-uganda/?lid=355 [last visit: November 18, 2019].

6 Idem.

7 See also: ICC, Trust Fund for Victims, n.d., supra n. 3.

8 Idem.

9 Centre for Children in Vulnerable Situations, 2015, supra n. 5.

are made available, which facilitate interaction between victims depending on their specific needs[10].

In addition to the foregoing, awareness-raising mass media campaigns were launched within affected communities, with the aim of reducing the stigma and discrimination surrounding victims of the conflict (particularly those of a sexual nature)[11].

The second country in which the TFV has intervened is the DRC. Since 2008, its assistance program has been helping victims mostly in the Ituri district and the South Kivu and North Kivu provinces[12]. As with Uganda, the TFV projects in the DRC have focused on addressing the damage caused to the victims, promoting their physical and psychological rehabilitation and material support[13], paying special attention to victims of sexual crimes, cases of forced recruitment of minors and the treatment of psychological trauma of the relatives of individuals killed during the conflict[14].

Health services aimed at providing physical rehabilitation have been provided in coordination with the entities specialized in the different needs of the victims[15]. Here, the TFV's function is to refer patients to these entities, which have an agreement with the TFV to carry out such activities. The resources have been used mainly to assist patients who need general and reconstructive surgery, diagnosis and treatment of sexually transmitted diseases, extraction of foreign objects from their bodies, treatment of fistulas, and in general, guaranteed access to basic healthcare (a service that has been difficult to acquire by the affected populations)[16].

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10 ICC, Trust Fund for Victims, n.d., supra n. 3.

11 Idem.

12 ICC, Trust Fund for Victims, 2017, supra n. 4.

13 ICC, Trust Fund for Victims, n.d., supra n. 3.

14 McCleary-Sills, J. & Mukasa, S., 2013, External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo, November, 2013, International Center for Research on Women, https://www.icrw.org/wp-content/uploads/2016/10/ICRW-TFV–Evaluation-Report.pdf [last visit: November 18, 2019].

15 Idem.

16 ICC, Trust Fund for Victims, n.d., supra n. 3.

Regarding rehabilitation and psychological treatment, as in Uganda, psychological counselling programs have been implemented both individually and through support groups. In addition, various spaces have been set up, offering activities such as music, dance, and theatre, as well as workshops and community awareness programmes to promote reintegration and social acceptance. Finally, different information channels (radio programs and public information sessions) have been used to allow victims to become aware of their rights[17].

In addition, other material support projects for victims were implemented to provide complementary assistance to affected populations in the DRC. Among them, educational subsidies, vocational training, and workshops regarding labour and financial education were provided in order to promote a culture of a more productive work and financial ethic[18].

By the end of 2017 it was estimated that 400,000 victims had been assisted in Uganda and the DRC combined, so a decision was taken to renew the assistance programs in both countries[19]. Although the number of people affected in the two conflicts exceeds 22 million[20], it is important to note that the programs aim to expand their implementation and coverage. However, this is a challenge due to the limited nature of financial resources that come from voluntary donors in the international community.

Finally, it is also important to mention that in mid-2017 it was decided to begin an assistance program in Ivory Coast[21]. That same year, a preliminary study was carried out to identify victims and recognize their needs. Following this, the TFV approved an action program to

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17 Idem.

18 Idem.

19 ICC, Trust Fund for Victims, 2017, Report of the Board of Directors of the Trust Fund for Victims, December 4, 2017, https://www.trustfundforvictims.org/sites/default/files/reports/ASP-16-BDTFV.pdf [last visit: November 18, 2019].

20 ICC, Trust Fund for Victims, n.d., supra n. 3.

21 Idem.

begin in 2018. Nevertheless, to date, this has not been implemented[22].

4. Implementation of assistance programs for the victims in the Bemba case through the Trust Fund for Victims

The Bemba case involves a citizen of the DRC, Jean-Pierre Bemba who, at the time that the alleged crimes were committed, was the president of the *Mouvement pour la Libération du Congo* (MLC). This is a political party which he founded. He served as the commander in charge of the group's armed wing, the *Armée de Liberation du Congo* (ALC)[23].

On May 24th, 2008, ICC Pre-Trial Chamber III issued the arrest warrant for Bemba[24]. On June 15, 2009, ICC Pre-Trial Chamber III considered that Bemba should be prosecuted for his alleged criminal responsibility as a military commander – as stated under Article 28 (a) of the ICC Statute – for the war crimes of murder, rape, and pillage, as well as the crimes against humanity of murder and rape. These crimes were committed by MLC/ALC soldiers in the Central African Republic from October 26th, 2002 to March 15th, 2003[25].

After the charges were confirmed, the trial began on November 22nd, 2010, before ICC Trial Chamber III. During this trial, ICC Trial Chamber III recognized 5229 victims, which allowed them to partici-

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22 Idem.

23 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, March 21, 2016, ICC Doc. No.: ICC-01/05-01/08-1343, par. 10.

24 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Pre-Trial Chamber III, Warrant of Arrest for Jean Pierre Bemba Gombo, May 24, 2008, ICC Doc. No.: ICC-01/05-01/08-1-tENG.

25 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Pre-Trial Chamber III, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, June 15, 2009, ICC Doc. No.: ICC-01/05-01/08-424.

pate in the proceedings[26]. On March 21st, 2016, ICC Trial Chamber III found that Bemba, as a military commander, was guilty of the crimes stated above, and one month later he was sentenced to 18 years in prison[27].

The verdict and the sentence were appealed against, and on June 8th, 2018, the ICC Appeals Chamber found that ICC Trial Chamber III had committed the following errors in its judgment: (i) convicting Bemba for criminal acts that were not among the acts of violence expressly included in the decision of the confirmation of charges issued by ICC Pre-Trial Chamber III; and (ii) conducting an inadequate evaluation of all reasonable and necessary measures taken by Bemba to prevent, suppress, and punish his subordinates who committed the acts of violence charged and proven in the oral proceedings[28]. For these reasons, the ICC Appeals Chamber decided to revoke his conviction and acquitted Bemba of all charges[29].

After Bemba's acquittal, the question has been raised about how to proceed with the thousands of victims who have participated at trial, because, as seen above, there is no room for judicial reparation without a prior conviction.

According to the ICC Office of the Prosecutor and the OPCV, the TFV can and should act upon this situation through its assistance mandate[30]. Although there are some financial limitations, as in the

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26 ICC, Public Information and Communication Section, 2019, Case Information Sheet: the Prosecutor v. Jean Pierre Bemba Gombo, ICC Doc. No.: ICC-01/05-01/08, https://www.icc-cpi.int/CaseInformationSheets/BembaEng.pdf [last visit: November 18, 2019].

27 ICC, Bemba Trial Judgment, supra n. 23.

28 ICC, Press Release, 2018, *ICC* Appeals Chamber acquits Mr. Bemba from charges of war crimes and crimes against humanity, June 8, 2018, https://www.icc-cpi.int/Pages/item.aspx?name=pr1390 [last visit: November 20, 2019].

29 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", June 8, 2018, ICC Doc. No.: ICC-01/05-01/08-3636-Red.

30 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Office for Public Counsel for Victims, Legal Representatives of Victims' joint submissions on the

cases of Uganda and the DRC, the TFV can and should use this mandate in the CAR to provide medical and psychological rehabilitation and material support for victims[31]. This is regardless of whether or not beneficiaries have been recognized as victims in the Bemba case, as long as the TFV recognizes them as victims of ICC crimes committed in the CAR situation[32].

As studies have repeatedly expressed that the TFV is an autonomous and independent body, the common understanding of traditional reparation processes has shifted by creating the possibility for collective redress of victims in cases without a conviction[33]. In this way, the TFV ensures the implementation of assistance projects to victims of crimes, which do not necessarily result in a criminal charge or a conviction, as in the Bemba case[34].

The TFV, in June 2018, stated that, apart from the decision taken by the ICC Appeals Chamber to absolve Bemba of the crimes committed in the CAR, the damage suffered by the victims who participated in this case shall be considered and therefore it will proceed to develop projects aimed at assisting and rehabilitating the victims, as far as possible[35].

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consequences of the Appeals Chamber's Judgment dated 8 June 2018 on the reparations proceedings, June 12, 2018, ICC Doc. No.: ICC-01/05-01/08-3649.

31 ICC, Office of the Prosecutor, 2018, Statement of the ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr. Jean-Pierre Bemba Gombo, June 13, 2018, https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat [last visit: November 18, 2019].

32 ICC, Office for Public Counsel for Victims Joint Submissions, supra n. 30.

33 Dannenbaum, T., 2010, supra n. 2, pp. 234 et. seq.

34 Idem.

35 ICC, Trust Fund for Victims, 2018, Press release: following Mr. Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic, June 13, 2018, https://www.icc-cpi.int/Pages/item.aspx?name=180613-TFVPR [last visit: November 18, 2019].

5. The role of the legal representatives of the victims in relation to the Trust Fund for Victims

Finally, it is necessary to determine the role of the legal representatives of the victims in relation to the TFV, so that victims (particularly those involved in the Bemba case) can access the benefits offered by the TFV. In this issue, legal studies emphasize that the TFV should be in contact with the legal representatives and ascertain the victims' needs, in order to determine what should be the appropriate reparation mechanisms for each situation[36].

This requirement of participation of the legal representatives of the victims is also based upon the ICC notion that the legal representation of the victims is understood as a particularly important right of the victims. This has been the case since the negotiations for the creation of the Statute of the ICC[37].

Likewise, in the Court's revised strategy in relation to victims enacted in 2012 by the Assembly of States Parties, it was stated that the right to be repaired was closely linked to the right to receive legal representation. The legal representation of the victims allows the TFV to know what the general and specific needs of the victims are, which allows it, therefore, to determine what the correct measures to help and rehabilitate them should be. Its participation is not imperative; however, it has a great impact in the implementation of assistance projects[38].

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36 De Brouwer, A.M., 2007, 'Reparation to victims of sexual violence: possibilities at the International Criminal Court and at the Trust Fund for Victims and their families', Leiden Journal of International Law, Vol. 20, No. 1, pp. 207-227.

37 United Nations, Public Information Department, 1998, *Estatuto de Roma de la Corte Penal Internacional: preguntas y respuestas*, October, 1998, https://www.un.org/spanish/law/cpi.htm [last visit: November 18, 2019].

38 ICC, Assembly of States Parties, 2012, Court's revised Strategy in relation to Victims, November 5, 2012, 11th session, ICC Doc. No.: ICC-ASP/11/38, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf [last visit: November 18, 2019].

Specifically, in relation to the Bemba case, the TFV expressly stated that it would communicate with the legal representation of the victims to study the interests and needs of the victims to know how to proceed to assist them[39].

It should be noted that, following the acquittal of Bemba, and as affirmed by the International Federation of Human Rights, the legal representatives of the victims have the duty to intercede in support of their rights so that they are recognized as victims by the TFV and can be included in the assistance projects that are implemented. Additionally, it is necessary that victims' representatives pressure the TFV to effectively implement said projects, in such a way that the specific damages suffered by the victims can be dealt with[40].

Lastly, regarding the way in which the legal representatives of the victims can interact with the TFV, and in the absence of a specific regulation in this regard, it is considered that this should be articulated through the presentation of papers with information about the relevant issues to determine which assistance measures should be adopted, with emphasis upon the general facts, the level of damage suffered by the victims, their main needs and the most effective coping mechanisms.

6. Conclusion

Considering the above, the following conclusions can be reached:

1. As a result of its dual mandate on reparations, the TFV has a role of assistance to and accompaniment of the victims which does not depend upon the issuance by the ICC chambers of a conviction. The TFV is, therefore, an autonomous and inde-

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39 ICC, Trust Fund for Victims, 2018, supra n. 35.

40 International Federation for Human Rights, 2018, The Bemba Case: heavily criticized, the ICC must maintain victims' legal representation as the establishment of assistance programmes for victims is awaited, October 1, 2018, available at: https://www.fidh.org/en/region/Africa/central-african-republic/the-bemba-case-heavily-criticised-the-icc-must-maintain-victims-legal [last visit: November 18, 2019].

pendent entity, which greatly modifies the common way of understanding traditional reparation processes because it opens the possibility for collective redress of the victims of those crimes foreseen in the ICC Statute, notwithstanding that they are not subject to a declaration of responsibility in a conviction. In this way, it warrants the implementation of assistance projects to victims of crimes not charged, or for which the accused are finally acquitted as in the Bemba case, thus attributing to these projects a priority status in the ICC Statute.

2. The assistance mandate of the TFV does not operate by virtue of a judgment convicting the accused person. It is based upon a preliminary study by the TFV itself to determine to which communities and groups of persons to whom victim status may be recognized according to Rule 85 of the ICC RPE. As a result, individual compensation of a monetary nature has no place in the TFV's assistance mandate. Consequently, the latter can only take the form of measures of physical and psychological rehabilitation and material support to these communities or groups of people.

3. Considering the above, following the acquittal of Bemba, the victims who participated in the trial cannot access individual monetary compensation. However, in carrying out its assistance mandate, the TFV may implement in the CAR an assistance program that includes physical and psychological rehabilitation projects and material support for them. It has the power to decide autonomously if a part of the donations received should be used for these purposes.

4. It is necessary that, in order that suitable assistance projects be adopted, the legal representatives of the victims be consulted so that they shall clearly inform the TFV about the interests of the victims and the most efficient rehabilitation mechanisms for them.

5. In the absence of a specific regulation in this regard, the way in which legal representatives can interact with the TFV must be articulated through the presentation to the TFV of written submissions containing information on the issues relevant to the

TFV for the purpose of determining what assistance projects should be adopted. Particular attention should be paid to the characterization of the victimizing facts, the nature and level of damage suffered by the victims, their main needs and the most effective mechanisms to deal with them.

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tims.org/sites/default/files/reports/ASP-16-BDTFV.pdf [last visit: November 18, 2019].

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18. Are the nature and extent of victimization, the acts of violence that constitute the contextual elements of crimes against humanity and the special gravity of some international crimes' relevant factors in the determination of sentences by the International Criminal Court?

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1. Introduction

Article 78 of the ICC Statute and Rule 145 of the ICC RPE provide for the factors that the ICC must consider for the determination of sentences. As provided for in Article 78 (1) of the ICC Statute,

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'[i]n determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.' Furthermore, according to Article 78 (2) and (3), when imposing a sentence of imprisonment the ICC will: (i) deduct the time previously spent in detention by the convicted person in accordance with an ICC's order (it may also deduct any time otherwise spent in detention in connection with conduct underlying the crime); and (ii) pronounce a sentence for each crime and a joint sentence, specifying the total period of imprisonment, which will be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment (unless the extreme seriousness of the crime and the personal circumstances of the convicted person justify the imposition of life imprisonment).

Rule 145 of the ICC RPE complements Article 78 of the ICC Statute by stating in its paragraphs (1) (a) and (1) (b) that, in the determination of sentences, which must reflect the culpability of the convicted person, all relevant factors must be balanced, including: (i) the 'circumstances of the crime' (which could be interpreted as the gravity of the crime); (ii) the 'circumstances of the convicted person' (which could be interpreted as the individual circumstances of the convicted person); and (iii) mitigating factors (such as, circumstances falling short of constituting grounds for exclusion of criminal responsibility and the conduct of the convicted person after the crime) and aggravating factors (such as, previous convictions, abuse of power, abuse of official capacity, defencelessness of the victim, multiplicity of victims, cruelty, discriminatory motive and other circumstances of similar nature) provided for in paragraphs 2(a) and 2(b) of Rule 145. As some of the last factors (for instance, the multiplicity of victims) could also be considered when analysing the gravity of the crime, the problem arises as to how to interpret the interrelation between article 78 of the ICC Statute and Rule 145.

The extent of the problem increases when Rule 145 (1) (c) of the ICC RPE establishes that, in addition to the factors mentioned in Article 78 (1) of the ICC Statute (the gravity of the crime and the personal circumstances of the convicted person), the ICC, in the determination of sentences, will also consider other factors such

as: (i) the extent of the damage caused, in particular the harm caused to the victims and their families; (ii) the nature of the unlawful behaviour and the means employed to execute the crime; (iii) the degree of participation of the convicted person; (iv) the degree of intent; (v) the circumstances of manner, time and location; and (vi) the age, education, social and economic condition of the convicted person. Nevertheless, most of these additional factors tend to overlap with those circumstances that determine the gravity of the crime and the personal circumstances of the convicted person, thus generating considerable confusion as to the interrelation between Article 78 and Rule 145. The jurisprudence of the ICC in the Lubanga, Katanga, Al-Mahdi and Bemba case has so far been unable to shed some light on this issue.

In complex context, the present work is aimed at analysing whether the following circumstances constitute relevant factors in the determination of sentences: (i) the nature and extent of victimization; (ii) the acts of violence constituting the contextual elements of CAH; and (iii) the special gravity of some international crimes.

2. Whether the nature and extent of victimization are a relevant factor in the determination of sentences by the International Criminal Court

As D'Ascoli points out, the expression 'victimization' must be analysed both from a qualitative perspective (nature of the damage, level of suffering and physical and mental trauma caused to the victims) as well as from a quantitative perspective (number of victims)[1]. Consequently, leaving for later the analysis on whether the special gravity of some international crimes is a relevant factor in the determination of sentences, this section analyses the jurisprudence of the ICC and other international and hybrid criminal tribunals (the ICTY,

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1 D'Ascoli, S., 2011, Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC, Oxford, Hart Publishing Ltd., p. 133.

the ICTR, the SCSL and the ECCC) on the qualitative and quantitative circumstances included in the notion of victimization.

2.1. The jurisprudence of the International Criminal Court

In the Lubanga[2], Katanga[3], Al Mahdi[4] and Bemba cases[5], the jurisprudence of the ICC considers the nature and extent of the victimization as part of the gravity of the crimes. Therefore, they constitute a relevant factor in the determination of sentences.

In the sentencing decision of the Lubanga case, ICC Trial Chamber I analyses the victimization based on the nature of the damage and the number of victims upon whom it was inflicted. The Chamber considers that the damage has to be assessed in the light of the following elements: (i) the risks that minors under the age of 15 had to run when they were voluntarily enlisted, forcibly recruited and/or actively used in the conduct of hostilities by members of the *Union des Patriotes Congolais* (UPC) and the *Forces Patriotiques pour la Libération du Congo* (FPLC); (ii) the physical and psychological *sequelae* they suffered as a consequence of the victimizing acts; and (iii) the number of victims under the age of fifteen to whom such harm was caused[6].

Subsequently, in the sentencing decision in the Katanga case[7], ICC Trial Chamber II analyzes the nature and extent of the damage caused to the victims as a consequence of the attack to the village of

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2 ICC, the Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, July 12, 2012, ICC Doc. No.: ICC-01/04-01/06-290, par. 44.

3 ICC, the Prosecutor v. Germain Katanga, Trial Chamber II, Decision on Sentence pursuant to Article 76 of the Statute, May 23, 2014, ICC Doc. No.: ICC-01/04-01/07-3484-tENG, par. 71.

4 ICC, the Prosecutor v. Almah Al Faqi Al Mahdi, Trial Chamber VIII, Judgment and Sentence, September 27, 2016, ICC Doc. No.: ICC-01/12-01/15-171, par. 76.

5 ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, June 21, 2016, ICC Doc. No.: ICC-01/05-01/08-3399, par. 15.

6 ICC, Lubanga Sentencing Decision, supra n. 2, parrs. 39, 40, 41, 49.

7 ICC, Katanga Sentencing Decision, supra n. 3, par. 47.

Bogoro, on 24 February 2003, by the troops of the *Front des Nationalistes et Intégrationnistes* (FNI) and the *Force de Résistance Patriotique d'Ituri* (FRPI)[8]. The Chamber takes into special consideration the fact that *sequelae* of Bogoro attack spread over time as the poverty rate increased, as did the number of orphans in the area and the number of displaced persons[9]. Moreover, from a quantitative perspective, ICC Trial Chamber II finds that the number of victims is a factor that should be taken into consideration when establishing the gravity of the crimes for which a conviction has been entered[10].

In the Al Mahdi case, ICC Trial Chamber VIII, in determining the sentence, assesses the damage as a central part of the analysis of the gravity of the crimes. In particular, the Chamber assess the damage on the basis of the loss of cultural and economic heritage resulting from the destruction of sacred sites which had been declared as cultural heritage by UNESCO. For the Chamber, these sites did not only fulfill a religious function but had a symbolic and an emotional value to the people of Timbuktu (Mali) and international society[11].

Finally, in the sentencing decision of the Bemba case, ICC Trial Chamber III analyzes the physical and psychological consequences of the harmful acts perpetrated against the victims and their families as a factor in determining the nature and extent of the harm (as part of the analysis of the gravity of the crimes). In this case, the nature and extent of the victimization is analyzed separately for each of the crimes for which a conviction was entered: murder[12], sexual violence[13] and pillage[14]. Moreover, when looking into the gravity of sexual violence, the Chamber states that the high number of victims must be taken into consideration (although it does not specify exactly how many victims there were)[15].

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8 Ibid., parrs. 56, 57.
9 Ibid., parrs. 52, 55, 56, 59.
10 Ibid., parrs. 47 et. seq.
11 ICC, Al Mahdi Judgment and Sentence, supra n. 4, parrs. 80, 108.
12 ICC, Bemba Sentencing Decision, supra n. 5, paras. 30-32.
13 Ibid., parrs. 36, 37.
14 Ibid., parrs. 50, 51.
15 Ibid., par. 40.

2.2. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia

Like Article 78 of the ICC Statute, Article 24 (2) of the ICTY Statute provides that, when determining sentences, the ICTY must consider factors such as the gravity of the crime and the personal circumstances of the convicted person[16]. Moreover, according to Article 24(1) of the ICTY Statute, the ICTY must also consider the general practice of the tribunals of the former Yugoslavia regarding prison sentences.

In complementing Article 24, Rule 101 of the ICTY RPE stipulates that, in addition to the factors referred to in Article 24(2) of the Statute (the gravity of the crime and the personal circumstances of the convicted person), the ICTY must take into account the following factors when determining sentences: (i) aggravating and mitigating factors (including substantial cooperation with the Office of the Prosecutor before and/or after conviction); (ii) the time spent in provisional detention by the convicted person while he was being transferred to the ICTY and the trial took place; and (iii) the extent to which the convicted person has served any sentence imposed by a national court for the same acts for which he has been convicted by the ICTY[17].

In applying the above-mentioned provisions, ICTY jurisprudence has developed the so-called *litmus test*, which analyses the gravity of the crime through the circumstances of the case, the number of victims, the suffering caused to them and the form of participation of the convicted person[18]. This also includes the long-term extension of physical, psychological and emotional harm, as shown by the Kupres-

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16 Article 24 of the ICTY Statute.

17 Idem.

18 ICTY, the Prosecutor v. Miroslav Kvocka, Dragoljub Prcac, Milojica Kos, Mlado Radic & Zoran Zigic, Trial Chamber I, *Judgment*, November 2, 2001, Case No.: IT-98-30/1-T, para. 701; ICTY, the Prosecutor v. Dario Kordic & Mario Cerkez, Trial Chamber III, Judgment, February 26, 2001, Case No.: IT-95-14/2-T, par. 852.

kic et. al.[19], Kvocka et. al.[20], Stanisic & Zupljanin[21] and Krnojelac[22] et. al. cases. As a result, the ICTY follows, in principle, the same jurisprudential line as the ICC.

Nevertheless, it can also be noted that in some cases before the ICTY (in particular, in the Blaskic[23] and Brdjanin[24] cases), the suffering and trauma of the victims have been considered as aggravating factors rather than circumstances determining the gravity of the crime. Moreover, in other cases, such as the Dragan Nikolic[25], Blaskic[26], Bralo[27] and Blagojevic & Jokic[28] cases, the number of victims has also been considered as an aggravating factor.

2.3. The jurisprudence of the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia

Article 23(2) of the ICTR Statute and Rule 101 of the RPE establish a system of determination of sentences similar to that provided for the ICTY. Nevertheless, unlike ICTY jurisprudence, ICTR jurisprudence has not been consistent in treating the nature and extent

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19 ICTY, the Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic & Vladimir Santic, Appeals Chamber, Appeals Judgment, October 23, 2001, Case No.: IT-95-16-A, para. 442.

20 ICTY, Kvocka et. al. Trial Judgment, supra n. 18, par. 701.

21 ICTY, the Prosecutor v. Mico Stanisic & Stojan Zupljanin, Trial Chamber II, Judgment, March 27, 2013, Case No.: IT-08-91-T, Vol. 2, par. 892.

22 ICTY, the Prosecutor v. Milorad Krnojelac, Trial Chamber II, Judgment, March 15, 2002, Case No.: IT-97-25-T, par. 512.

23 ICTY, the Prosecutor v. Tihomir Blaskic, Trial Chamber I, Judgment, March 3, 2000, Case No.: IT-95-14-T, para. 787.

24 ICTY, the Prosecutor v. Radoslav Brdjanin, Trial Chamber II, Judgment, September 1, 2004, Case No.: IT-99-36-T, par. 1105.

25 ICTY, the Prosecutor v. Dragan Nikolic, Trial Chamber II, Sentencing Judgment, December 18, 2003, Case No.: IT-94-2-S, par. 213.

26 ICTY, Blaskic Trial Judgment, supra n. 23, p. 784.

27 ICTY, the Prosecutor v. Miroslav Bralo, Trial Chamber III, Sentencing Judgment, December 7, 2005, Case No.: IT-95-17, parr. 30.

28 ICTY, the Prosecutor v. Vidoje Blagojevic & Drajan Jokic, Trial Chamber I, Judgment, January 15, 2005, Case No.: IT-02-60-T, par. 841.

of the victimization as a relevant factor in the determination of sentences. In some cases, such as the Bagosora et. al[29]. and Bizimingu et. al[30]. cases, the nature and extent of the victimization are considered as part of the gravity of the crimes, whereas in other cases, such as in the Kambanda[31] and Gatete[32] cases, they are treated as aggravating factors[33].

The Special Court for Sierra Leone considers victimization (and in particular the number of victims, the harm caused to the victim's physical, emotional and psychological health and the repercussions caused to the victim's relatives and society) as a relevant factor in the determination of sentences[34]. In the Taylor case, SCSL Trial Chamber II takes into consideration for the purpose of determining the sentence the suffering caused to the victims by (i) the large number of lost lives; (ii) the brutality with which the crimes were committed; (iii) the substantial change in the lives of the survivors who cannot return to a productive life; (iv) the stigma attached to the raped girls; and (v) the rejection of the recruited children by their own families and communities[35].The Chamber also recognizes that the crimes for which Charles Taylor was convicted are most serious for targeting

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29 ICTR, the Prosecutor v. Theoneste Bagosora, Trial Chamber I, Judgment and Sentence, December 18, 2008, Case No.: ICTR-98-41-T, par. 2266.

30 ICTR, the Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka & Prosper Mugiraneza, Trial Chamber II, Judgment and Sentence, September 30, 2011, Case No.: ICTR-99-50-T, para. 1991.

31 ICTR, the Prosecutor v. Jean Kambanda, Trial Chamber I, Judgment and Sentence, September 4, 1998, Case No.: ICTR 97-23-S, par. 42.

32 ICTR, the Prosecutor v. Jean-Baptiste Gatete, Trial Chamber III, Judgment and Sentence, March 31, 2011, Case No.: ICTR-2000-61-T, par. 678.

33 In both cases, ICTR Trial Chambers I and III, despite addressing the nature and extent of victimization as part of the analysis of the gravity of the crimes condemned, end up treating them as an aggravating factor.

34 SCSL, the Prosecutor v. Charles Taylor, Trial Chamber II, Sentencing Judgment, May 30, 2012, Case No.: SCSL-03-01-T, para. 20; SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu (the AFRC Accused), Trial Chamber, Sentencing Judgment, June 20, 2007, Case No.: SCSL 04-16-T, par. 19.

35 SCSL, Taylor Sentencing Judgment, supra n. 34, par. 70.

vulnerable groups such as girls and women, the elderly and child soldiers[36].

Finally, the jurisprudence of the ECCC also considers that the nature and extent of the victimization constitute a relevant factor in the determination of sentences, insofar as they are part of the analysis of the gravity of the crimes attributed to the convicted person. This is reflected in the trial judgments in the Chea and Samphan case (002/01[37] and 002/02)[38]. Nevertheless, the number of victims has sometimes been treated by the ECCC as an aggravating factor, as shown by the judgment of the Appeals Chamber in the Duch case (001), which confirms the analysis made by the Trial Chamber[39].

3. Whether the acts of violence that constitute the contextual elements of crimes against humanity are a relevant factor in the determination of sentences by the International Criminal Court

To analyze the jurisprudence of international and hybrid criminal tribunals on the question addressed in this section, it is necessary to distinguish two types of CAH cases. On the one hand, there are those cases related to political and military leaders, who are specifically charged with all acts of violence that are part of the systematic or widespread attack against the civilian population (core contextual element of the CAH).

On the other hand, we find a second type of case, normally directed against direct perpetrators or middle commanders, in which the crimes attributed, comprise only a small component of the crimes

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36 Ibid., par. 74-75.

37 ECCC, the Prosecutor v. Nuon Chea & Khieu Samphan, Trial Chamber, Judgment, August 7, 2014, Case No.: 002/19-09-2007/ECCC/TC, par. 1075.

38 ECCC, the Prosecutor v. Nuon Chea & Khieu Samphan, Trial Chamber, Judgment, November 16, 2018, Case No.: 002/19-09-2007/ECCC/TC, par. 4362.

39 ECCC, the Prosecutor v. Kaing Guek Eav, Supreme Court Chamber, Appeal Judgment, February 3, 2012, Case No.: 001/18-07-2007-ECCC/SC, par. 361.

that constitute the systematic or widespread attack against the civilian population. These types of cases, in contrast to the first, discern between crimes specifically attributed to the convicted person and other acts of violence that are only part of the contextual elements of CAH. Therefore, it is in the second type of cases that the question under analysis in the present section can be studied.

ICC jurisprudence has not addressed, so far, the question raised. In the sentencing decisions in the Bemba and Katanga cases (which are, so far, the only ICC sentencing decisions dealing with CAH) is not possible to differentiate for the purpose of the determination of sentences between: (i) the crimes specifically attributed to the convicted person; and (ii) those acts of violence that have been proven beyond reasonable doubt for the only purpose of establishing the contextual elements of CAH.

In relation to international and hybrid criminal tribunals, the ICTR has focused primarily on the crime of genocide. As a result, those ICTR cases that also address CAH do not do so extensively. For this reason, it does not seem that ICTR jurisprudence is the most appropriate to analyze the question under study.

The SCSL has dealt only with cases relating to the first type of CAH cases previously mentioned, as shown by the cases against the former President of Liberia (Charles Taylor) and the most senior living leaders of the three main armed groups involved in the armed conflict in Sierra Leone (the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC) and the Civil Defense Forces (CDF).

Likewise, the two cases completed so far by the ECCC also belong to the first model. In the 001 case, Duch was charged as a responsible superior with all crimes committed in the S-21 detention center because he was the director of it at the relevant time[40]. The same occurred in case 002 against the Nuon Chea (former Head of State of the

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40 ECCC, the Prosecutor v. Kaing Guek Eav, Trial Chamber, Judgment, July 26, 2010, Case No.: 001/18-07-2007/ECCC/TC, par. 549.

Republic of Kampuchea)[41] and Khieu Samphan (former President of the State Council of the Republic of Kampuchea)[42], because all acts of violence that were part of the contextual elements of the CAH were also charged as specific crimes.

Consequently, in light of the above, the most suitable cases to analyze the question under study in this section, insofar as they correspond to the second type of cases mentioned above, belong to the ICTY. Among them, the most noteworthy cases are the Kunarac et. al.[43], Kvocka et. al.[44], Momir Nikolic[45] and Obrenovic[46] cases.

In the Kunarac et. al. case, the Prosecution sought that certain acts of violence, which were part of the same course of conduct or common plan but not specifically indicted against the convicted person, be taken into consideration by ICTY Trial Chamber II in determining the sentence. Nevertheless, the Chamber rejected the Prosecutor's request, as only the acts of violence which have been proven and attributed beyond a reasonable doubt to the convicted person (as well as those directly related to them), may be considered as aggravating factors for the imposition of the sentence[47].

Likewise, in the Kvocka et. al. case, the Prosecution requested ICTY Trial Chamber I to take as a factor in assessing the gravity of the crimes for the purpose of determining the sentence, that they had been committed as part of a broader policy of general and systematic prosecution[48]. Although the repetitive and continuous nature of the crimes was critical in establishing the existence of CAH, the Chamber

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41 ECCC, Chea & Samphan Judgment, supra n. 37, para. 941.

42 Ibid., par. 1052.

43 ICTY, the Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic, Trial Chamber II, Judgment, February 22, 2001, Case No.: IT-96-23-T & IT-96-23/1-T.

44 ICTY, Kvocka et. al. Trial Judgment, supra n. 18.

45 ICTY, the Prosecutor v. Momir Nikolic, Trial Chamber I, Sentencing Judgment, December 2, 2003, Case No.: IT-02-60/1-S.

46 ICTY, the Prosecutor v. Dragan Obrenovic, Trial Chamber I, Sentencing Judgment, December 10, 2003, Case No.: IT-02-60/2-S.

47 ICTY, Kunarac et. al. Trial Judgment, supra n. 43, para. 850.

48 ICTY, Kvocka et. al. Trial Judgment, supra n. 18, para. 696.

rejected the Prosecution's request. The reasons given by the Chamber in reaching its conclusion were as follows: (i) only the conduct attributed to the convicted person beyond a reasonable ground can be considered when determining the sentence; (ii) conduct not attributed to the convicted person cannot be considered as a circumstance that increase the gravity of the crimes or as an aggravating factor, despite having been proven beyond a reasonable doubt when establishing the contextual elements of CAH[49].

Finally, in Momir Nikolic and Obrenovic cases, ICTY Trial Chamber I also followed the same argumentative line. In both cases, which discuss the events that occurred during the Srebrenica massacre (Bosnia and Herzegovina), the Office of the Prosecutor requested the Chamber to consider as a relevant factor for the determination of the sentence the acts of violence related to the general context in which the massacre took place, including the events that occurred before the commission of the massacre in July 1995. Nevertheless, the Chamber ruled out this possibility in both cases.

In the Nikolic case, ICTY Trial Chamber I affirmed that such facts could only be considered in order to provide a general background to the history of the attack on Srebrenica prior to 1995[50]. Subsequently, in the Obrenovic case, the Chamber was even more explicit, emphasizing that it would only consider those crimes directly attributed to the convicted person to assess the gravity of the crime for the purpose of determining the sentence. Consequently, according to the Chamber, in the face of acts of violence that are part of the general context of the attack, it would be necessary to carry out another trial to establish beyond a reasonable doubt who is criminally responsible for them[51].

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49 Ibid., par. 705.

50 ICTY, Nikolic Sentencing Judgment, supra n. 45, par. 106.

51 ICTY, Obrenovic Sentencing Judgment, supra n. 46, parrs. 78, 152.

4. Whether the special gravity of some international crimes is a relevant factor in the determination of sentences by the International Criminal Court

Finally, regarding the question of whether the special gravity of some international crimes is a relevant factor in the determination of sentences, only ICTR jurisprudence affirms that genocide is more serious than crimes against humanity and war crimes[52]. This differentiation between categories of international crimes is exclusive to the ICTR. Neither ICC jurisprudence nor ICTY jurisprudence make such a claim.

Moreover, the ICC, the ICTY and the ICTR have emphasized that the qualitative and quantitative dimensions of the victimization are a relevant factor in the determination of sentences. Nevertheless, they do not agree on whether such circumstances should be considered for the purpose of assessing the gravity of the crimes or as an aggravating factor.

Therefore, the analysis carried out in this last section is limited to whether the type of legally protected interest, which has been harmed by the crimes attributed to the convicted person, is a relevant factor in the determination of sentences by the jurisprudence of ICC, the ICTY and the ICTR.

4.1. The jurisprudence of the International Criminal Court

ICC jurisprudence stresses the importance of the type of legally protected interest harmed by the crimes attributed to the convicted person in the determination of the sentence. In the Katanga case, ICC Trial Chamber II states that crimes for which a conviction has

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52 ICTR, the Prosecutor v. Gaspard Kanyarukiga, Trial Chamber II, Trial Judgment, November 1, 2010, Case No.: ICTR-2002-78-T, par. 674; ICTR, the Prosecutor v. Simon Bikindi, Trial Chamber III, Judgment, December 2, 2008, Case No.: ICTR-01-72-T, par. 448; ICTR, the Prosecutor v. Sylvestre Gacumbitsi, Trial Chamber III, Judgment, June 17, 2004, Case No.: ICTR-2001-64-T, para. 345; ICTR, Kambanda Judgment and Sentence, supra n. 31, par. 42.

been entered are not equivalent in terms of gravity, because crimes against persons are more serious than crimes against objects[53].

Likewise, in the Al Mahdi case, ICC Trial Chamber VIII emphasizes the difference between the gravity of crimes committed against persons and objects. For ICC Trial Chamber VIII, a crime committed against a person is always more serious than a crime committed against an object[54]. Moreover, for the Chamber, the seriousness of the crimes committed against objects is also influenced by the cultural and psychological impact that the destruction of the affected property has on the population[55]. Consequently, crimes committed against the following objects are particularly serious: (i) objects that are destined for religious activities; (ii) objects that have a strong cultural importance for the population; and (iii) objects whose destruction generate a significant psychological damage in the population.

In the Bemba case, ICC Trial Chamber III underscores the greater seriousness of the crimes that threaten the lives of the members of some especially vulnerable groups, such as women and children. For the Chamber, these crimes deserve a more severe sentence. [56] Likewise, the Chamber considers that the war crime of looting is more serious when it is aimed at goods necessary for the survival of the victims, or when it generates a particularly damaging impact on the population[57].

Finally, in the Lubanga case, ICC Trial Chamber I looks into the implications for the gravity of the crimes of the commission of criminal conduct against children under the age of fifteen. For the Chamber, this is a special protection group, which is particularly vulnerable to the physical and psychological consequences generated by the crimes attributed to the convicted person[58].

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53 ICC, Katanga Sentencing Decision, supra n. 3, parrs. 47 et. seq.
54 ICC, Al Mahdi Judgment and Sentence, supra n. 4, par. 77.
55 Ibid., par. 79.
56 ICC, Bemba Sentencing Decision, supra n. 5, par. 29.
57 Ibid., parrs. 49-51.
58 ICC, Lubanga Sentencing Decision, supra n. 2, para. 37.

4.2. The jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda

ICTY jurisprudence distinguishes between crimes committed against: (i) persons and objects; (ii) groups of persons with different circumstances; and (iii) objects with different connotations.

In relation to the first distinction, the ICTY Appeals Chamber states in the Delalic et. al.[59] and Furundzija cases[60] that it is more serious to fail to prevent or sanction murder and torture, than to fail to prevent or sanction crimes committed against property, such as pillage.

Regarding crimes committed against persons, ICTY jurisprudence considers that the sentence should be increased due to the particular vulnerability of certain groups of victims. For instance, in the Kunarac case, ICTY Trial Chamber II emphasizes that the fact that, when the crimes were committed, some of the victims were between 15 and 19 years old, should be considered as an aggravating factor[61].

Finally, concerning crimes against objects, ICTY Trial Chamber II notes in the Strugar case that there is a substantial difference between attacking cultural property relevant for the community (such as the old town of Dubrovnik) and attacking civilian property. For the Chamber, attacks upon specially protected property are more serious[62].

Regarding ICTR jurisprudence, it is noteworthy that it recognizes genocide as the most serious international crime. As a result, according to ICTR jurisprudence, all genocidal acts, including its direct and public incitement, must be sanction with the utmost severity[63].

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59 ICTY, the Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo, Appeals Chamber, Appeals Judgment, February 20, 2001, Case No.: IT-96-21-A, para. 732.

60 ICTY, the Prosecutor v. Anto Furundzija, Appeals Chamber, Judgment, July 21, 2000, Case No.: IT-95-17/1-A, par. 244.

61 ICTY, Kunarac et. al. Trial Judgment, supra n. 43, par. 864.

62 ICTY, the Prosecutor v. Pavle Strugar, Trial Chamber II, Judgment, January 31, 2005, Case No.: IT-01-42-T, par. 232.

63 ICTR, Kanyarukiga Trial Judgment, supra n. 52, para. 674; ICTR, Bikindi Trial Judgment, supra n. 52, par. 448; ICTR, Gacumbitsi Trial Judgment,

Nevertheless, ICTR jurisprudence is not consistent in addressing this circumstance as part of the analysis of the gravity of the crimes or as an aggravating factor. In the Kanyarukiga[64] and Bikindi[65] cases, ICTR Trial Chambers II and III note that genocide is a crime of such gravity that it affects the foundations of society and the conscience of humanity, and therefore its unique seriousness should be considered when assessing the gravity of the crimes attributed to the convicted person. Nevertheless, in the Kambanda[66] and Gacumbitsi[67] cases, ICTR Trial Chambers I and III state that the particular characteristics of genocide must be considered as an aggravating factor.

Finally, in the Gacumbitsi case, ICTR Trial Chamber III also stresses the special gravity of crimes of a sexual nature, specially rape, which should be consider as an aggravating factor[68].

5. Concluding remarks

Considering the above, the following conclusions can be reached. Firstly, the jurisprudence of the international and hybrid criminal tribunals (including the ICC) that has been analysed shows that all of them consider the nature and extent of the victimization (in particular, the damage and suffering caused to victims, the short and long term consequences on their physical and mental health and the number of victims) as a relevant factor in the determination of sentences.

Nevertheless, there are inconsistencies regarding whether the nature and extent of victimization should be addressed for the purposes of assessing the gravity of the crimes attributed to the convicted person, or when analyzing the aggravating factors. While the juris-

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supra n. 52, par. 345; ICTR, Kambanda Judgment and Sentence, supra n. 31, par. 42.

64 ICTR, Kanyarukiga Trial Judgment, supra n. 52, par. 674.

65 ICTR, Bikindi Trial Judgment, supra n. 52, par. 448.

66 ICTR, Kambanda Judgment and Sentence, supra n. 31, par. 42.

67 ICTR, Gacumbitsi Trial Judgment, supra n. 52, par. 345.

68 Idem.

prudence of the ICC, the SCSL and the ECCC consistently deals with the nature and extent of victimization in the analysis of the gravity of the crimes, the jurisprudence of the ICTY and ICTR shows a greater degree of inconsistency. While the quantitative dimension of victimization (number of victims) is treated as an aggravating factor in a number of ICTY and ICTR cases, its qualitative dimension is usually dealt with as part of the analysis of the gravity of the crimes.

Secondly, the ICTY has been the only international and hybrid criminal tribunal that has so far addressed the question of whether the acts of violence that are only proven beyond a reasonable doubt to establish the existence of the contextual elements of CAH are a relevant factor in the determination of sentences. As seen above, the jurisprudence of all ICTY trial chambers provide a negative answer to this question.

Finally, while the jurisprudence of the ICTR considers the crime of genocide as the most serious international crime, the ICC and the ICTY do not consider different levels of gravity for general categories of international crimes falling within their jurisdiction (genocide, crimes against humanity and war crimes). Nevertheless, the jurisprudence of the ICC and the ICTY considers that the nature of the legally protected interests harmed by the crimes have an impact on the assessment of their gravity, and therefore it should be a relevant factor in the determination of sentences. Thus, for the ICC and the ICTY, crimes committed against people are inherently more serious than those committed against objects. Moreover, crimes committed against specially protected persons (such as women and children) and objects (such as cultural property) are also more serious.

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19. Does the practice by the Lord's Resistance Army of abduction of children constitute the crime against humanity of torture, persecution or other inhuman acts under the Statute of the International Criminal Court?

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1. Introduction

Dominic Ongwen was born in Uganda in 1975. At the age of ten, he was abducted by members of the Lord's Resistance Army (LRA)[1],

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[1] Justice and Reconciliation Project, 2008, *Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen*, http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf [last accessed: November 11, 2017].

lead by Joseph Kony. In the midst of the armed conflict between the LRA and the Ugandan Government, the LRA trained Ongwen to fight against the Ugandan People's Defense Forces (UPDF). Due to his military skills, thirty years after his abduction, Ongwen became the commander of the Sinia Brigade, one of the most important operational units in the LRA.

On 23 March 2016, ICC Pre-Trial Chamber II issued a decision confirming seventy charges against Ongwen concerning events that occurred in Northern Uganda between 1 July 2002 and 31 December 2005[2]. According to Pre-Trial Chamber II, many of the incidents in which Dominic Ongwen and his subordinates committed ICC crimes included the following practices:

1. The deprivation of liberty of children under the age of fifteen years against their will through violence or deceit; and
2. The separation of said children from their families or the environment in which they lived[3].

The length of the children's deprivation of liberty varied considerably. Sometimes the deprivation of liberty was lengthy because it was

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2 ICC, the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, March 23, 2016, ICC Doc. No.: ICC-02/04-01/15, paras. 60-64.

3 Idem; According to the Office of the Special Representative of the UN Secretary General for Children and the Armed Conflict (2009/2013), *The six grave violations against children during armed conflict: The legal foundation*, available at: https://childrenandarmedconflict.un.org/publications/WorkingPaper1_SixGraveViolationsLegalFoundation.pdf [last accessed: March 12, 2018], abduction is an act carried out against the will of the children or their guardians. Moreover, for Amnesty International, *Uganda. Breaking God's commands: the destruction of childhood by the Lord's Resistance Army*, 1997, https://www.amnesty.org/download/Documents/156000/afr590011997en.pdf [last visit: March 12, 2018], '[a]bducted children embark on a journey in hell. Abduction is itself an act of violence, ripping terrified children from the security of their families. It is often accompanied by killings, rape and severe beating.' The testimonies and reports on the situation in Northern Uganda show that the LRA had a strategy of immediate transfer of children once they had been abducted, in order to keep them as far away from their homes as possible.

followed by other ICC crimes, such as conscription into the LRA or sexual slavery. Other times, the deprivation of liberty did not endure long because the children were released, or managed to escape, immediately after they were abducted[4]. Having regard to the foregoing, the LRA's practice of abduction of children is considered in this work as an act of violence in itself, without taking into account what happened to the victims following their abduction[5].

The practice of abduction of children is widely rejected by the international community. Article 35 of the Convention on the Rights of the Child imposes upon States Parties the duty to '[…] take all appropriate national, bilateral and multilateral measures to prevent the abduction, sale and trafficking of children for any purpose and in any way.'

The Office of the Special Representative of the United Nations Secretary-General for Children and Armed Conflict has also stated that '[…] the abduction of children against their will and the will of their adult guardians, either temporarily or permanently, is illegal under international law.' For the Office of the Special Representative, this practice '[…] can constitute a serious violation of the Geneva Conventions and even a crime against humanity or a war crime.'[6]. As a result, and in light of its magnitude and serious consequences on children's lives, the Office of the Special Representative considers

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4 These cases were reported by Amnesty International, supra n. 3. According to this report, which was based on the statements made by the victims, '[…] those that are too small are set free; they are not strong enough to carry looted goods or to use weapons. It also seems that LRA units are given conscription targets that change according to need and objective.'

5 The definition of abduction in the Ugandan Criminal Code emphasizes the need for the act of abduction to be carried out through deception or violence towards the victim. Nevertheless, the length of the abduction is not determinative for the commission of the crime. See Ugandan Criminal Code, Chapter XXIV, Article 2.4.

6 Office of the Special Representative of the United Nations Secretary-General for Children and Armed Conflict (2009/2013), see supra n. 3.

that the abduction of children is one of the six grave violations committed against children during armed conflicts[7].

Likewise, the United Nations Security Council has also stressed in Resolution 2225 (2015) on children and armed conflict that the abduction of children constitutes a serious violation of IHRL and IHL, and that it is urgent to acknowledge its special gravity in light of its increase, especially in Northern Uganda[8].

The IACtHR has also emphasized the rejection by IHRL of the practice of abduction of children. In the case of Contreras et. al. v. El Salvador, the IACtHR has found that when children are separated from their families, their fundamental rights to their dignity and personal integrity are breached[9]. Moreover, the references made in this case by the IACtHR to the 1996 UN Machel Report[10] show a deep concern by the IACtHR about the psycho-social effects of violence against children in armed conflicts, including '[…] feelings of loss, abandonment, intense fear, uncertainty, anguish and pain.'[11].

The aforementioned decisions, reports and resolutions share the view that the practice of abduction of children, regardless of the purpose behind the abduction or what happens subsequent to its commission, constitute a grave breach of IHRL and IHL, that causes great suffering and/or a serious harm to the physical integrity or mental or physical health of the victims.

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7 Idem. According to the Office of the Special Representative, the six grave violations against children during armed conflict, are the following: (i) recruitment and use of children; (ii) killing or maiming of children; (iii) sexual violence against children; (iv) attacks against schools or hospitals; (v) abduction of children; and (vi) denial of humanitarian access.

8 United Nations, Security Council, Resolution 2225, 2015, June 18, 2015, UN Doc. No.: S/RES/2225.

9 IACtHR, Contreras et. al. v. El Salvador, *Judgment of 31 August 2011 (Merits, Reparations and Costs)*, August 31, 2011, para. 82.

10 Machel, G., 1996, The Impact of Armed Conflict on Children, Report of the Secretary-General's expert, Ms. Graça Machel, August 26, 1996, UN Doc. No.: A/51/306.

11 IACtHR, Contreras et. al. v. El Salvador, supra n. 9, para. 85.

Nevertheless, the abduction of children does not constitute an autonomous crime against humanity or war crime under the ICC Statute or ICL[12]. Moreover, at the national level, some domestic legislations treat the practice of abduction of children as a crime of 'abduction,'[13] whilst others consider it a crime of 'kidnapping'[14].

In light of the foregoing, this work analyzes whether the LRA's practice of abduction of children (the term 'abduction' is used in this work to refer to this practice) could constitute the crime against humanity of torture, persecution or other inhuman acts under paragraphs (f), (h) and (k) of Article 7(1) of the ICC Statute. The analysis focuses on the specific elements of these three crimes, and therefore it does not extend to the contextual elements that are common to all crimes against humanity under Article 7 of the ICC Statute. Moreover, as the analysis does not take into consideration what happened to the children after being abducted, the crime against humanity of deportation or forcible transfer is not studied, because, as provided

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12 The working group in charge of preparing an initial draft of the SCSL Statute proposed to include as part of the provision on other serious IHL violations in non-international armed conflicts, 'the abduction of children under 15 for the purpose of using them to actively participate in hostilities.' Nevertheless, Amnesty International highlighted that this proposal was not acceptable because it implied that criminal liability would only arise if a child was abducted for the purpose of being an active combatant in hostilities. According to Amnesty International, this specific purpose requirement, which cannot be found in common Article 3 to the Geneva Conventions, also meant that abduction of children would not been a crime if it was carried out for other purposes, such as using the abductees: (i) to carry out other tasks (i.e. cooking or doing housework); or (ii) as sexual slaves; See Amnesty International (2000), *Sierra Leone: Recommendations on the draft Statute of the Special Court*, November 14, 2000, https://www1.essex.ac.uk/armedcon/story_id/000143.html [last accessed: March 10, 2018]. The UN Security Council ended up rejecting the proposal. See United Nations, Secretary General, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, October 4, 2000, UN Doc. No.: S/2000/915; See also SCSL, the Prosecutor v. Charles Ghankay Taylor, Trial Chamber II, *Judgment*, May 12, 2012, Case No.: SCSL-03-01-T, p. 165, para n. 1056.

13 Ugandan Criminal Code, Chapter XXIV, Article 2.4.

14 US Model Penal Code, Title 18, Section 1201.

for in the EC, it requires that civilians be transferred from a place where they are legally established to another place[15].

According to Article 21(1)(a) of the ICC Statute, the analysis conducted in the present work looks first into the ICC Statute, the EC and their interpretation by ICC jurisprudence. Subsequently, as provided for in Article 21(1)(b) of the ICC Statute, it also analyzes, when relevant, the jurisprudence of the ICTY, the ICTR and the SCSL. Reference will also be made, when appropriate, to the jurisprudence of international and regional human rights bodies, which is also applicable pursuant to Article 21 (3) of the ICC Statute.

Finally, although outside the scope of our analysis, it is worth mentioning that the LRA's practice of abduction of children under the age of fifteen may also constitute an act preparatory to the commission of some other ICC crimes, namely, the crime against humanity of deportation or forcible transfer, the war crime of conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities[16], and some sexual based offences[17].

In this regard, evidence provided by witnesses' statements and other data collected from studies on Northern Uganda[18] shows that the LRA is an organized armed group that feeds on children. Expert witness Tim Allen[19] indicates that LRA members were under instructions from their commanders to target adolescents aged between 12 and 16[20]. Moreover, according to World Vision Uganda, '[…] for

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15 See Article 7(1)(d) and (2)(d) of the ICC Statute and the EC.

16 See Article (8)(2)(c)(vii) of the ICC Statute and the EC.

17 See Articles (7)(1)(g) and (8)(2)(c)(vi) of the ICC Statute and the EC.

18 Allen, T. & Vlassenroot, K. (2010), *The Lord's Resistance Army: Myth and Reality,* London, Zed Books, p. 138.

19 Idem.

20 According to Allen & Vlassenroot (2010), supra n. 18, p. 138, '[…] of those males abducted before age 30 over two-thirds were under 18 and over three-quarters were under 21 […] The distribution of abduction age indicates that four times as many males aged 14 were abducted as those aged 9 or 23. The study provides that "from 1998 to 2004 a 14 years old youth in the study population had an average of a 5 percent chance of abduction (20 the level of risk faced by one aged either 9 or 23).'

over 3,000 former LRA soldiers, approximately 47%, were aged between 11 and 16 when taken. A further 36% were between 17 and 22 years old. Approximately 30% of abducted people seen by World Vision have been female; of these 54% have been aged between 11 and 16.'[21]. Therefore, for decades, age has been the main criterion in carrying out the LRA's practice of abduction of civilians, because children are easier to indoctrinate and control.

2. The specific elements of the crime against humanity of torture under Article 7 (1)(f) and (2)(e) of the ICC Statute and the EC

According to paragraphs (1)(f) and (2)(e) of Article 7 of the ICC Statute, the crime against humanity of torture occurs when, as part of a widespread or systematic attack directed against any civilian population, the perpetrator, with knowledge of the attack, inflicts intentionally '[…] severe pain or suffering, whether physical or mental, upon a person in the custody or under [his] control [of the accused]; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.'

Moreover, according to the EC, the crime against humanity of torture is comprised of the following specific elements[22]: (i) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (ii) the victim(s) was/were in the custody or under the control of the perpetrator; and (iii) the pain or suffering did

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21 Figures presented by World Vision Uganda at the conference organized by the Foundation for Human Rights Initiative on *Challenges to Reconciliation and the Protection of Human Rights* held in Gulu (Northern Uganda) on July 7, 1997. These figures are included in Amnesty International (1997), supra n. 3, p. 10.

22 According to the EC, the crime against humanity of torture is also comprised of the following two contextual elements: (a) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (b) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

not arise only from, and was not inherent in or incidental to, lawful sanctions[23].

The limited ICC jurisprudence existing so far on the definition and specific elements of the crime against humanity of torture state that the main objective element of the crime is the requirement of a severe and high degree of pain or suffering inflicted upon the victim (s) (severity threshold). As ICC Pre Trial Chamber II has stated in the Bemba case, '[a]lthough there is no definition of the severity threshold as a legal requirement of the crime of torture, it is constantly accepted in applicable treaties and jurisprudence that an important degree of pain and suffering has to be reached in order for a criminal act to amount to an act of torture.'[24].

As pointed out by Pre-Trial Chamber II, the severity threshold is also provided for *inter alia* in the definition of torture under Article 1(1) of the Convention against Torture[25], as well as in the jurispru-

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23 Paragraphs (a)(ii) and (c)(i) of Article 8(2) of the ICC Statute and the EC also define and establish the elements of the war crime of torture, applicable in international armed conflicts and non-international armed conflicts.

24 ICC, the Prosecutor v. Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, June 15, 2009, ICC Doc. No.: ICC-01/05-01/08-424, para. 193.

25 Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by UN General Assembly Resolution 39/46 of December 10, 1984, and entered into force on June 26, 1987, says as follows: 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.' See United Nations, General Assembly, Resolution 39/46, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984.

dence of the ICTY, the ICTR, the SCSL and the ECtHR[26]. Nevertheless, they do not define the specific content of the severity threshold.

In this regard, it is worth-mentioning that Articles 3 and 5 of the ICTY Statute, Articles 3 and 4 of the ICTR Statute and Articles 2 and 3 of the SCSL Statute attribute jurisdiction to the ICTY, the ICTR and the SCSL over torture as a crime against humanity and as a war crime, but do not provide for a definition of torture. As a result, the jurisprudence of these international criminal tribunals has defined torture by looking into IHRL and IHL and has established that torture is comprised of two main elements: (i) the infliction, by an intentional act or omission, of severe pain or suffering, whether physical or mental (objective element); with (ii) the aim to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person (subjective element)[27].

The ICTY, the ICTR and the SCSL, like the ICC, have not provided a clear definition of the severity threshold. Instead of defining the severity threshold, they have analyzed whether specific acts of violence, such as rape, meet the severity threshold[28]. Moreover, for these international criminal tribunals, the severity threshold (which is a core difference between the crimes against humanity of torture and the crime against humanity of other inhumane acts) has to be examined on a case-by-case basis, in the interest of not confusing an

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26 ECtHR, Ireland v. United Kingdom, *Judgment*, January 18, 1978, para. 167; ECtHR, Selmouni v. France, *Judgment*, July 28, 1999, para. 105; ECtHR, Aydin v. Turkey, *Judgment,* September 25, 1997, para. 82.

27 ICTY, the Prosecutor v. Anton Furundzija, Trial Chamber II, *Judgment*, December 10, 1998, Case No.: IT-95-17/1-T, para. 162. See also, ICTY, the Prosecutor v. Milorad Krnojelac, Trial Chamber II, *Judgment*, March 15, 2002, Case No.: IT-97-25-T, para. 180; ICTR, the Prosecutor v. Jean Paul Akayesu, Trial Chamber I, *Judgment*, September 2, 1998, Case No.: ICTR-96-4-T, paras. 593-595; ICTR, the Prosecutor v. Laurent Semanza, Trial Chamber III, *Judgment*, May 15, 2003, Case No.: ICTR-97-20-T, para. 544; SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu, Trial Chamber II, *Judgment*, June 20, 2007, Case No.: SCSL-04-16-T, para. 726.

28 Idem.

act of mere physical violence with conduct that may constitute torture[29]. To undertake this case-by-case analysis, the following factors are to be taken into consideration: '[…] the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim, the physical or mental effect of the treatment upon the particular victim, the victim's age, sex, or state of health. The extent that an individual has been mistreated over a prolonged period of time will also be relevant.'[30].

The ICTY, the ICTR and the SCSL, like the ICC, also consider that the participation of State officials is not a requirement of the definition of the crime against humanity of torture[31]. They have found that, while the definition of torture provided for in Article 1(1) of the 1984 Torture Convention (which requires the involvement of State officials) reflects customary international law in relation to the content of the obligations of the States Parties, this is not the case in relation to the definition of torture as a crime against humanity[32].

Finally, concerning the subjective elements, the most relevant characteristic of the definition of the crime against humanity of torture in Article (7)(1)(f) and (2)(e) of the ICC and in the EC is the absence of a specific purpose requirement, as the one provided for in Article 1(1) of the Convention against Torture. On the other hand, and in accordance with the Convention against Torture, the definition of the war crime of torture in Article 8(2)(a)(ii) and (c)(i), and in the EC, as well as the definition of torture as a crime against humanity and as a war crime in the jurisprudence of the ICTY, the ICTR and the SCSL, also includes the specific purpose requirement.

In this regard, ICTY Trial Chamber II has highlighted in the Krnojelac case that '[t]orture as a criminal offence is not a gratuitous act

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29 SCSL, 2007, Brima, Kamara & Kanu Judgment, supra n. 27, para. 726.

30 ICTY, the Prosecutor v. Miroslav Kvocka, Mlado Radic, Zoran Zigic, Dragoljub Prcac & Milojica Kos, Trial Chamber I, *Judgment*, November 2, 2001, Case No.: IT-98-30/1-T, paras. 142–143.

31 Idem.

32 ICTR, 2003, Semanza Trial Judgment, supra n. 27, para. 342.

of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even very severe infliction of pain would not qualify as torture pursuant to Article 3 or Article 5 of the Tribunal's Statute.'[33]. Likewise, ICTR Trial Chamber III has emphasized in the Semanza case that torture involves the intentional infliction of severe mental or physical pain […] for the purpose of obtaining information or a confession; or punishing, intimidating or coercing the victim or a third person; or discriminating, on any ground, against the victim or a third person[34]. As a result, except for the definition of the crime against humanity of torture in the ICC Statute and in the EC, all other definitions of torture as a crime against humanity or as a war crime include the specific purpose requirement.

In light of the foregoing, and considering that the definition of torture under the ICC, the ICTY, the ICTR and the SCSL Statutes do not require the involvement of State officials, it can be concluded that the LRA's practice of abduction of children meets the objective and subjective specific elements of torture as a crime against humanity under Article 7 (1) (f) and (2) (e) of the ICC Statute and the EC.

This conclusion is supported by a number of reasons. First, as seen above, the UN Security Council[35], the Office of the Special Representative of the UN Secretary General[36] and IACtHR[37] consider that the abduction of children causes great suffering and/or a serious attack on the physical integrity or mental or physical health of the victims.

This view is also shared by two studies relied on by ICC Trial Chamber I in the Lubanga case, which looked into the practice of the *Forces Patriotiques pour la Libération du Congo* (the armed wing of the *Union des Patriotes Congolais* presided over by Thomas Lubanga) of massive abductions of children under the age of fifteen in the district of Ituri (DRC) between July 2002 and the end of 2003, followed by

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33 ICTY, 2002, Krnojelac Trial Judgment, supra n. 27, para. 180.
34 ICTR, 2003, Semanza Trial Judgment, supra n. 27, para. 544.
35 United Nations, 2015, Resolution 2225, supra n. 8.
36 Office of the Special Representative of the UN Secretary General for Children and the Armed Conflict (2009/2013), supra n. 3.
37 IACtHR, 2011, Contreras et. al. v. El Salvador Judgment, supra n. 9.

their conscription into the FPLC[38]. Both studies concluded that the abduction of children causes serious traumatic consequences to their mental health, which in the long-term can hinder their normal and healthy development[39]. As a result, according to ICC Trial Chamber I, the protection of children's physical and psychological well-being from the risks associated with armed conflicts requires *inter alia* that they be offered protection against potential traumas that may result from their separation from their families, disruption in their education, and exposure to an environment of violence and fear[40].

In this context, the jurisprudence of the international criminal tribunals has pointed out that childrens' ages, physical condition and position of inferiority (being defenseless), as well as the violent methods used by the attackers and the physical and mental impact of the abduction on children, are some of the factors to be taken into consideration in determining whether the LRA's practice of abduction of children constitutes a crime against humanity of torture[41].

Second, the requirement of custody or control upon the victim(s) was met at the moment LRA members abducted the children, regardless of whether subsequently some of the children could escape or were released by the LRA. Third, the suffering and pain caused to the children was not associated with any legal sanction. Finally, the absence of evidence to prove that abduction aimed at obtaining information or a confession, at providing punishment, intimidation or coercion, or at discriminating against the victims, is no longer a decisive factor[42], because the definition of torture as a crime against

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38 ICC, the Prosecutor v. Thomas Lubanga, Trial Chamber I, *Decision on Sentence pursuant to Article 76 of the Statute,* July 10, 2012, ICC Doc. No.: ICC-01/04-01/06-2901, para. 41.

39 Ibid., para. 39.

40 Ibid., para. 58.

41 SCSL, 2007, Brima, Kamara & Kanu Judgment, supra n. 27, para. 726; see also ICTY (2001), Kvocka, Radic, Zigic, Prcac & Kos Judgment, supra n. 30.

42 The LRA's practice of abduction of children did not aim at obtaining information or a confession. Moreover, even when the LRA targeted the internal displaced persons (IDP) camps based on the believe that all civilians who resided in the camps were supporting the government, there is no evidence

humanity under the ICC Statute and the EC do not include the specific purpose requirement.

3. The specific elements of the crime against humanity of persecution under Article 7(1)(h) of the ICC Statute and EC

Article 7(1)(h) of the ICC Statute provides for the crime against humanity of '[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court'. Furthermore, paragraph 2(g) of the same provision makes clear that '[p]ersecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.'

Based on this, the EC has developed the specific elements of the crime against humanity of persecution as follows: (i) the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; (ii) the perpetrator targeted the victim(s) by reason of the identity of a group or collectivity or targeted the group or collectivity as such; (iii) such targeting was based on political, racial, national, ethnic, cultural, religious, gender grounds as defined in Article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law; and (iv) the conduct was committed in connection with any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court[43].

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to affirm that the abduction of children from the camps aimed at punishing or discriminating against the victims.

[43] According to the EC, the crime against humanity of persecution is also comprised of the following two contextual elements: (a) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (b) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

As a result, the question arises as to whether the LRA's practice of abduction of children could constitute a severe deprivation of the victims' fundamental rights based on a ground that is universally recognized as impermissible under international law, such as age (as seen above, there is ample evidence that age has been the main criterion in the selection of the victims of the LRA's practice of abduction of civilians)[44]. Moreover, in case of a positive answer, a second question arises as to whether the LRA's practice of abduction of children was committed in connection with other acts that can constitute crimes against humanity or war crimes under the ICC Statute.

Regarding the first question, our analysis focuses on whether the act of abduction could constitute in itself a severe deprivation of the children's fundamental rights. Given the limited ICC jurisprudence so far on the definition and specific elements of the crime against humanity of persecution, and considering that this crime has been a core crime in most cases brought before the ICTY, in answering this question it is important to look into how the ICTY jurisprudence has elaborated on the objective elements of the crime against humanity of persecution.

In this regard, ICTY Trial Chamber I has affirmed in the Krajisnik case that the crime against humanity of persecution requires an act or omission which discriminates in fact and denies a fundamental human right laid down in international law.'[45]. Furthermore, in the Kupreskic et. al.[46] and the Kvocka et. al. cases[47], ICTY Trial Chamber I has also stated that the objective elements of the crime against humanity of persecution include any act that violates a fundamental right, as long as it has a level of gravity similar to the other crimes listed under Article 5 of the ICTY Statute[48]. As a result, although the

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44 Allen & Vlassenroot, 2010, supra n. 18, p. 138; See also Amnesty International (1997), supra n. 3, p. 10.

45 ICTY, the Prosecutor v. Momcilo Krajisnik, Trial Chamber I, *Judgment*, September 27, 2006, Case No.: IT-00-39-T, para. 734.

46 ICTY, the Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic & Vladimir Antic, Trial Chamber I, *Judgment*, January 14, 2000, Case No.: IT-95-16-T, para. 621.

47 ICTY, 2001, Kvocka et. al. Trial Judgment, supra n. 30, para. 185.

48 ICTY, 2000, Kupreskic et. al. Trial Judgment, supra n. 46, paras. 618-619.

ICTY has not made any specific finding with regard to the practice of abduction of children because the violence in the former Yugoslavia was significantly different from the LRA's practices, the ICTY jurisprudence has extended, as Pocar has emphasized[49], the definition of persecution to a wide range of conduct that violate political, economic or social rights, and even to acts of humiliation and psychological abuse. Based upon this, and in the light of our conclusions in the previous section, it can only be concluded that the abduction of children constitutes a severe deprivation of the victims' fundamental rights.

Concerning the second question, the ICTY jurisprudence has also stressed that under customary ICL there is no need for the relevant conduct (the LRA's practice of abduction of children) to be committed in connection with any other act that constitutes a crime under international law[50]. As a result, the connection requirement is a specific characteristic of the definition of the crime against humanity of persecution in the ICC Statute and in the EC.

The existence of the connection requirement can be analyzed according to two different approaches. The first approach aims to identify whether other acts of violence constituting ICC crimes, such as mutilation, murder of family members, looting or humiliation, were committed by LRA members against the same children that were taken by force simultaneously to (or closely connected with) their abduction. This approach requires a case-by-case analysis.

In its decision on the confirmation of charges in the Owgwen case, ICC Pre-Trial Chamber II found substantial grounds to believe that many of the children that were abducted by LRA's members were subsequently conscripted, enlisted and/or used to participate actively in hostilities and/or subjected to sexual based offences[51]. Based on this, the connection requirement between the LRA's practice of abduction of children and other ICC crimes committed against them appears to be met.

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49 Pocar, F., 2008, 'Persecution as a crime under International Criminal Law', Journal of National Security Law & Policy, Vol. 2, pp. 355-365.

50 ICTY, 2000, Kupreskic et. al. Trial Judgment, supra n. 46, para. 577.

51 ICC, 2016, Ongwen Confirmation of Charges Decision, supra n. 2., paras. 136-145.

According to the second approach, a connection between the abduction of children with other ICC crimes may also exist when there is a systematic pattern of violations of other victims in the same context. For this approach, the connection requirement is met if, during the time when the LRA's practice of abduction of children was implemented, other members of the children's communities were also victims of other ICC crimes committed by LRA members.

This second approach has been taken by ICC Pre-Trial Chamber IV in the case against William Somei Ruto et. al., as it confirmed the charges of crimes against humanity of persecution, murder and forcible transfer based upon acts of violence committed against different victims who belonged to the same population that shared a common context[52]. The same approach has been taken by ICC Pre-Trial Chamber II when confirming the persecution charges in the Ongwen case[53].

Based on the aforementioned, it can be concluded that the LRA's practice of abduction of children constitutes a severe deprivation of the victims' fundamental rights based on age (a ground that is universally recognized as impermissible under international law), that was implemented in connection with several other ICC crimes committed by the LRA against the abductees and other members of their communities.

4. The specific elements of the crime against humanity of other inhumane acts under Article 7(1)(k) of the ICC Statute and the EC

According to Article 7(1)(k) of the ICC Statute, the crime against humanity of other inhumane acts occurs when, as part of a wides-

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52 ICC, the Prosecutor v. William Samoei Ruto, Henry Kirprono Kosgey &Joshua Arap Sang, Pre-Trial Chamber II, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, February 4, 2012, ICC Doc. No.: ICC-01/09-01/11-373, paras. 269-281.

53 ICC, 2016, Ongwen Confirmation of Charges Decision, supra n. 2., paras. 25, 39, 52 and 65.

pread or systematic attack directed against any civilian population, the perpetrator, with knowledge of the attack, inflicts intentionally upon the victim(s) great suffering, or serious injury to body or to mental or physical health, by means on an inhumane act of a similar character to any other act referred to in Article 7, paragraph 1, of the ICC Statute. As stated by ICC Pre-Trial Chamber II in the Muthaura, Kenyatta and Ali case, the crime against humanity of other inhumane acts, provided for in Article 7(1)(k) of the ICC Statute, is considered a residual category of crimes against humanity, which aims to include a conduct that does not amount to any other type of crime against humanity under the ICC Statute.

According to the EC, the crime against humanity of other inhumane acts is comprised of the following specific elements: (i) the perpetrator inflicted on the victim(s) great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; (ii) such act was of a character similar to any other act referred to in Article 7, paragraph 1, of the Statute; and (iii) the perpetrator was aware of the factual circumstances that established the character of the act[54].

In light of the definition and elements of the crime against humanity of other inhumane acts under Article 7(1)(k) of the ICC Statute and the EC, the question arises as to whether the LRA's practice of abduction of children inflicted on the victim(s) great suffering, or serious injury to body or to mental or physical health. Furthermore, in case of a positive answer, a second question arises as to whether the LRA's practice of abduction of children was of a character similar to any other act referred to in Article 7 (1) of the ICC Statute.

Regarding the first question, the answer can only be affirmative because, as shown in previous sections, the LRA's practice of abduction meets the higher severity threshold required by Article 7(1)(f)

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[54] According to the EC, the crime against humanity of other inhuman acts is also comprised of the following two contextual elements: (a) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (b) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

and (2)(e) of the ICC Statute for the crime against humanity of torture. As Schabas has pointed out, inhumane treatment involves acts or omissions that do not necessarily rise to the same level of gravity as torture because the degree of physical or mental suffering required is lower than the one required for torture[55].

Concerning the second question, ICC Pre Trial Chamber I has stated in the Katanga case that the conduct of causing mental or physical injury constitutes a serious violation of international customary law and is of a similar nature and gravity to the other crimes against humanity referred to in Article 7 (1) of the ICC Statute. Moreover, Pre-Trial Chamber I has also emphasized that the following factors must be taken into consideration to analyze whether the gravity threshold provided for in Article 7 (1) (k) of the ICC Statute is met: the nature of the act, the context in which it occurred, the personal circumstances of the victim, (age, gender, and health), and the physical, mental and moral effects that the act caused on them[56].

The same approach has been taken by the SCSL Appeals Chamber, which in the Brima, Kamara & Kanu case has stated that in order for an act to qualify as a crime against humanity of other inhumane acts, an analysis must be made on a case-by-case basis taking into consideration criteria that are very similar to the criteria established by Pre-Trial Chamber I in the Katanga case[57].

In applying said factors to the LRA's practice of abduction of children, the following circumstances are to be taken into consideration. First, the practice of abduction took place in the context of a non-international armed conflict in Northern Uganda from 2002-2005. Second, the victims of this practice were usually children under the

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55 Schabas, W., 2016, The International Criminal Court: A Commentary on the Rome Statute, 2nd Ed., Oxford, Oxford University Press; See commentary to Articles 7(1)(k) and 8(2)(a)(i) and (c)(i).

56 ICC, the Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Pre-Trial Chamber I, *Decision on the confirmation of charges*, September 30, 2008, ICC Doc. No.: ICC-01/04-01/07-717, para. 449.

57 SCSL, the Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu, Appeals Chamber, *Judgment*, February 22, 2008, Case No.: SCSL-04-16-A, paras. 183-184.

age of fifteen, who were defenseless against the violent methods used by the members of the LRA who abducted them. Third, abductions caused a serious impact on the mental health of the children, as shown by the studies relied on in the Lubanga case[58]. As a result, it can be concluded that the LRA' practice of abduction of children has a character similar to other acts referred to in Article 7 (1) of the ICC Statute.

This conclusion is reinforced by the fact that during the drafting of the SCSL Statute a proposal was made by the drafting working group to include as part of the provision on other serious IHL violations in non-international armed conflicts, 'the abduction of children under 15 for the purpose of using them to actively participate in hostilities.'[59].

5. Conclusion

The present work has studied whether the LRA's practice of abduction of children could constitute a crime against humanity of torture, persecution or other inhuman acts under paragraphs (f), (h) and (k) of Article 7(1) of the ICC Statute. The analysis has focused on the specific elements of these three crimes against humanity. The contextual elements that are common to all crimes against humanity under Article 7 of the ICC Statute have not been addressed. The conclusion is that the LRA's practice of abduction of children meets all specific elements of the crimes against humanity of torture, persecution and other inhuman acts that have been studied in this work.

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58 ICC, 2016, Ongwen Confirmation of Charges Decision, supra n. 2, paras. 65-85.

59 Such proposal was finally rejected because it contained a specific purpose requirement that cannot be found in common Article 3 to the Geneva Conventions. See supra n. 12.

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20. Are insanity and duress applicable in the Ongwen case before the International Criminal Court?

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1. Introduction

Dominic Ongwen was born in 1978 in the town of Coorom (Northern Uganda). The Lord's Resistance Army (LRA), led by Joseph

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Kony, abducted him at the age of ten[1]. After his abduction, he was tortured and forced to witness intense violence as part of his training by the LRA. Years afterwards, he began to ascend in the LRA's military structure, and in 2004 became the commander of the *Sinia* Brigade (one of the four brigades of the LRA)[2].

Due to his involvement in the crimes committed by the LRA during the armed conflict against the Ugandan government, the ICC Prosecution accused Ongwen of seventy charges of crimes against humanity and war crimes committed between July 2002 and December 2005, including murder, slavery, torture, cruel treatment, inhumane acts, attacks against personal dignity, pillaging, destruction of property and persecution[3]. Although Pre-Trial Chamber II issued an arrest warrant against Ongwen in 2005, he was only handed down to the ICC in 2015[4].

At the confirmation of charges hearing, the Defense argued that, according to Article 31(1)(d) of the ICC Statute, Ongwen could not be held criminally liable because he acted under duress, as a result

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1 The Defense and Ongwen's family affirm that Ongwen was abducted at the age ten. Nevertheless, the Prosecution affirms that he was three years older when the abduction took place. According to the Defense, '[a]fter investing years investigating the case from 2004 through 2010, the Office of the Prosecutor determined that Dominic was born in May 1978. The Prosecution talked to his family and asked about birth records. They know that the records no longer exist. It is disingenuous to now say that his birth was in 1975.' See: ICC, The Prosecutor v. Dominic Ongwen, Defense of Dominic Ongwen, *Fourth Public Redacted Version of "Defence Brief for the Confirmation of Charges Hearing"*, January 18, 2016, ICC Doc. No.: ICC-02/04-01/15-404-Red4.

2 Justice in Conflict, 2016, We Need to Talk About Ongwen: The Plight of Victim-Perpetrators at the ICC, April 19, 2016: https://justiceinconflict.org/2016/04/19/we-need-to-talk-about-ongwen-the-plight-of-victim-perpetrators-at-the-icc/ [last accessed: December 31, 2016].

3 ICC, Public Information Office, n.d., The Prosecutor vs. Dominic Ongwen/ Alleged crimes (non-exhaustive list): https://www.icc-cpi.int/uganda/ongwen/pages/alleged-crimes.aspx [last accessed: December 31, 2016].

4 ICC, Public Information Office, n.d., *Case Information Sheet. The Prosecutor v. Dominic Ongwen, Doc. No. ICC-PIDS-CIS-UGA-02-018/20_Eng*: https://www.icc-cpi.int/CaseInformationSheets/OngwenEng.pdf [last visit: December 31, 2016].

of the brutal and hostile environment created in the LRA by Joseph Kony (the 'supreme and sole' leader of the LRA) and the violent reprisals by the LRA against those who tried to leave it[5]. Nevertheless, Pre-Trial Chamber II rejected this claim because none of the three elements of duress under Article 31(1)(d) of the ICC Statute were met: (a) the existence of a threat of imminent death or continuing or imminent serious body harm for Ongwen or another person; (b) his necessary and reasonable response to avoid this threat; and (c) his lack of intention to cause a greater harm than the one sought to be avoided[6]. Consequently, it confirmed the charges against Ongwen on March 23, 2016[7].

Despite this situation, the Defense has affirmed that it intends to rely on duress at the trial[8] that started on December 6, 2016 before Trial Chamber IX[9]. Moreover, due to the mental harm that Ongwen may have suffered as a result of his abduction and brutal training at a very early age by the LRA, the Defense may also seek to allege insanity, which, as provided for in Article 31(1)(a) of the ICC Statute, is comprised of the following two elements: (a) the existence of a disease or mental defect; that (b) causes, at the time in which the alleged crime is committed, the deprivation of the defendant's capacity to (i) appreciate the unlawfulness or nature of his conduct; or (ii) control his conduct according to the requirements of law.

If Trial Chamber IX finds that all elements of insanity or coercion are proven by the Defense, Ongwen will be exonerated of criminal liability. Nevertheless, if only some of these elements can be proven, Trial Chamber IX could only consider them as mitigating factors in sentencing, as provided for in Rule 145(2)(a)(i) of the RPE.

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5 ICC, Ongwen Defense Brief, supra n. 1, paras. 50-57.

6 ICC, The Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, March 23, 2016, ICC Doc. No.: ICC-02/04-01/15-422-Red, paras. 150-159.

7 Ibid., parrs. 150-156.

8 Ibid., parrs. 157-159.

9 This is the first ICC trial against a member of the LRA, despite the several ICC arrest warrants issued against LRA's members since the start of the ICC investigation into the Ugandan situation in 2005.

In light of the above-mentioned and giving due consideration to Article 21 of the ICC Statute on the applicable law, this work first studies the elements of insanity and duress under Article 31(1)(a) and (d) of the ICC Statute. Subsequently, it analyzes whether they may be applicable in the Ongwen case.

2. The elements of insanity under Article 31(1)(a) of the ICC Statute

According to Article 31(1)(a) of the ICC Statute, the first element of insanity requires that the accused has a mental disease or defect at the time in which the offence is committed. As a result, if the mental disease or defect arises during trial, this substantial defense is not applicable, and therefore only a procedural defense may apply as long as it can be proven that the accused is no longer mentally fit to stand trial[10].

As Ambos points out, Article 31(1)(a) of the ICC Statute does not require the existence of a specific mental disease or defect that is medically recognized[11]. Nevertheless, as Werle highlights, the mental disease or defect must cause the accused a mental impairment of a certain degree of severity and duration[12]. As a result, a momentary psychological defect caused by rage, jealousy or pain is not sufficient[13]. In this regard, Knoops points out that the reports of medical experts are not conclusive evidence by themselves because it is up to the judges to decide the probative value that medical reports may have in a specific case[14].

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10 Ambos, K., 2013, Treatise on International Criminal Law, Oxford, Oxford University Press, p. 314.

11 Idem.

12 Werle, G., 2011, *Tratado de derecho penal internacional*, Valencia, Tirant lo Blanch, p. 267.

13 Ambos, K., 2013, supra n. 10, p. 314.

14 Knoops, G.J.A., 2007, Defenses in Contemporary International Criminal Law, Leiden, Martinus Nijhoff Publishers, p. 110.

The second element of insanity requires that the mental disease or defect destroys the accused's capacity to: (a) appreciate the unlawfulness or nature of his conduct; or (b) control it. Eser highlights that Article 31(1)(a) of the ICC Statute uses the conjunction 'or', thus making clear that only the accused's loss of any of these two capacities is required[15].

Concerning the required level of impairment, Ambos considers that a literal interpretation of the verb 'destroy' requires the accused's total (100%) incapacity. As a result, he considers that, unless the impairment of the accused's capacity to appreciate the unlawfulness or nature of his conduct reaches the level of an extensive and great loss in the use of reason, insanity would not be applicable. Nevertheless, Ambos acknowledges that medical experts highlight that mental disorders do not fully eliminate a person's capacity to control his or her conduct. As a result, he accepts some degree of flexibility with regard to the accused's incapacity to control his conduct[16].

Unlike Ambos, Eser is of the view that the term 'destroys' should be read in a more flexible way, and that a level of impairment that exceeds the level of 'substantial deterioration' should be sufficient for the application of insanity. As a result, for Eser, there is no need to reach the level of 'absolute deterioration' of the accused's cognitive or volitional abilities[17].

Finally, for Kittichaisaree, a difference should made between both alternatives in Article 31(1)(a) of the ICC Statute. As a consequence, if it can be proven that the accused is incapable of knowing the unlawfulness or nature of his conduct, criminal liability should be excluded. Nevertheless, if what is proven is the accused's incapacity to control his conduct, this should be only considered as a mitigating factor in sentencing[18]. This approach, which according to Kittichaisa-

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15 Eser, A., 2016, 'Article 31: Grounds for Excluding Criminal responsibility', Triffterer, O. & Ambos, K. (Eds.), *The Rome Statute of the International Criminal Court - A Commentary*, Munich, Beck/Hart, p. 1139.

16 Ambos, K., 2013, supra n. 10, p. 322.

17 Eser, A., 2016, supra n. 15, p. 1139.

18 Kittichaisaree, K., 2001, International Criminal Law, Oxford, Oxford University Press.

ree finds support in the Celebici case at the ICTY[19], follows the traditional common law approach to the defense of insanity.

In this regard, it is important to highlight that, in most common law jurisdictions, the defense of insanity finds its foundation in the so-called *M'Naghten rule* of 1843. According to this rule, to prove the accused's insanity is necessary to show that 'at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know that what he was doing was wrong.'[20]. In light of this definition, it can be stated that the *M'Naghten rule* covers the first element of the definition of insanity in Article 31 (1) (a) of the ICC Statute and the first alternative requirement of the second element. Nevertheless, it does not cover cases of accused's inability to control his conduct.

The regulation of the defense of insanity in England and Wales follows the *M'Naghten rule*[21]. Likewise, section 11 of the Penal Code of the Republic of Uganda contains a similar definition to the one adopted in England and Wales[22]. In applying section 11, Ugandan case law has particularly stressed that '[a] person is not criminally responsible for an act or omission if at the time of doing the act or omission, he or she is, through any disease affecting his or her mind, incapable of knowing that he or she ought not to do the act or make the omission […].'[23]. Furthermore, according to Ugandan case law,

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19 ICTY, The Prosecutor v. Zdravko Mucic, Hazim Delic, Esad Landzo, Zejnil Delalic, Trial Chamber I, *Judgement*, November 16, 1998, Case No.: IT-96-21-T, paras. 1156-1172; ICTY, The Prosecutor v. Zdravko Mucic, Hazim Delic, Esad Landzo, Zejnil Delalic, Appeals Chamber, *Judgment*, February 20, 2001, Case No. IT-96-21-A, paras. 580-595.

20 Legal Information Institute (n.d.), *Insanity Defense*, Cornell University Law School: https://www.law.cornell.edu/wex/insanity_defense [last accessed: December 31, 2016].

21 Law Commission of the England and Wales (2013), *Criminal Liability: Insanity and Automatism. A Discussion Paper*, sections 1.23 to 1.26.

22 The Penal Code Act of Uganda is available at: https://ulii.org/ug/legislation/consolidated-act/120 [last accessed: December 31, 2016].

23 High Court of Uganda at Jinja, Uganda v. Mwesigwa, *Judgement*, November 11, 2013, Criminal Session Case No.: 269/2011, [2013] UGHCCRD 70.

it is up to the Defense to prove that at the material time the accused was incapable of appreciating the consequences of his activities[24].

The narrow definition of defense of insanity in common law jurisdictions has led common law academics to propose a complementary defense known as 'irresistible impulse.' According to Winslow, this complementary defense is defined as follows:

> 'A person may be perfectly competent to draw a correct distinction between right and wrong, and yet, labor under a form of insanity which ought unquestionably to protect him from legal or moral responsibility. I allude to cases of insanity where the patient is driven, by an irresistible impulse, to destroy, after struggling, for some time, against the morbid desire, being, at the same time, perfectly conscious that he is impelled to do what is wrong both in the sight of God and man.'[25].

In contrast with the regulation of defense of insanity in the England and Wales and Uganda, section 4.01(1) of the US Model Penal Code defines insanity as follows: '[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.' This definition is much more similar to the definition of insanity under Article 31(1)(a) of the ICC Statute because it covers both its first element and the two alternatives of its second element.

Furthermore, as stated in the Explanatory Notes of the US Model Penal Code, the expression 'lack of substantial capacity' in section 4.01(1) means: (a) the impossibility for the accused to appreciate the criminal nature of his conduct due to: (i) a lack of awareness of what is being done; (ii) an error in the material circumstances; or (iii) a failure to perceive the significance of his conduct; or (b) the accused's substantial lack of volitional capacity to act in accordance

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24 *Idem.*

25 Cited by: Keedy, E.R., 1952, 'Irresistible Impulse as a Defense in the Criminal Law', *University of Pennsylvania Law Review*, Vol. 100, No. 7, pp. 956-993, p. 957.

with the law[26]. As a result, the meaning given to the expression 'lack of substantial capacity' in section 4.01(1) is consistent with Eser's interpretation of the second element of insanity under Article 31(1)(a) of the ICC Statute[27].

Moreover, according to section §5K2.13 of the Guidelines Manual of the US Sentencing Commission[28], where a mental impairment does not exclude criminal liability, a reduction of sentence should be guaranteed whenever the accused suffered a significant reduced mental capacity during the commission of the crime, and that reduced mental capacity has contributed to the materialization of the punishable act[29].

The definition of insanity in civil law jurisdictions is similar to its definition in section 4.01(1) of the US Model Penal Code because criminal responsibility is excluded whenever the accused is not able to appreciate the unlawfulness of his conduct or to control it in accordance with the law[30].

In this regard, section 20 of the German Criminal Code states that "[w]hoever, at the time of the commission of the offence, is incapable of appreciating the unlawfulness of the act or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound disturbance of consciousness, mental deficiency or any

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26 American Law Institute, 1985, Model Penal Code. Official Draft and Explanatory Notes, p. 89: http://www.icla.up.ac.za/images/un/use-of-force/western-europe-others/UnitedStatesofAmerica/Model%20Penal%20Code%20United%20States%20of%20America%201962.pdf [last accessed: December 31, 2016].

27 Eser, A., 2016, supra n. 15, p. 1139.

28 US Sentencing Commission, 2013, *Guidelines Manual Annotated*, p. 463: https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf [last accessed: December 31, 2016].

29 Idem. For the US Sentencing Commission, reduced mental capacity is defined as the deterioration of the capability to: (1) understand the illegality of the conduct, understand the crime or exercise the use of reason; or (2) control the conduct despite being aware of its illegality.

30 Ambos, K., 2013, supra n. 10, p. 318.

other serious mental abnormality is deemed to act without guilt.'[31]. Moreover, according to section 21 of the German Criminal Code, [i]f the offender's capacity to appreciate the unlawfulness of the act or to act in accordance with any such appreciation is substantially diminished at the time of the commission of the offence due to one of the reasons indicated in section 20, the penalty may be mitigated pursuant to section 49 (1).' As a result, the regulation of insanity provided for in sections 20 and 21 of the German Penal Code is consistent with its regulation in Article 31(1)(a) of the ICC Statute and Rule 145(2)(a)(i) of the RPE.

A similar regulation of insanity can be found in Article 122(1) of the French Penal Code (1994), which defines it as follows: '[w]ho, at the time of the commission of the act, suffered from a psychic or neuropsychic disorder that has annulled his discernment or control of his acts.'[32]. According to this definition, criminal liability is only excluded when the psychic or neuropsychic disorder of the accused annuls his cognitive or volitional ability at the time the crime occurs. Moreover, article 122(1) enshrines the notion of reduced mental capacity when the psychic or neuropsychic disorder only disrupts the accused's discernment or makes it difficult to control his conduct.

As a result, and apart from the different treatment of the accussed's volitional incapacity by those common law jurisdictions that follow the *M'Naghten* rule, the following common features of the definition of insanity at the national level can be found: (i) the mental disorder that impairs the accused's cognitive or volitional capacities must take place at the moment of the commission of the wrongful conduct (extemporaneous mental disorders, which are unrelated to the unlawful conduct, do not qualify as insanity); (ii) the accused's mental disease or defect must affect substantially his cognitive or volitional capacities; and (iii) the distinction between insanity and reduced mental capacity depends on the degree of impairment of the

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31 German Criminal Code: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0147 [last accessed: December 31, 2016].

32 French Criminal Code: https://www.legislationline.org/download/id/8546/file/France_CC_am012020_fr.pdf [last accessed: December 31, 2016].

accused's cognitive or volitional capacities. Pursuant to Article 21(1)(c) of the ICC Statute, these common features must be taken into consideration when interpreting the definition of insanity under Article 31(1)(a) of the ICC Statute.

3. The elements of duress under Article 31(1)(d) of the ICC Statute

According to Article 31(1)(d) of the ICC Statute, duress requires that '[t]he conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) [m]ade by other persons; or (ii) [c]onstituted by other circumstances beyond that person's control.'

3.1. The first element: the threat

The first element of the definition of duress under Article 31 (1)(d) of the ICC Statute consists of the following three sub-elements (i) the existence of a threat for the accused or another person of (ii) imminent death or continuing or imminent serious body harm, whose cause (iii) must not be related to the accused's conduct (the threat must thus come from other persons or other circumstances beyond the accused' control).

According to the first sub-element, a threat, understood as an 'objective situation in which, under certain conditions, damage is likely to occur', must exists at the time the crime is committed[33]. Therefore, 'the threat must be objectively given and not merely exist in the

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[33] Ambos, K., 2005, *La parte general del derecho penal internacional, bases para una elaboración dogmática*, Berlin, Konrad-Adenauer-Stiftung, p. 478.

perpetrator's mind.'[34]. Moreover, a 'threatening context', 'a mere abstract danger' or 'an elevated probability that a dangerous situation might occur' (as a result, for instance, of the omnipresence of the Gestapo in the *Third Reich*) would not suffice, unless there is concrete evidence of the likelihood of harm against the accused or another person[35].

With respect to continuous threats, duress requires concrete evidence that the damage against the accused or a third person can occur at any time[36]. As the ICTY Appeals Chamber has found in the Kvocka et. al. case, even if the evidence put forward by defendants Kvocka and Prlac show that they were been taken to the detention camp under threat, the absence of evidence suggesting that they continued working under threat makes duress inapplicable[37].

Likewise, at the national level, the Court of Appeals of England and Wales in the case of R v. Hudson and Taylor (1971) has also stated that '[i]t is essential for the defense of duress that the threat be effective at the time the crime is committed. The threat must be a 'present' threat in the sense that it is effective to neutralize the will of the accused at that time.'[38]. Thus, if the threat loses its neutralizing effect, or if the threat of future violence is so remote that it falls short to dominate the will of the accused, the defense of duress will not succeed, since the accused cannot justify a crime only to ensure

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34 Eser, A., 2016, supra n. 15, p. 1151; See also: Cryer, R., Friman, H., Robinson, D. & Wilmshurst, E., 2010, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2 Ed., p. 408.

35 Eser, A., 2016, supra n. 15, p. 1151; Ambos, K., 2013, supra n. 10, pp. 357 et. seq.; Werle, G. & Jessberger, F., 2014, *Principles of International Criminal Law*, Oxford, Oxford University Press, marginal 638.

36 Werle, G. & Jessberger, F., 2014, supra n. 35, marginal 638.

37 ICTY, The Prosecutor v. Miroslav Kvocka, Mlado Radic, Zoran Zigic & Dragoljub Prcac, Appeals Chamber, *Judgment*, February 28, 2005, Case No.: IT-98-30/1/A, paras. 221 and 645.

38 Court of Appeals of England and Wales, Regina v. Hudson and Taylor, Criminal Division, *Judgment*, March 17, 1971, Case No.: 3715/A/70 and No. 3721/A/70: http://www.bailii.org/ew/cases/EWCA/Crim/1971/2.html [last accessed: December 31, 2016].

its own peace of mind[39]. This is the situation when an accused, who joined a rebellion under threat, remains with the rebel group after the initial threat has lost its neutralizing effect and his will has had the opportunity to be reaffirmed[40].

Ugandan case law has also highlighted that there must be tangible facts that show that the threat curtails the accused's will in such way that it leads him to commit the crime[41]. This is consistent with Article 31(1)(d) of the ICC Statute because the threat must not only exist in the accused's mind, but it must have an objective existence and be able to be effective on the accused[42].

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39 Idem. As the Court of Appeals has put it: 'Similarly a threat of future violence may be so remote as to be insufficient to at the moment when the offence was committed, or the accused may have elected to commit the offence in order to rid himself of a threat hanging over him and not because he was driven to act by immediate and unavoidable pressure. In none of these cases is the defense of duress available because a person cannot justify the commission of a crime merely to secure his own peace of mind.'

40 McCrowther's Case (1746) and Foster's Crown Cases 13: A-G v. Whelan (1934) (I.R.518), cited by Ormerod, D. & Laird, K. 2014, *Smith and Hogan's Text, Cases and Materials on Criminal Law*, Oxford, Oxford University Press, 11th Ed., P. 370.

41 Supreme Court of Uganda at Mengo, Kasirye Hamuza, Cpl and Ors v. Uganda, *Judgment*, May 18, 2004, Criminal Appeal No.: 44/2001, UGSC 36. This decision interprets section 14 of the Ugandan Penal Code, which defines the defense of compulsion, as follows: 'A person is not criminally responsible for an offence if it is committed by two or more offenders and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or her or do him or her grievous bodily harm if he or she refuses; but threats of future injury do not excuse any offence.'

42 Some proposals made during the ICC Statute negotiation process argued that any person who believed to be under threat should also be covered by duress; See: United Nations, General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, September 13, 1996, UN Doc. No.: 22A (A/51/22), Vol. II (Compilation of Proposals), p. 101: 'Article P. Duress / Coercion. 1. A person [is not criminally responsible and] is not liable for punishment if the person acts under duress or coercion. 2. A person acts under duress or coercion if:

The second sub-element provided for in Article 31(1)(d) of the ICC requires a threat of 'imminent death or continued or imminent serious bodily harm.'[43]. In the German High Command case, the US Military Tribunal acting under Law No. 10 of the Allied Control Council has highlighted the relationship between the notions of imminence and immediacy by stating that the execution of superiors' orders, due to fear of threats that are not immediate, does not constitute duress[44]. Moreover, the ICTY has emphasized in the Erdemovic case that the term 'imminent threat' can refer to: (i) a threat that, despite its earlier occurrence in time, can be considered the overall cause of the multiple crimes committed; or (ii) an immediately preceding threat that must exist before each criminal act[45].

Finally, concerning the third sub-element, Eser highlights that Article 31(1)(d) of the ICC Statute makes clear that the threat must not be related to the accused's conduct. Therefore, it must come from

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[(a) [the person reasonably believes thatl there is a threat of [imminent] [present] or otherwise unavoidable] [unlawful] force or use of such force against that person or another person]; […]'.

43 Ambos, K., 2005, supra n. 33, p. 478.

44 US Military Tribunal Nuremberg, United States of America v. Wilhelm von Leeb et. al. (known as 'German High Command Trial'), *Judgment*, October 27, 1948, Case No. 12.

45 In the Erdemovic case before the ICTY, the accused pleaded guilty to seventy counts of murder during the Srebrenica Massacre. In his guilty plea, he also claimed that he only committed such acts because otherwise they would have killed him. Trial Chamber II convicted him for crimes against humanity and accepted that he acted under duress. Nevertheless, Trial Chamber II did not exonerate Erdemovic from criminal liability, but it only considered duress as a mitigating factor. The Appeals Chamber upheld Trial Chamber II's decision. In his dissenting opinion, Judge Cassese (para. 16) found that the requirement of an imminent threat to life or bodily integrity is one of the essential elements of duress; See: ICTY, the Prosecutor v. Drazen Erdemovic, Trial Chamber II, *Sentencing Judgment,* November 19, 1996, Case No.: IT-96-22-T, paras. 89-91; ICTY, the Prosecutor v. Drazen Erdemovic, Appeals Chamber, *Judgment*, October 7, 1997, Case No.: IT-96-22-A; ICTY, The Prosecutor v. Drazen Erdemovic, Appeals Chamber, *Separate and Dissenting Opinion of Judge Cassese*, October 7, 1997, Case No. IT-96-22-A, paras. 11-49.

the conduct of other persons, or from other circumstances (such as natural forces or technical menaces) beyond the accused' control[46].

The ICC Statute does not impose any requirements on the relationship between 'the coercer and the coerced.'[47]. Thus, the threat may come from any person or entity and not necessarily from a superior. Ambos[48] and Bassiouni[49] have pointed out that this is a very relevant issue because the highest commanders do not have any superior who could threat them to make them act under duress.

Bantekas & Nash[50], Cryer et. al[51]. and Kittichaisaree[52] underscore that it is necessary to analyse whether the accused conduct has contributed to cause the threat subsequently suffered[53], such as in cases in which the treat to commit the crimes is posed by members of a criminal group to which the accused willingly joined. Likewise, the US Military Tribunal in the *Einsatzgruppen* case has found that coercion is not applicable when the accused, before receiving the illegal order causing the treat, knew that this could be a logical step in the execution of a clearly illegal project to which the accused voluntarily joined[54].

At the national level, common law jurisdictions also reject the application of the defense of duress in cases of voluntary membership in illegal or rebellious groups. As cited by the Court of Appeals of

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46 Eser, A., 2016, supra n. 15.

47 Ambos, K., 2002, 'Other Grounds of Excluding Criminal Responsibility', In Cassese A., Gaeta, P. & Jones, R. W. D. (Eds), *The Rome Statute of the International Criminal Court: A Commentary,* Oxford, Oxford University Press, Vol. 1, p. 1038.

48 Ibid., p. 1022.

49 Bassiouni, M.C., 1999, Crimes against Humanity in International Criminal Law, Leiden, Martinus Nijhoff Publishers, 2 Ed., p. 491.

50 Bantekas, I. & Nash, B., 2009, International Criminal Law, Oxford and Portland, Routledge/Hart, pp. 108-112.

51 Cryer, R. et. al., 2010, supra n. 34, p. 410.

52 Kittichaisaree, K., 2001, supra n. 18, p. 263.

53 Bantekas, I. & Nash, B., 2009, supra n. 50, pp. 108-112.

54 US Military Tribunal Nuremberg, United States of America v. Ohlendorf et. al. (known as the *Einsatzgruppen* case), *Judgment*, April 8, 1948, Case No. 9, para. 480.

England and Wales in the Regina v. Hasan case, in the R v. Fitzpatrick [1977] case was stated that, '[i]f a person voluntarily exposes and submits himself, as the appellant did, to illegal compulsion, he cannot rely on the duress to which he has voluntarily exposed himself as an excuse either in respect of the crimes he commits against his will or in respect of his continued but unwilling association with those capable of exercising upon him the duress which he calls in aid'[55].

3.2. The second element: the necessity and proportionality of the response to the threat

According to Article 31(1)(d) of the ICC Statute, the second element of duress refers to the necessary and reasonable nature of the accused's response to the threat.

For Eser, the necessity requirement means that 'the act directed at avoiding the threat must be necessary in terms that no other means are available.'[56]. Furthermore, Ambos points out that 'it is clear that the means used should be apt and efficient, that the harm should be limited to that absolutely necessary to avoid the threat […]'[57].

The US Military Tribunal in the Flick et. al. case has analysed whether the accused persons' conduct was limited to meet the threat, or it went beyond what was strictly required to offset the threat, which would suggest the voluntariness of their conduct. For the Tribunal, the defendants 'increased the production quota beyond what was required which was determinative of the rejection of their plea of duress'[58].

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55 R. v. Fitzpatrick, 1977 was cited in: Court of Appeals of England and Wales, Regina v. Hasan (Respondent) (On Appeal from the Court of Appeal (Criminal Division)) (formerly Regina v. Z (2003) (On Appeal from the Court of Appeal (Criminal Division)), Criminal Division, *Judgment*, March 17, 2005, Case No.: [2005] UKHL 22: https://www.bailii.org/uk/cases/UKHL/2005/22.html [last accessed: December 31, 2016].

56 Eser, A., 2016, supra n. 15.

57 Ambos, K., 2002, supra n. 47, p. 1040.

58 US Military Tribunal Nuremberg, United States of America v. Flick et. al., Judgment, December 22, 1947, Case No. 5, paras. 1199-1200; See also:

In relation to the reasonability requirement, Cryer et. al. considers that '[t]he reactions of the person seeking to use the defense must be both necessary and reasonable in the circumstances to avoid the threat. The test is similar to that of proportionality in self-defense.'[59]. Bantekas & Nash also use the term 'proportionality' when referring to the reasonability requisite[60], which is defined by Eser as 'being able to reach the desired effect, as well as adequate in terms of not being unreasonably disproportionate.'[61]. Finally, for Ambos, even though Article 31(1)(d) of the ICC Statute doesn't expressly require proportionality as in the case of self-defense under Article 31(1)(c), the difference is only terminological[62]. Hence, there seems to be a common understanding in the doctrine about the reasonability requisite as a proportional response by the accused's conduct to the threat[63].

The negotiation process of the ICC Statute leads to a similar conclusion. In this regard, the coordinator of the ICC's Preparatory Committee considered, already in 1996, that one of the main concerns of States with respect to the definition of duress was: '[…] (e) the necessity that a proportionality exists between the harm that has been avoided and the harm caused by the accused.'[64]. The issue if raise by the Twelfth Report of the Special Rapporteur on the Draft Code of Crimes against the Peace and Security of Mankind (1994)[65].

Joyce, M., 2015, 'Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse', Leiden Journal of International Law, Vol. 28, No. 3, pp. 623-642, p. 638.

59 Cryer, R. et. al., 2010, supra n. 34, p. 410.

60 Bantekas, I. & Nash, B., 2009, supra n. 50, pp. 108-112.

61 Eser, A., 2016, supra n. 15.

62 Ambos, K., 2005, supra n. 33, p. 466.

63 Kittichaisaree, K., 2001, supra n. 18, p. 263.

64 United Nations, General Assembly, 1996, Report of the Preparatory Committee on the Establishment of an International Criminal Court, supra n. 42, p. 101.

65 United Nations, International Law Commission, Twelfth Report on the Draft Code of Crimes against the Peace and Security of Mankind, May 2 – July 22, 1994, UN Doc. No.: A/CN.4/460, p. 31: https://digitallibrary.un.org/record/187305?ln=es#record-files-collapse-header [last accessed: December 31, 2016]. According to the Special Rapporteur, '[t]he requirement of proportionality between the good or preserved interest and the

Finally, the US Military Tribunal in the *Einsatzgruppen* case has also established that 'it would not be an adequate excuse, for example, if a subordinate under orders murders a person he knows is innocent because by not obeying, he would risk spending days in reclusion.'[66]. Moreover, in the Krupp et. al. case, the US Military Tribunal has found that the damage that defendant Krupp could have suffered (the loss of his factory) is insufficient to satisfy the requisite of proportionality[67], since the possibility of being sent to a concentration camp was only theoretical[68].

3.3. The third element: the intention to not cause a greater harm than the one to be avoided

According to Article 31(1)(d) of the ICC Statute, the third element of duress requires that the accused who invokes it did not have the intention to cause a greater harm than the one sought to

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good or sacrificed interest was emphasized, in particular in the Krupp case and others.'

66 US Military Tribunal Nuremberg, *Einsatzgruppen case*, supra n. 54, paras. 477-480.

67 Joyce, M., 2015, supra n. 58.

68 According to the US Military Tribunal in the Krupp et. al. case (para. 1444), '[i]f we may assume that as a result of opposition to Reich policies, Krupp would have lost control of his plant and the officials their positions, it is difficult to conclude that the law of necessity justified a choice favourable to themselves and against the unfortunate victims who had no choice at all in the matter. Or, in the language of the rule, that the remedy was disproportionate to the evil. In this connection it should be pointed out that there is a very respectable authority for the view that the fear of the loss of property will not make the defense of duress available.' Moreover, in the IG Farben Trial (para 1178), the US Military Tribunal compared the threat caused by the Third Reich and the policies of the German government with the benefits that the factories obtained from using forced labour. The Tribunal concluded that the use of forced labour was neither necessary nor proportional, Moreover, it brought about personal benefit for the accused; See: US Military Tribunal Nuremberg, United States of America v. Krupp et. al., Judgment, July 31, 1948, Case No. 10.

be avoided. For Ambos[69] and Werle[70], this requirement causes the subjectivation of duress because, as in common law jurisdictions, it implies the need to analyse the intention of the accused at the time the crime is committed.

The case law of the ICTY and the ICTR is not useful to interpret this subjective requirement because the definition of duress in their statutes does include a similar requisite. The same applies to the case law of the military tribunals established in accordance with Law No. 10 of the Allied Control Council[71]. All these tribunals limit their analysis to study whether the accused is in a position to have moral choice at the time the crime is committed. As a result, as Joyce has highlighted, '[the] evaluation of the intention of the accused as to the level of harm caused amounts to a subjective element which has not been previously employed in cases of necessity or duress'[72].

This third element, which can be proven through the speeches given by the accused, the plans in which he is involved and preparatory, concurrent and subsequent events to the commission of the crimes[73], must be read in conjunction with the other two elements of duress under Article 31(1)(d) of the ICC Statute. As a result, it should be *prima facie* considered as met whenever the accused manages to act reasonably through a proportional response to the threat, as this shows that he tried to balance the legal interest that he tried to protect and the legal interests that he harmed.

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69 Ambos, K., 2002, supra n. 47, p. 1041.

70 Werle, G., 2011, supra n. 12, p. 342.

71 According to US Military Tribunal Nuremberg, *Einsatzgruppen case*, supra n. 54, '[t]he true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible; See also Joyce, M., 2015, supra n. 58, p. 639.

72 Joyce, M., 2015, supra n. 58, p. 639.

73 In the Decision for a Warrant of Arrest against Al Bashir (the only ICC decision on genocide to date), the accused's genocidal intent to destroy in whole or in part the Fur, Zaghawa and Masalit ethnic groups is analysed by Pre-Trial Chamber I based on his plans and speeches; See: ICC, the Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, March 4, 2009, ICC Doc. No.: ICC-02/05-01/09-3.

4. The application of insanity and duress to the Ongwen case

In light of the above analysis the question arises as to whether insanity and duress are applicable in the Ongwen case. Concerning insanity, it is first necessary to overcome the reductionist distinction made by International Criminal Law between 'victims' and 'perpetrators'[74], which is not applicable to those rather common and complex situations where perpetrators are also victims of international crimes[75]. Indeed, it is very likely that the LRA's abduction, torture and brutal training of Ongwen at a very young age had a relevant impact on his cognitive and volitional development[76].

Nevertheless, in the absence of medical reports that may bring about additional information, this is not *per se* sufficient to prove the defendant's deprivation of his capacity: (i) to appreciate the unlawfulness or nature of the acts of murder, torture, cruel treatment, inhumane acts, slavery, attacks against personal dignity, pillaging, destruction of property and persecution, with which he has been charged; or (ii) to control his conduct to refrain from said acts to follow the requirements of the law. Moreover, there is no sign of impairment in Ongwen's psychomotor system, as his physical skills and abilities have been essential to survive in very hostile conditions since he was a child and move up quickly in the LRA's military organization.

As a consequence, as required by insanity in Article 31(1)(a) of the ICC Statute, it is up to the Defense to prove by medical reports and other evidence that Ongwen abduction, torture and brutal training by the LRA substantially impaired his cognitive or volitional capacities in relation to each of the charges confirmed by Pre-Trial Chamber II[77]. If any of the two elements of this defense cannot be

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74 Justice and Reconciliation Project, 2008, Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen p. 4: http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf [last accessed: December 31, 2016].

75 Ibid., p. 12.

76 Ibid., p. 16.

77 ICC, the Prosecutor v. Jean-Pierre Bemba Gombo, Trial Chamber III, *Decision on Sentence pursuant to Article 76 of the Statute*, June 21, 2016, ICC Doc. No.: ICC-01/05-01/08, para. 19; ICC, the Prosecutor v. Thomas Lubanga,

proven in relation to some of the crimes, any cognitive or volitional impairment suffered by Ongwen at the time in which they were committed could only be considered as a mitigating factor in sentencing, as provided for in rule145 (2)(a)(i) of the RPE.

With respect to duress, the Defense claims that the threat that led Ongwen to perpetrate the crimes: (i) came from the 'supreme and only leader' of the LRA (Kony)[78]; (ii) was likely to be carried out because the LRA was an illegal armed group that had sufficient capacity to launch significant attacks and exercise widespread and systematic violence, including against their own members; and (iii) persisted over time. As a result, for the Defense, even though Ongwen reached one of the highest positions in the LRA, Kony always remained as the supreme leader of the group with authority over the accused[79].

Even if the Defense could prove all these claims, it would still have to prove that: (i) Ongwen did not remained voluntarily in the LRA after he turned 18 and became aware of the risk that remaining in the LRA posed to his life and physical integrity; (ii) Ongwen's conduct was a response to Kony's persistent threats; (iii) Ongwen's conduct was necessary and reasonable (in the sense of proportional) to avoid

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Trial Chamber I, *Decision on Sentence pursuant to Article 76 of the Statute*, July 10, 2012, ICC Doc. No.: ICC-01/04-01/06, para. 34; ICC, the Prosecutor v. Germain Katanga, Trial Chamber II, *Decision on Sentence pursuant to Article 76 of the Statute*, May 23, 2014, ICC Doc. No.: ICC-01/04-01/07-3484-tENG, para. 34; See also: ICTY, the Prosecutor v. Milan Babic, Appeals Chamber, *Judgment on Sentencing Appeal*, July 18, 2005, Case No.: IT-03-72-A, para. 43; ICTY, the Prosecutor v. Milomir Stakic, Appeals Chamber, *Judgment*, March 22, 2006, Case No.: IT-97-24-A, para. 406.

78 For Pre-Trial Chamber II, [t]he undisputed leader of the organisation was Joseph Kony, from whom emanated all important decisions. To maintain his tight grip on the organisation, Joseph Kony also successfully invoked possession of mystical powers.'; See: ICC, *Ongwen Confirmation of Charges Decision*, *supra* n. 6, para. 26.

79 See, for instance, the alleged killing of Vincent Otti (one of LRA's highest commanders) in execution of Kony's orders; See: Diocese of Northern Uganda, 2007, *How Vincent Otti was Killed*, December 10, 2007: http://dioceseofnorthernuganda.blogspot.com.co/2007/12/how-vincent-otti-was-killed.html [last accessed: December 31, 2016].

Kony's threats; and (iv) Ongwen did not want to cause a greater harm than the one he was trying to avoid.

There are several reasons why it is very unlikely that the Defence may succeed in proving all these elements. First, although Ongwen was conscripted against his will as a child into a group with a strong sense of hierarchy, he held several command positions (for instance, in 2002 he was the commander of the Oka battalion and in 2003 he became the second in command of the *Sinia* brigade) prior to becoming in 2004, due to his excellent performance in the LRA' operations[80], one of the highest commanders of the LRA. This allowed him to give orders to his subordinates[81] and to suggest operations to Kony[82]. As a result, it does not seem that Ongwen remained against his will in the LRA once he was 18 or that his participation in the crimes with which he is charged was always a necessary response to Kony's threats.

Moreover, according to several victims, Ongwen had a large degree of autonomy to decide how to comply with Kony's orders, and therefore he could have easily escaped from the LRA when traveling to execute LRA's operations[83]. Furthermore, if due attention is giving to the crimes of sexual slavery and pillage with which Ongwen is charged, it is evident that, if the can they proven, the accused raped the victims and took their property to obtain a personal benefit, since he could have avoided committing these crimes without risking his

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80 ICC, Ongwen Confirmation of Charges Decision, supra n. 6.

81 Ibid., para. 27.

82 According to Pre-Trial Chamber II, '[t]he evidence demonstrates that Dominic Ongwen devised the plan to attack Lukodi, and sought and obtained permission from Joseph Kony for the attack – this particular radio communication was intercepted on 17 May 2004.'; See: ICC, *Ongwen Confirmation of Charges Decision*, *supra* n. 6, para. 36.

83 Wong, M., 2016, 'Making a Murderer in Uganda', *Foreign Policy*, January 20, 2016: http://foreignpolicy.com/2016/01/20/making-a-murderer-dominic-ongwen-uganda-icc/?wp_login_redirect=0 [last accessed: December 31, 2016].

life[84]. As a result, neither the necessity nor the proportionality requirement are met.

Finally, at least in relation to the crimes in which he obtained a personal gain, it seems unlikely that Ongwen did not want to cause greater harm than the harm he was allegedly trying to avoid. To say otherwise it would be necessary for the Defense to prove that: (a) said personal benefit was not relevant when deciding how to carry out the LRA's operations in which the crimes were committed; and that (b) Ongwen's main consideration when planning them was how not to cause a greater damage[85].

In conclusion, and given Ongwen's high command position in the LRA and his autonomy to carry out Kony's orders, it is very unlikely that he was not in a position to avoid and/or to put an end to any threat to his life or his physical integrity coming from any member of the LRA, including Kony. At the very least, it appears that Ongwen had always the opportunity to leave the LRA. Furthermore, several crimes with which Ongwen has been charged do not appear to constitute a necessary and proportional response to any threat that he might have received from Kony. Moreover, he could have acted in a much less damaging way for the victims, especially in relation to victims of sexual slavery and pillage. Finally, even though we are not in a situation to assess Ongwen's intention, it is very unlikely that the Defense can prove that Ongwen acted with the intent to not cause a greater harm than the one sought to be avoided.

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84 See, for instance, the systematic pillage committed in October 2003 by Ongwen and his subordinates in Paujule displacement camp.

85 For instance, in relation to the attack on Ludoki (May 19, 2004), Ongwen asked Kony's authorization to launch it. After obtaining Kony's authorization, Ongwen commanded the attack and gave instructions to attack and murder indiscriminately all the persons in the camp; See: ICC, *Ongwen Confirmation of Charges Decision*, supra n. 6, para. 36.

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21. Are girls under the age of 15, who are taken as wives or partners by members of an armed group participating in a non-international armed conflict, protected from sexual violence perpetrated against them by their partners or by other members of the armed group to which they belong?

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1. Introduction

The determination as to which groups of persons are protected by IHL in NIACs is still a controversial issue. At the same time, it is an issue of undoubted relevance, given the fact that more than ninety percent of current armed conflicts are of a non-international character[1]. This work analyzes the following aspect of this discussion: are girls under 15 years of age protected by IHL in the face of violence committed against them by members of the group that has enlisted or recruited them?

The analysis focuses on the sexual violence suffered between 2002 and 2003 by girls under 15 years of age within the *Forces Patriotiques pour la Libération du Congo* (FPLC). These acts of sexual violence are a part of the ICC case against Bosco Ntaganda, deputy commander of operations of the FPLC, which was established as a military arm of the *Union des Patriotes Congolais* (UPC) in mid-2002. Both movements, military and political, were commanded between July 2002 and August 2003 by Thomas Lubanga Dyilo, former governor of the Ituri district of the Democratic Republic of Congo, and the first person to be convicted and sentenced by the ICC[2].

To address this issue, we first study whether, within the context of a NIAC, the protection offered by IHL to the civilian population, including girls under 15 years of age, is limited only to violence committed by members of a party to the conflict with which the victim is not affiliated; or, alternatively, whether IHL protection of the civilian population extends to violence inflicted by members of all parties to the conflict.

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1 *Escola de Cultura de Pau*, 2004, *Alerta 2004! Informe sobre conflictos, derechos humanos y construcción de paz*, *Escola de Cultura de Pau*, p. 17; See also: Rodríguez-Villasante, J.L., 2013, '*La pérdida de la inmunidad de las personas civiles por su participación directa en las hostilidades*', *Cuadernos de Estrategia*, Instituto Español de Estudios Estratégicos, Vol. 160, p. 167; Fernández, J., Miralles, F., & González, B., 2001, *Adiós a las armas: ni un solo niño en la guerra*, Madrid, UPCO, p. 78.

2 ICC, the Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, *Decision on sentence pursuant to Article 76 of the Statute*, July 10, 2012, ICC Doc. No.: ICC-01/04-01/06.

In IACs, IHL limits its protection to acts committed against the civilian population by the enemy, in terms of nationality -the traditional approach- or by other distinctive signs such as ethnicity, as stated by the ICTY[3]. As a result, it is necessary to analyze if the same limitation applies in NIACs, or if it is not applicable because NIACs develop within the territory of one State between parties that are distinguished by their political, social or economic ideas. Only if the limitation is not applicable, will the civilian population in NIACs be protected from acts of violence by IHL regardless of which party perpetrates it.

Secondly, we study whether girls under 15 years of age, who are recruited or enlisted to comply with duties as 'wives' or 'partners' of the commanders of organized armed groups, should be considered members of the group under IHL; or, alternatively, whether they should be considered members of the civilian population protected by IHL, despite living with the armed group in question.

In the latter case, it will also be necessary to analyze whether the activities that they commonly carry out to assist their 'husbands' or 'partners' can be characterized as direct participation in hostilities. If this is found to be true, the protection they enjoy under IHL is lost during the time in which they undertake those activities. Otherwise, if the functions they perform do not merit such qualification, they retain their protection as members of the civilian population, despite the assistance they offer to their 'husbands' or 'partners'.

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[3] ICTY, the Prosecutor v. Dusko Tadic, Appeals Chamber, *Appeal Judgment*, July 15, 1999, Case No.: ICTY-94.1-A, paras. 166-169; ICTY, the Prosecutor v. Tihomir Blaskic, Trial Chamber I, *Judgment*, March 3, 2000, Case No.: IT-95-14-T, paras. 126-127; ICTY, the Prosecutor v. Dario Kordic & Mario Cerkez, Trial Chamber III, *Judgment*, February 26, 2001, Case No.: IT-95-14/2-T, para. 152; ICTY, the Prosecutor v. Stanislav Galic, Trial Chamber I, *Judgment*, December 5, 2003, Case No.: IT-98-29-T, paras. 45-53; and ICTY, the Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic & Vladimir Santic, Trial Chamber II, *Judgment,* January 14, 2000, Case No.: IT-95-16-T, paras. 522-523.

Finally, we examine whether some groups that are particularly vulnerable to violence during a NIAC, and, especially, girls under 15 years, enjoy a special regime of protection.

2. Is there any limitation to IHL protection of the civilian population in NIACs because of affiliation to a party to the conflict?

The defense of Bosco Ntaganda states that girls under 15 years of age, enlisted or recruited in a NIAC, are only protected against the parties to the conflict with which they do not have affiliation[4].

On this point, Common Article 3 to the GCs states that every person who does not participate directly[5] in hostilities in a NIAC is protected '[…] without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.'

The ICRC states that the intention of Common Article 3 is to achieve a general protection for those who are not participating directly in hostilities, regardless of their affiliation with any of the parties to the conflict[6]. Furthermore, according to the ICRC, the parties to the conflict should strive for a wide application of Common Article 3, meaning that restrictive interpretations that include distinctions that are not present in the text should be avoided[7].

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4 ICC, the Prosecutor v. Bosco Ntaganda, Defense of Bosco Ntaganda, *Defense application in relation to counts 9 and 6 pursuant to Article 19 and Rule 58*, September 1, 2015, ICC Doc. No.: ICC-01/04–02/06–804-ENG, paras. 23-24, 28-29.

5 Melzer, N., 2010, *Guía para interpretar la noción de participación activa en las hostilidades según el Derecho Internacional Humanitario,* Geneva, ICRC, p. 43.

6 Pictet, J., 1952, Commentary to the first Geneva Convention, ICRC, section on paragraph 1 of Common Article 3.

7 In addition to Common Article 3, Article 31.1 of the Vienna Convention on the Law of the Treaties should be considered. According to this provision, treaties must be interpreted '[…] in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The object and purpose of a treaty

As a result, the protection provided by Common Article 3 to the civilian population, including girls under 15 years of age, does not depend on their affiliation with a party to the conflict. It extends, in principle, to all acts of violence, including those of a sexual nature, committed by any of the parties to the conflict[8].

3. Are girls who act as 'wives' or 'partners' of members of the parties to a NIAC members of these groups?

In a NIAC, persons protected by IHL are, in principle, all persons who are not members of the armed forces of the State in which territory the conflict is taking place[9]. Armed forces consist of all groups and units that, according to that State's internal law, form part of or are ascribed to the armed structures, including armies of land, sea and air, the police, the military intelligence, the reservists and, if applicable, police units and civil intelligence[10].

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is especially relevant when its goal is to provide protection to those who do not directly participate in hostilities.

8 United Nations, Security Council, Resolution 2106 (2013), *Sexual violence in conflict*, June 24, 2013, UN Doc. No.: S/RES/2106; See also: United Nations, Secretary General, *Report to the General Assembly on sexual violence related to the conflict*, January 13, 2012, UN Doc. No.: S/2012/33, pp. 2, 6, paras. 17-18; United Nations, Secretary General, *Report to the Security Council on sexual violence related to the conflict*, March 23, 2015, UN Doc. No.: S/2015/203, paras. 7, 18, 29, 61, 64, 83; United Nations, Office of the Special Representative of the Secretary General for Children and Armed Conflict (2013), *The six grave violations against children during armed conflict: the legal foundation*, Working Paper No. 1, p. 16.

9 ICRC, 2008, 'Interpretative guidance on the notion of direct participation in hostilities under International Humanitarian Law. Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009.', *International Review of the Red Cross*, Vol. 90, No. 872, p. 1004; See also: ICC, the Prosecutor v. Jean Pierre Bemba Gombo, Pre-Trial Chamber II, *Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo*, June 15, 2009, ICC Doc. No.: ICC-01/05-01/08-424, para. 78.

10 Henckaerts, J.M. & Doswald-Beck, L., 2005, *Customary International Humanitarian Law*, Vol. 1, Cambridge, Cambridge University Press & ICRC, pp. 11-17.

The protection offered by IHL to those who are not members of the armed forces of the relevant State is automatically lost by becoming a member of an organized armed group[11]. The loss of protection has effect throughout the duration of their membership in the group[12]. On this basis, even in specific moments when they are not carrying out military operations (for example when they are on leave), they can be, according to IHL, the target of an attack, as long as their membership to the group continues[13].

The ICRC uses a functional criterion to distinguish between those who are members of an organized armed group and those who are not[14]. As Williamson points out, only those who have a continuous combat function are considered members of the group[15], which means that membership to the group is not necessarily expressed through the use of uniforms, insignias or identification cards[16]. Schmitt has underlined that, according to this functional criterion, those who participate directly in hostilities in a prolonged manner should be considered members of the group[17].

As a consequence, individuals who prepare, execute or command military operations of an organized armed group for a long term maintain a continuous combat function[18]. The same characterization applies to those who are enlisted, recruited, trained and equipped to conduct hostilities in name of the group, regardless of whether any hostile act has actually taken place[19].

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11 Article1 (1) of AP II; See also: Schmitt, M., 2010, 'The interpretative guidance on the notion of direct participation in hostilities: a critical analysis', Harvard National Security Journal, Vol. 1, pp. 5-44, p. 21.

12 Idem.

13 Idem.

14 ICRC, 2008, supra n. 9, p. 1006.

15 Williamson, J.A., 2010, 'Challenges of twenty-first century conflicts: a look at direct participation in hostilities', Duke Journal of Comparative and International Law, Vol. 20, pp. 457-471, p. 464.

16 ICRC, 2008, supra n. 9, p. 1006.

17 Schmitt, M., 2010, supra n. 11, p. 21.

18 Melzer, N., 2009, Interpretive guidance for the notion of active participation in the hostilities under International Humanitarian Law, Geneva, ICRC, p. 34.

19 ICRC, 2008, supra n. 9, p. 1007.

On the other hand, individuals who support or accompany an organized armed group during a prolonged period of time, but without carrying out functions that involve direct participation in hostilities, cannot be considered as members of the group[20]. The same is true for those who limit their activity inside the group to recruitment, financing or training, unless they have an additional function that can link them directly to hostilities[21]. Individuals who acquire, manufacture and do weapons maintenance, or who carry out intelligence work, apart from specific military operations, also maintain their protection[22].

On this basis, IHL distinguishes between those girls under 15 years of age who are enlisted or recruited by an organized armed groups to be trained and equipped for the purpose of participating in a prolonged and direct manner in hostilities, and those who are enlisted or recruited to accompany or assist the group continuously, but without carrying out activities of direct participation in hostilities.

Even though it is necessary to undertake a case-by-case analysis in order to make such determination, the cases against Thomas Lubanga Dyilo and Bosco Ntaganda demonstrate that, as a general rule, girls under 15 years of age do not undertake activities which could be qualified as direct participation in hostilities in a prolonged manner[23]. Therefore, despite accompanying the group permanently and being the 'wives' or 'partners' of their members and commanders, they do not assume a continuous combat function and therefore cannot be considered as members of the group.

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20 Ibid., p. 1008.

21 Ibid., p. 1021.

22 Ibid., pp. 1008, 1021-1022.

23 ICC, the Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, *Judgment pursuant to Article 74 of the Statute*, March 14, 2012, ICC Doc. No.: ICC-01/04-01/06-2842, paras. 878-882, 892; ICC, the Prosecutor v. Bosco Ntaganda, Pre-Trial Chamber II, *Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda*, June 9, 2014, ICC Doc. No.: ICC-01/04-02/06-309, para. 82.

4. Do 'wives' or 'partners' of members of the parties to a NIAC carry out activities of direct participation in hostilities?

In a NIAC, protection can also be lost without becoming a member of one of the parties to the conflict, through the performance of occasional activities of direct participation in hostilities on behalf of one of the parties, and against the other[24].

Common Article 3 limits its protection to '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause.' Meanwhile, Article 13(3) of the AP II –as well as Article 51(3) of AP I in relation with IACs- establishes that protected persons maintain their protection unless they take direct participation in hostilities and for the time such participation takes place.

Therefore, when applying these provisions, it is necessary to distinguish between, on the one hand, acts that are considered direct participation in hostilities, and, on the other hand, acts that do not imply the loss of protection. In this regard, the ICRC has stated that for a specific activity to be considered as direct participation in hostilities it must fulfill the following three requirements: (a) damage threshold; (b) direct causation; and (c) belligerent nexus[25].

The damage threshold requires the objective probability that the relevant act can adversely affect the military operations or the military capacity of one of the parties to the conflict[26] or, alternatively, can cause death, injury or destruction to protected persons or goods[27]. Direct causation requires the existence of a causal nexus between the damage threshold and the act in question, whether considered individually or as part of a coordinated military operation of which it constitutes an integral part[28]. In this regard, the preparatory acts for the implementation of a military operation, the deployment to

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24 Melzer, N., 2009, supra n. 18, pp. 45-64, 70.
25 ICRC, 2008, supra n. 9, p. 1016.
26 Idem.
27 Ibid., p. 1017.
28 Ibid., p. 1019.

the place of execution and the return from it are an integral part of the military operation[29]. Finally, the belligerent nexus requires that the relevant act must be specifically designed to directly cause the required damage threshold in favor of a party to the conflict and to the detriment of another[30].

As discussed in detail by Báez et. al[31]., Schmitt differs with the ICRC on some aspects concerning the content of the three abovementioned requirements[32]. Nevertheless, such differences of interpretation do not affect the conclusion that acts of sexual nature coercively engaged in by girls under 15 years of age recruited by the FPLC in favor of the commanders or other members of the group with which they were married, fail to meet any of the requirements.

This conclusion is reached by finding that these acts (a) are not suitable by themselves to directly cause the required damage threshold; (b) are not an integral part of any military operation that might generate such damage threshold; and (c) do not have the belligerent nexus required, since they are not specifically designed to cause harm to any FPLC adverse party.

Girls under the age of 15, who were recruited by the FPLC, conducted other kinds of activities such as domestic work, including culinary tasks[33], transporting food to airbases and accompanying the other wives of the commanders[34]. Even though each of these activities should be analyzed independently, the Majority of ICC Trial Chamber I stated, in the Lubanga case, that none of these tasks met the requirements to be considered as direct participation in hostili-

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29 Idem.

30 Ibid., p. 1025.

31 Castillo Forero, S., Lozano Pradere, F., Mateus Ramírez, L. & Molano Araque, A., 2012, *Pérdida de la condición de persona protegida durante los conflictos armados,* International Law Clinic: https://www.urosario.edu.co/Clinica-Juridica-Internacional/documentos/2012-Semestre-II-Perdida-de-la-Condicion-de-Person/.

32 Schmitt, M., 2010, supra n. 11, pp. 5-44.

33 ICC, Lubanga Trial Judgment, supra n. 23, para. 623; ICC, Ntaganda Confirmation of Charges Decision, supra n. 23, para. 82.

34 Idem.

ties[35]. This suggests that girls who were enlisted or recruited by the FPLC never lost their protection under IHL.

In this regard, it is important to mention that the English version of Common Article 3 has led to confusion by using the adjective 'active' to describe the form of participation in hostilities that generates the loss of protection, rather than the adjective 'direct' found in other IHL instruments[36]. In this context, the ICRC states that the terms 'active' and 'direct' should be understood as synonyms, being that the French and Spanish versions of the text only use the expression '*directament/ directamente*'[37]to describe the form of participation in hostilities that generates the loss of protection[38]. Consequently, for the ICRC, both adjectives represent the same level and degree of participation in hostilities[39]. The ICTR came to the same conclusion in the Akayesu case[40].

Nevertheless, the ICC Trial Chamber I drew a distinction between 'active participation' and 'direct participation' in the Lubanga case, when interpreting the war crime of using children to participate actively in hostilities provided for in Article 8(2)(e)(vii) of the ICC Statute[41]. ICC Trial Chamber I considered that, in the context of this crime, the expression 'active participation' includes both the use of children for activities of direct participation as well as for activities of a different nature, which entail an effective contribution to hostilities. This would include, for instance, girls who, without being involved in combat, are used as bodyguards of the group's commanders[42].

It is worth highlighting that the distinction made by ICC Trial Chamber I between 'direct participation' and 'active participation'

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35 Idem.

36 Articles 47, 51 (3) and 77 (2) of AP I; See also: Articles 4(3)(c), 4(3)(d) and 13(3) of AP II.

37 In French '*directement*'; in Spanish '*directamente*'.

38 ICRC, 2008, supra n. 9, p. 1014.

39 Idem.

40 ICTR, the Prosecutor v. Jean Paul Akayesu, Trial Chamber I, *Judgment*, September 2, 1998, Case No.: ICTR-96-4-T, para. 629.

41 ICC, Lubanga Trial Judgment, supra n. 23, para. 628.

42 Idem.

in hostilities has been limited, to date, to the interpretation of said war crime. It has not been used to widen the category of activities that cause the loss of protection under IHL in general. As a result, when determining whether the activities carried out by girls under 15 years of age in favor of the group that has enlisted or recruited them result in their loss of protection, it is only necessary to analyze whether these activities meet the requirements to be considered as direct participation in hostilities.

As noted, when applying these criteria, ICC Trial Chamber I considered in the Lubanga case that neither the activities of a sexual nature, nor any other of the activities carried out by girls under the age of 15 enlisted or recruited by the FPLC, constituted a direct participation in hostilities that would result in a loss of their protection under IHL. Moreover, according to the Majority of Trial Chamber I[43], those activities, including those of a sexual nature, do not meet even the most flexible requirements of active participation, in as much as these activities never provided an effective contribution to hostilities[44].

When discussing the specific issue of sexual activities carried out by girls below the age of 15 who were enlisted or recruited by the FPLC, ICC Pre-Trial Chamber II, in the Ntaganda Confirmation of Charges Decision, has added that it is not possible that the role of a sexual partner occurs simultaneously with the role of active participation in hostilities[45].

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43 Ibid., paras. 622-623.

44 For a different view: ICC, the Prosecutor v. Thomas Lubanga Dyilo, 'Separate and dissenting opinion by judge Odio Benito', in *Judgment pursuant to Article 74 of the Statute*, March 14, 2012, ICC Doc. No.: ICC-01/04-01/06-2842.

45 ICC, *Ntaganda Confirmation of Charges Decision*, supra n. 23, para. 79. Grey takes the same position due to the special protection that Article 4(3) of AP II offers to girls under 15 years of age because of their special vulnerability; See: Grey, R., 2014, 'Sexual violence against child soldiers', *International Feminist Journal of Politics*, Vol. 16, No. 4, p. 611.

5. The scope of the special protection of girls under 15 years of age in NIACs

An integrated interpretation of IHL, International Human Rights Law and International Criminal Law[46], which departs from the traditional conception of IHL as *lex specialis* in armed conflict situations[47], provides wide protection to girls under the age of 15 in NIACs.

This protection goes beyond the general protection provided to civilians under IHL; it arises from the vulnerable character of children in general [48] and, especially, girls under the age of 15. It is manifested in the Convention on the Rights of the Child of 1989[49], the

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46 Droege, C., 2008, 'Elective affinities? Human rights and humanitarian law', *International Review of the Red Cross*, Vol. 90, No. 871, pp. 501-548.

47 The distinction between IHL and IHRL as *lex specialis* and *lex generalis* has become obsolete in the doctrine and has not been accepted by the case law of regional human rights courts; See: Milanovic, M., 2014, 'The lost origins of *lex specialis*: rethinking the relationship between human rights and International Humanitarian Law', in Ohlin, J. (ed.), Theoretical boundaries of armed conflict and human rights, Cambridge, Cambridge University Press; Isupova, M.V., 2013, 'Interrelationship between International Humanitarian Law and International Human Rights Law in the process of fragmentation of International Law', *Russian Juridical Journal / Rossijskij Juridiceskij Zurnal*, Vol. *92*, No. 5, pp. 43-48.

48 Hernández, D.M., 2000, *'Menores y conflicto armado'*, *Revista Derecho del Estado*, No. 9, pp. 145-166.

49 Outside the specific scope of armed conflicts, Article 3 of the Convention on the Rights of the Child provides as follows: '1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.' Moreover, Article 19 of the Convention provides as follows: '1. States Parties shall take all appropriate legislative, ad-

GCs and its APs, the ICC Statute and Resolutions 1882 (2009), 1960 (2010) and 2016 (2013) by the UN Security Council.

In this context, the Office of the Special Representative of the UN Secretary General for Children and Armed Conflict has stressed that IHL offers a special protection to boys and girls, inasmuch as Common Article 3 and Article 27 of the Geneva Convention IV, as well as Articles 75(2), 76(1) and 77(1) of AP I and 4(2)(e) of AP II, provide that outrages against life, physical integrity and personal dignity, as well as humiliating or degrading treatment, such as sexual violence and any form of indecent assault, especially to children, are absolutely prohibited[50].

For its part, the UN Security Council has reiterated the special protection afforded to children on several occasions. Initially, Resolution 1882 (2009) provided that their protection must be a part of every general strategy to resolve an armed conflict[51] and strenuously

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ministrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent (s), legal guardian (s) or any other person who has the care of the child. 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.'. The Committee on the Rights of the Child, in its General Comment No. 13 of April 18, 2011, stated that Article 19 of the Convention must be understood in the broadest possible context to remove and combat all forms violence against children, excluding any violence however slight and protecting them in any type of environment or in transit between environments; See: United Nations, Committee on the Rights of the Child, *General comment No. 13 (2011) - The right of the child to freedom from all forms of violence*, April 18, 2011, UN Doc. No.: CRC/C/GC/13, paras. 7, 19.

50 United Nations, Office of the Special Representative of the Secretary General for Children and Armed Conflict, 2013, supra n. 8, p. 16; See also: Henckaerts, J.M. & Doswald-Beck, L., 2005, supra n. 10; Article 22 of the African Charter on the Rights and Welfare of the Child.

51 United Nations, Security Council, Resolution 1882, 2009, Children on armed conflict, August 4, 2009, UN Doc. No.: S/RES/1882 (2009), p. 2.

condemned any violation of International Law in respect of children, including rape and any act of sexual violence[52].

Likewise, in Resolution 1960 (2010), the UN Security Council reiterated '[…] its demand for the complete cessation with immediate effect by all parties to armed conflict of all acts of sexual violence,'[53] in order to improve the effectiveness of the protection that children and women have as civilians, as well as the special protection they have as a population exposed to specific kinds of risks[54].

Nevertheless, none of these resolutions explicitly mentions the mental, physical and sexual abuses suffered by children that are enlisted or recruited by a party to an armed conflict at the hands of their members.

For this reason, UN Security Council Resolution 2106 (2013) makes reference to these forms of violence, emphasizing that IHL prohibits rape and other forms of sexual violence[55]. The resolution also recognizes that girls and women who are recruited to be part of an armed force or organized armed groups are especially vulnerable to this type of violence[56].

In the same sense, reports by the UN Secretary-General to the UN General Assembly and the UN Security Council have stressed that within certain armed conflicts there are cases in which the perpetrators of sexual assault against the recruited women and girls are the members of the same group the victims are a part of[57].

Furthermore, the UN Secretary-General has considered that sexual violence against women and girls recruited by the parties of a conflict is directly linked to their strategic, ideological and financial objectives. Furthermore, it is especially used with the aim of promot-

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52 Idem.

53 United Nations, Security Council, Resolution 1960, 2010, Women, peace and security, December 16, 2010, UN Doc. No.: S/RES/1960(2010), p. 3.

54 Ibid., p. 2.

55 United Nations, Security Council, Resolution 2106, 2013, supra n. 8, p. 2.

56 Ibid., p. 6.

57 United Nations, Secretary General, 2012, supra n. 8, paras. 17, 18; United Nations, Secretary General, 2015, supra n. 8, paras. 7, 18, 29, 61, 64, 83.

ing tactical imperatives such as recruitment, generation of income by sexual trafficking or slavery, indoctrination and modification or dissolution of kinship ties that bind women and girls with their communities[58].

The observations of the Committee on the Rights of the Child to Article 19(1) of the Convention, which provides for the protection of children against all forms of abuse, can be interpreted in the same manner[59]. The Committee, which defines 'caregivers' of children as any person who has the care of a child[60], has observed that '[c]hildren may be subjected to violence by primary or proxy caregivers and/or by others against whom their caregiver does provide protection.'[61]. Thus, according to the Committee, children are not only subjected to violence by outsiders, but also by persons who are close to them or have their care[62]. This definition is important in the context of armed conflicts, since those parties to the conflict that recruit or enlist children are responsible for them, and their members can thus commit acts of physical, mental and sexual violence against them.

Finally, International Criminal law also offers protection to children under the age of 15 years from the parties to an armed conflict that have recruited or enlisted them. In particular, Article 8(2)(b)(xxiii) of the ICC Statute, in respect to IACs, and Article 8(2)(e)(vii), for NIACs, contemplate the war crime of 'conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.' As ICC Trial Chamber I has stated in the Lubanga case, the protection offered by Article (8)(2)(e)(vii) of the ICC Statute extends in time and includes

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58 United Nations, Secretary General, 2015, supra n. 8, paras. 82, 83.

59 Weissbrodt, D., Hansen, J. C., & Nesbitt, N. H., 2011, 'The role of the Committee on the Rights of the Child in interpreting and developing International Humanitarian Law', *Harvard Human Rights Journal*, Vol. 24, No. 1, pp. 115-153.

60 United Nations, Committee on the Rights of the Child, 2011, supra n. 49, para. 33.

61 Ibid., para. 36.

62 Idem.

acts committed against children by the members of their own group, once they have been enlisted or recruited[63].

Considering all the foregoing, it can be said that children below the age of 15 enjoy special protection in both IACs and NIACs[64]. This protection extends to acts of sexual violence committed by members of national armed forces or organized armed groups that enlist or recruit them. As a consequence, the acts of sexual violence committed by commanders and members of the FPLC against girls under the age of 15 who were made their partners or wives constitute a violation of this special protection regime.

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63 For ICC Trial Chamber I in the Lubanga case, the distinction between recruiting and enlisting is in the consent of the child, since both are methods of incorporation to a national armed force or an organized armed group, but recruitment is made through coercion, while enlisting is voluntary. Nevertheless, even if the child consents, such expression of consent does not represent a valid defense in regard to the punishable act, considering that the coercive environment of an armed conflict does not meet the necessary circumstances for children under the age of 15, that actually have a limited capacity to consent due to their young age, to do so validly. Moreover, according to ICC Trial Chamber I, the war crimes of enlisting and recruiting of children under the age of 15 are crimes of a continuing nature, meaning that they are still being committed while the child continues to be linked to the group that enlisted or recruited him/her or until they turn 15 years of age. As a result, protection against enlisting and recruiting is not limited to the initial act of enlisting or recruiting, but it extends in time. Furthermore, protection is not only confined to the acts by members of the parties to the conflict with whom children are not linked, but it is also extended to acts committed against children by members of their own group, once their enlistment or recruitment has become effective; See: ICC, *Lubanga Trial Judgment*, supra n. 23, paras. 607, 617- 618; See also: SCSL, the Prosecutor v. Moinina Fofana & Allieu Kondewa, President of the Residual SCSL, *Public decision of the president on application for conditional early release*, August 11, 2014, Case No.: RSCSL-CDF/836/SCSL-04-14-ES-836-ENG, para. 15.

64 Matthews, H., 2013, 'The interaction between International Human Rights Law and International Humanitarian Law: seeking the most effective protection for civilians in non-international armed conflicts', *International Journal of Human Rights*, Vol. 17, No. 5/6, p. 635.

6. Conclusion

Girls below the age of 15 enlisted or recruited by the parties to a NIAC have a general protection as a part of the civilian population under IHL, as long as they do not have a continuous combat function, nor participate directly in hostilities. At the same time, constituting a group especially vulnerable to violence in NIAC, these girls enjoy a special protection, as it is provided in the Convention on the Rights of the Child, the GCs, the APs, the ICC Statute and UN Security Council Resolutions 1882 (2009), 1960 (2010) and 2106 (2013).

These general and special protections are not limited to aggressions by members of the opposing party, as stated by the defense in the Ntaganda case, but girls under the age of 15 years are also protected from sexual violence that is inflicted by members of the group that enlisted or recruited them, even in cases where they are taken as wives or partners of the commanders. As a result, girls below the age of 15 enlisted or recruited from 2002 to 2003 by the FPLC of Thomas Lubanga and Bosco Ntaganda were holders of this protection.

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22. Content and scope of the war crime of ordering an act of displacement of the civilian population under article (8)(2)(e)(VIII) of the ICC Statute

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1. Introduction

This work addresses the question of whether an 'order' alone is punishable under Article 8(2)(e)(viii) of the ICC Statute, regardless of the execution of the unlawful displacement. It also addresses the objective and subjective elements of this war crime, applicable to NIACs, in light of the following notions of (i) punishable preparatory acts; (ii) 'ordering' as mode of individual criminal liability; (iii) effective control under superior's responsibility; and (iv) indirect perpetration as an organized structure of power. This work concludes with a brief analysis of the notions of civilian safety and military necessity, as grounds for exemption from criminal liability.

1.1. Ordering the displacement of the civilian population as a punishable preparatory act, and its relation to the crime against humanity of forcible displacement

Ordering the forcible displacement of a civilian population is forbidden by: (i) Article 17 of AP II[1], (ii) Rule 129 (B) of the ICRC's study on customary IHL[2], and (iii) Article 8(2)(e)(viii) of the ICC Statute. The latter prohibits '[o]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand'.

Article 17 of AP II does not prohibit the 'order' itself. It only forbids the actual act of forcible displacement of the civilian population. For Willms, this is the most appropriate interpretation of the prohi-

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1 For Article 17 of AP II: '1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand […]. 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict'.

2 Henckaerts, J.M. & Doswald-Beck, L., 2005, *Customary International Humanitarian Law*, Vol. 1, Cambridge, Cambridge University Press & ICRC, Rule 129 (B). According to this Rule, '[p]arties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand'.

bition against ordering a forcible displacement, because, if only the order, but not the actual act of forcible displacement, is considered a crime, governments and insurgents would be encouraged to resort to indirect means to carry out acts of forcible displacement[3]. This would be in contradiction to the object and purpose of AP II, which is to ensure better protection for the victims of NIACs[4]. The preparatory works of AP II strengthen Willms interpretation because they use the expression 'forcible displacement' to include both direct and indirect means of carrying it out[5].

Most national legislation, and national case law, also forbid forcible displacement, without requiring the existence of an actual order[6]. Likewise, there are several resolutions of the UN Security Council and the UN General Assembly that condemn forcible displacement as such[7]. From these resolutions it can be inferred that States supporting such resolutions agree that an actual order is not necessary to condemn forcible displacement.

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3 Willms, J., 2009, 'Without order anything goes? The prohibition of forced displacement in non-international armed conflict', *International Review of the Red Cross*, Vol. 91, No. 875, pp. 547-565, p. 551.

4 Idem.

5 ICRC, 1971, *Conference of government experts on the reaffirmation and development of International Humanitarian Law applicable in armed conflicts 24 May - 12 June 1971*, Vol. VI, p. 29, n. 9.

6 The following instances of State practice contain an explicit reference to NIACs: (i) Canada: Law of Armed Conflict Manual (2004), p. 17 (under the heading of violations of AP II); (ii) Colombia: Basic Military Manual (1995), p. 77; (iii) The Netherlands: Military Manual (1993), p. ix; (iv) New Zealand: Military Manual (1992), para. 1823(1); (v) Georgia, Criminal Code (1999), Article 411(2). Some national tribunals have also taken this approach. See for instance the Constitutional Court of Colombia, *Judgment*, May 18, 1995, Constitutional Case No.: C-225/95, para. 33.

7 United Nations, Security Council, Resolution 1556 (2004), *Report of the Secretary-General on the Sudan*, July 30, 2004, UN Doc. No.: S/RES/1556; United Nations, General Assembly, Resolution 61/232 (2007), *Situation of human rights in Myanmar*, March 13, 2007, UN Doc. No.: A/RES/61/232; United Nations, General Assembly, Resolution 55/116 (2001), *Situation of human rights in Sudan*, March 12, 2001, UN Doc. No.: A/RES/55/116.

According to Rule 129 (B) of the ICRC's study on Customary International Humanitarian Law**,** parties to a NIAC must avoid any act of displacement caused by their own acts[8], especially those caused by acts contrary to IHL[9]. Thus, for the ICRC, the use of direct and indirect means, which may cause the displacement, are also forbidden.

Regarding Article 8(2)(e)(viii) of the ICC Statute, doctrine is divided. On the one hand, it is highlighted that the scope of application of this war crime must be broadly interpreted. As a result, according to the object and purpose of the prohibition contained in AP II, 'ordering' should be interpreted as any voluntary action that causes the displacement[10].

A second position argues that Article 8(2)(e)(viii) of the ICC Statute punishes the issuance of the order of displacement as a preparatory act[11], regardless of the execution of the act of displacement[12]. According to this interpretation, any action different from issuing an order (for instance, instigating) would not be included in Article 8(2)(e)(viii). In support of this position, Dörmann holds that the first element of the crime was drafted for the purpose of underlining the criminal liability of the person who issues the order (and not of those who carry out the act of displacement in furtherance of the order)[13].

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8 Henckaerts, J.M. & Doswald-Beck, L., 2005, supra n. 2, p. 461.

9 Idem.

10 Sivakumaran, D., 2002, *The law of non-international armed conflict*, Oxford University Press, p. 285.

11 Roch, M.P., 1996, 'Forced displacement in the former Yugoslavia: a crime under International Law?', *Dickinson Journal of International Law*, Vol. 14, No. 1, p. 14; Carey, C.M., 1999, 'Internal displacement: is prevention through accountability possible? A Kosovo case study', *American University Law Review*, Vol. 43, p. 267.

12 According to Byron, who quotes Zimmerman, the expression 'ordering' narrows the scope of unlawful displacement. According to this provision, situations where conflict-related dangers compelled civilians to escape are not included as part of the crime. See: Byron, C., 2013, *Studies in International Law: war crimes and crimes against humanity in the ICC Statute of the International Criminal Court,* Manchester, Manchester University Press, p. 184.

13 Dörmann, K., 2003, *Elements of war crimes under the ICC Statute of the International Criminal Court*, Cambridge, Cambridge University Press & ICRC, p. 472.

The roots of Article 8(2)(e)(viii) of the ICC Statute can be traced back to Article 17 of AP II, which has been interpreted by the ICRC as establishing an obligation that the parties to a NIAC not carry out an act that directly or indirectly may cause the displacement of the civilian population. Nevertheless, the literal interpretation of Article 8(2)(e)(viii) of the ICC Statute expressly forbids 'ordering the displacement of the civilian population'.

In addition to the clarity of the language used in Article 8(2)(e)(viii) of the ICC Statute to define the war crime of 'ordering the displacement', Article 22 (2) of the ICC Statute requires the definition of such crime to be strictly construed, and not to be extended by analogy. Hence, it is not possible to resort to the interpretative criteria provided for in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties to extend the scope of application of the crime of 'ordering the displacement.'

As a result, while in Article 17 of AP II, the parties to a NIAC are responsible for acts that directly, or indirectly, cause displacement of the civilian population, this is not the case for Article 8(2) (e) (viii) of ICC Statute. According to the latter, criminal liability only arises from the issuance of an order to displace, regardless of whether such an order leads to an act of displacement.

Therefore, Article 8(2)(e)(viii) contains the second punishable preparatory act provided for in the ICC Statute: the first one being the public and direct incitement to commit genocide provided for in Article 25(3)(g) of the ICC Statute. According to this last provision, provoking a third party to commit a crime entails, by itself, criminal liability if the act was 'public' and 'direct'[14]. It is not necessary to prove that the expected result of genocide was achieved[15]. In addition, from a subjective perspective, the crime of incitement requires

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14 ICTR, the Prosecutor v. Jean Paul Akayesu, Trial Chamber I, *Judgment*, September 2, 1998, Case No.: ICTR-96-4-T, paras. 554-558.

15 ICTR, the Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze, Trial Chamber I, *Judgment*, December 3, 2003, Case No.: ICTR-99-52-T, para. 678.

the intent to trigger the commission of genocide by a third party[16]. In other words, the relevant intent is the instigator's intent to cause the required state of mind in a third party[17].

Cassese argues that the punishable preparatory acts contained in the ICC Statute are not limited to these two types but also include the issuance of any order that instructs the commission of any of the crimes provided for in the ICC Statute. Therefore, for this author, anyone who gives an illegal order incurs criminal liability, even if their subordinates did not execute the order. Hence, it would be sufficient for a superior to be criminally liable for 'ordering', if the superior intended for the order to be executed and knew that it would cause the commission of a crime provided for in the ICC Statute. According to Cassese, the case of Jacob H. Smith, tried in 1902 by a US Martial Court, and the case of Wilhem List et. al. (known as 'the hostages case'), tried in 1947 by a US Military Court under Law No. 10 of the Allied Control Council, support his interpretation[18].

Nevertheless, as seen in the next section, international case law since the 1990s does not follow this approach. On the contrary, it is considered that, unless expressly provided for (as in Article 8(2) (e) (viii) of the ICC Statute), ordering constitutes, under International Criminal Law, a mode of liability for a crime that has been completed (or at least attempted).

As a consequence, the International Law Clinic finds it necessary to resort to other provisions contained in the ICC Statute (such as the crime of forcible displacement contained in Article 7(1)(i)) to affirm criminal liability for acts different from 'ordering', which directly or indirectly have led to the displacement of the civilian population. According to Art. 7 (1)(i) of the ICC Statute, it is necessary for the act of displacement to have been carried out, or at least to have been attempted. Moreover, it is necessary for the contextual elements of

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16 Abtani, H. & Webb, P., 2008, *The genocide convention: the travaux préparatoires*, Leiden, Martinus Nijhoff Publishers.

17 ICTR, *Akayesu Trial Judgment*, supra n. 14, para. 560.

18 Cassese, A., Baig, L., Fan, M., Gaeta, P., Gosnell, C. & Whiting, A., 2013, *Cassese's International Criminal Law*, Oxford, Oxford University Press, 2 Ed., p. 204.

CAH provided for in Art. 7 of the ICC Statute to be proven. Hence, the act of displacement must be part of a widespread or systematic attack against a civilian population in furtherance of the policy of a State or organization.

1.2. Objective and subjective elements

According to the EC, the war crime of 'ordering the displacement of the civilian population in NIACs is comprised of the following elements:

1. The perpetrator ordered a displacement of a civilian population.
2. Such order was not justified for the security of the civilians involved or by military necessity.
3. The perpetrator was in a position to effect such displacement by giving such order.
4. The conduct took place in the context of, and was associated with, an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.'

In the absence of ICC case law on Article 8(2) (e) (viii) of the ICC Statute, the analysis focuses on the case law of other international criminal tribunals on "ordering" as a mode of liability for a crime that has been completed, or at least attempted. Moreover, in the following two sections, the requirement that 'the person was in a position to effect displacement by giving an order', and the lack of justification due to the security of civilians or military necessity will be analyzed. The last two of the above elements will not be studied because they are common to all war crimes.

The case law of the *ad hoc* tribunals provides for the objective and subjective elements of an order. The first element requires the order (be it implicit or explicit, oral or written) to be given by a superior in a position of authority regarding the material perpetrator, or the

intermediate commander, who receives the order[19]. Consequently, it is possible to have a chain of orders passed through several levels of intermediate commanders.

Since ordering an act of displacement constitutes a punishable preparatory act, according to Article 8(2) (e) (viii) of the ICC Statute, there is no need to reach the stage of attempt. As a result, the position of authority should be understood as relative to those who receive the order. Thus, to prove the position of authority, it is first necessary to identify those to whom the order is issued and their positions within the group[20].

It is important to highlight that the superior issuing the order may have a position of authority over small-armed groups having limited operational capacity, such as small paramilitary groups. He can also hold a position of authority over intermediate commanders or material perpetrators, who do not belong to the same organization (for instance, a military commander responsible for an area in which a paramilitary group operates, who instructs the head of such paramilitary group to commit crimes)[21]. Hence, to prove the existence of a

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19 ICTR, the Prosecutor v. Ephrem Setako, Trial Chamber I, *Judgment and sentence*, February 25, 2010, Case No.: ICTR-04-81-T, para. 240; ICTY, the Prosecutor v. Vujadin Popovic, Ljbisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero & Vinko Pandurevic, Trial Chamber II, *Judgment*, June 10, 2010, Case No.: IT-05-88-T, Vol. 1, para. 1012. A position of authority by the person issuing the order that causes the commission (or attempted commission) of the crime by the person who receives it must be proven. See also: ICTR, the Prosecutor v. Laurent Semanza, Appeals Chamber, *Judgmen*t, May 20, 2005, Case No.: ICTR-97-20-A, para. 361; ICTY, the Prosecutor v. Stanislav Galic, Appeals Chamber, *Judgment*, November 30, 2006, Case No.: IT-98-29-A, para. 176; ICTY, the Prosecutor v. Dario Kordic & Mario Cerkez, Appeals Chamber, *Judgment*, December 17, 2004, Case No.: IT-95-14/2-A, para. 28.

20 ICTY, *Galic Appeal Judgment*, *supra* n. 19, para. 176. See also: Olasolo, H., 2013, *Tratado de autoría y participación en Derecho Penal Internacional*, Valencia, Tirant lo Blanch, p. 623.

21 ICTR, the Prosecutor v. Jean de Dieu Kamuhanda, Appeals Chamber, *Judgment*, September 22, 2005, Case No.: ICTR-99-54A-A, para. 76. According to the ICTR Appeals Chamber, a direct order to the perpetrator of the crime is not required. Moreover, the order does not require any specific form.

position of authority, there is no need to prove a superior-subordinate relationship (the latter is no more than *indicia* of the existence of a position of authority)[22].

An omission without a previous positive act cannot constitute an order[23]. Although an omission is not an order, it can be considered as circumstantial evidence of the existence of a previous positive act amounting to an order[24].

Regarding the subjective elements, these vary according to different ICC case laws. If one follows ICC Pre-Trial Chamber I's case law, which has endorsed the notion of *dolus eventualis*, the person issuing the order must only be aware of the substantial likelihood that his order could cause the act of displacement. However, if one follows the case law of the ICC Pre-Trial Chamber II and ICC Trial Chamber II, which requires as a minimum a *dolus directus* of second degree, the person issuing the order must act with the awareness that the order issued is sufficient to cause the act of displacement (certainty, as opposed to substantial likelihood, is required)[25].

1.3. Capacity to cause the displacement of the civilian population through the order

The elements of the war crime of ordering the displacement of the civilian population require that the person be 'in a position to effect such displacement by giving such order'. Thus far, this element has not been elaborated upon by ICC case law or doctrine.

The International Law Clinic considers that such an element does not refer to the superior's authority to order, because in the case of an absence of such authority, there could not be any order. As a result, this element requires that: (i) those that receive the order must have the authority to transmit it to the potential material perpetra-

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22 Olasolo, H., 2013, supra n. 20, p. 622.

23 ICTY, *Galic Appeal Judgment*, supra n. 19, para. 176. See also: Olasolo, H., 2013, supra n. 20, p. 623.

24 ICTY, *Galic Appeal Judgment*, supra n. 19, paras. 176-177.

25 Olasolo, H., 2013, supra n. 20, p. 629.

tors of the crime; and (ii) the potential material perpetrators must have the capacity to cause the act of displacement. Hence, it is necessary for the organization to have a sufficiently broad membership, as well as the logistical and operational capacity, to implement the displacement order in the field.

These two requirements make it necessary to analyze the main characteristics of: (a) the organization within which the order is issued; or, in cases in which the order is given from outside the organization; (b) the organization receiving the outside instructions to carry out the act of displacement.

The above-mentioned requirements are met by those organizations to which the notion of indirect perpetration is applicable, because they are organized on the basis of the principle of automatic compliance with the superior's orders, due to their hierarchical structure and the interchangeability of their members[26]. Examples include, military units, police units, intelligence agencies, and other federal, regional, and local public institutions (particularly in big cities).

The notion of indirect perpetration is also applicable to non-state organizations, so long as they are organized in accordance with the principle of automatic compliance with the superior's orders. Nevertheless, the Lubanga case has shown the difficulties for any one person to maintain control over a non-state organization, particularly when there are several sub-groups within it, and divisions are fostered by intelligence agencies of several States[27].

Organizations which are not organized on the basis of the principle of automatic compliance with the superior's orders (such as some paramilitary groups, drug cartels and opposition armed

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26 ICC, the Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Pre-Trial Chamber I, *Decision on the confirmation of charges*, August 14, 2008, ICC Doc. No.: ICC-01/04-01/07-717, paras. 538-539. See also: ICTY, the Prosecutor v. Milomir Stakic, Trial Chamber II, *Judgment*, July 31, 2003, Case No.: IT-97-24-T, paras. 493-494, 498.

27 ICC, the Prosecutor v. Thomas Lubanga Dyilo, Pre-Trial Chamber I, *Decision on the confirmation of charges*, January 29, 2007, ICC Doc. No.: ICC-01/04-01/06-803-tEN, paras. 375-376.

groups), may nevertheless have the organizational, logistical and operational capacity to implement a displacement order (given by their own commanders, or by those in a position of authority over such commanders)[28]. In these situations, a case-by-case analysis must be conducted, focusing particular attention on: (i) the organization's hierarchical structure, and the position held by the person who issues the order; (ii) the organization's size, and the number of its members; and (iii) the organization's technological, logistical, and operational capacity[29]. Moreover, the fact that the order has in the end led to the commission of the act of displacement should also be taken into consideration.

1.4. Lack of justification on the ground of civilian security or military necessity

The EC of the war crime provided for in Art. 8(2)(e)(viii) of the ICC Statute excludes criminal liability when the displacement order is required by military necessity or by the need to secure protection of the civilian population. As a result, in order that criminal responsibility be excluded, it is necessary to prove that: (i) the safety of the civilian population was at risk, and the displacement order was aimed at safeguarding such civilian population; or (ii) there was an imperative military necessity, and the displacement order was aimed at satisfying such necessity. Hence, there is no exemption from criminal liability when the displacement order is used as a war tactic in order to gain a military advantage, gain control over a territory[30], and/or facilitate operations against insurgent groups[31].

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28 ICC, the Prosecutor v. William Samoei Ruto & Joshua Arap Sang, Pre-Trial Chamber II, *Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute*, February 4, 2012, ICC Doc. No.: ICC-01/09-01/11-373, para. 349. See also: ICC, *Katanga & Ngudjolo Confirmation of Charges Decision*, supra n. 26, para. 518; ICTY, *Stakic Trial Judgment*, supra n. 26, paras. 497-498.

29 Idem.

30 Byron, C., 2013, supra n. 12, p. 18.

31 Jacques, M., 2012, *Armed conflict and displacement: the protection of refugees and displaced persons under International Humanitarian Law*, Cambridge, Cam-

It is important to highlight that the ICTY case law makes no difference between those acts of displacement that are justified by military necessity, and those justified on grounds of enhancing safety for the civilian population[32]. The ICTY case law analyzes the evacuation guidelines provided for in GC IV, and determines whether such guidelines were complied with in light of the facts of the case.

As a result, the ICTY has found that acts of displacement would be legal (evacuation) if they comply with the conditions set forth in Article 49 of GC IV: (i) the occupying power may totally or partially evacuate an area if the security of the population or imperative military reasons so demand; (ii) evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory, except when for material reasons it is impossible to avoid such displacement; (iii) members of the same family should not become separated; (iv) evacuated persons shall be transferred back to their homes as soon as hostilities in the area in question have ceased; (v) the occupying power undertaking such transfers or evacuations must ensure, to the greatest practicable extent, that proper accommodation is provided for the protected persons, and that removals are effected in satisfactory conditions of hygiene, health, safety and nutrition; (vi) the protecting power must be informed of any transfers and evacuations as soon as they have taken place; and (vii) the occupying power cannot detain protected persons in an area particularly exposed to the dangers of war, unless the security of the population or imperative military reasons so demand; and (viii) the

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bridge University Press, p. 56.

32 ICTY, the Prosecutor v. Mladen Naletelic & Vinko Martinovic, Trial Chamber I, *Judgment*, March 31, 2003, Case No.: IT-98-34-T, paras. 514-518; ICTY, the Prosecutor v. Radislav Krstic, Trial Chamber I, *Judgment*, August 2, 2001, Case No.: IT-98-33-T, paras. 524-527; ICTY, the Prosecutor v. Milorad Krnojelac, Trial Chamber II, *Judgment*, March 15, 2002, Case No.: IT-97-25-T, para. 475; ICTY, the Prosecutor v. Dusko Tadic, Trial Chamber II, *Judgment*, May 7, 1997, Case No.: IT-95-9-T, para. 125; ICTY, the Prosecutor v. Milan Martic, Trial Chamber I, *Judgment*, June 12, 2007, Case No.: IT-95-11-T, paras. 107-109; ICTY, the Prosecutor v. Radoslav Brdanin, Trial Chamber II, *Judgment*, September 1, 2004, Case No.: IT-99-36-T, paras. 540, 556.

occupying power cannot deport or transfer parts of its own civilian population into the territory it occupies.

As a result, the International Law Clinic finds that a superior who issues a displacement order can be held criminally liable provided they have breached one of the following criteria. Specifically, that such order: (i) be issued in breach of the procedure established in Article 49 of GC IV; (ii) fails to stipulate the temporary nature of the displacement; or (iii) fails to provide for the return of the displaced civilian population to their homes, once the circumstances that justified their displacement have disappeared[33].

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[33] According to the ICTY in the Naletilic & Martinovic and Stakic cases, involuntary displacement gives rise to criminal liability, whether caused by direct or indirect coercion. Lack of opposition or consent to be displaced may suffice in an environment of terror or persecution. Population's consent may not be obtained through agreements between military leaders or politicians. A person can also be criminally liable under Article 7 (1) of the ICTY Statute when civilians are not returned to their homes once the safety conditions have been reestablished. See: ICTY, *Naletilic & Martinovic Trial Judgment*, supra n. 32, paras. 521-532; ICTY, *Stakic Trial Judgment*, supra n. 26, paras. 681-712.

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23. Evidence of facts underlying the contextual elements of crimes against humanity in ICC decisions on the confirmation of charges

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1. Introduction: The suspension of the hearing on the confirmation of charges in the Gbagbo case as an example of the importance of proving the contextual elements of crimes against humanity

This article addresses one of the most important evidentiary issues at the confirmation of charges stage in cases before the International Criminal Court (ICC), that is, whether the factual basis for the contextual elements of crimes against humanity (those acts of violence that constitute a systematic or widespread attack against a civilian

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population in furtherance of the policy of a State or an organization) should, or should not, be proven through the same means of proof as the acts of violence constituting the specific elements of those crimes (murder, torture, enforced disappearance, and the like).

The importance of this issue became evident as a result of the decision adopted by Pre-Trial Chamber (PTC) I on June 3, 2013, in the case against Laurent Gbagbo (former President of Côte d'Ivoire), which postponed the confirmation of charges hearing. This was because the PTC I considered that the indirect evidence presented by the Prosecutor's Office such as reports from international organizations, did not allow for the establishment of "reasonable grounds to believe" that the acts of violence allegedly constituting the contextual elements of the crimes against humanity charged had occurred[1],

In the opinion of the PTC I, there was no reason to justify the Prosecutor's allegations that these acts of violence could be proven through the exclusive use of reports from third parties (such as international organizations, non-governmental organizations, or even national authorities), rather than through the written statements required to establish the existence of reasonable grounds to believe in the existence of the acts of violence which constituted the specific elements of the crimes charged[2].

2. Contextual Elements of Crimes against Humanity

Before analyzing the evidentiary issues, it is necessary to present the content and scope of the different contextual elements of the crimes against humanity which are their target. Crimes against humanity contain two types of elements: contextual and specific. The former has been defined as the essential overall facts within which

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1 ICC, Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11-432, PTC I, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 3 June 2013, pars, 29,30,35,44

2 ICC, Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11-432, PTC I, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 3 June 2013, pars, 31, 32, 35.

the specific elements are framed, since the concurrence of both types of elements in the conduct is required for the punishable act to be established[3].

The specific elements refer to conduct itself consistent with crimes against humanity, as defined in Article 7(1) of the Statute of the International Criminal Court (SICC): murder, extermination, enslavement, deportation or forcible transfer, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence of comparable gravity, persecution of a group or collectivity having its own identity on grounds prohibited by international law, forced disappearance of persons, apartheid, and other inhumane acts of a similar nature intentionally causing great suffering or serious injury to the physical integrity or physical or mental health of the victims.

In a deeper analysis of the contextual elements of crimes against humanity, ICC jurisprudence has divided them into six categories: (a) an attack; (b) directed against "any" civilian population; (c) of a systematic or widespread nature; (d) in furtherance of a State or organizational policy; (e) in which there exists a nexus between the specifically charged conduct and the attack; and (f) the accused knew that such conduct constitutes part of the attack[4].

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3 Werle, G., 2011, International Criminal Law Treaty, Valencia, Spain: Tirant Lo Blanch, pp. 468 and 469; Cryer, R., 2010, An Introduction to International Criminal Law and Procedure. New York, United States: Cambridge University Press, pp. 230 – 245.

4 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, pars. 73 – 88; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, pars. 390-492; CPI, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, pars. 163-221; ICC, Prosecutor v. Kenyatta et al., ICC-01/09-02/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, pars. 108

As regards the requirement that there be an attack, this is understood to mean a course of conduct that involves the multiple commission of the acts of violence set out in Article 7(1) of the SICC as conduct constituting crimes against humanity.

The attack must be directed against "a civilian population." The expression "a" used to describe "a civilian population" suggests that the acts of violence do not necessarily have to be directed against the population affiliated with the enemy in an armed conflict but may be directed against the population itself[5]. The inclusion of the population itself as a potential victim of crimes against humanity is consistent with the fact that this category of crimes does not necessarily have to be committed within the framework of an armed conflict, but may also occur in peacetime[6].

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5 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 1103; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 399; ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, pars 76 -78; TIPY, Prosecutor v. Dusko Tadić, IT-94-1-T, Trial Chamber, Sentencing Judgment, 14 July 1997, pars. 635; TIPY, Prosecutor vs. Goran Jesilic, IT-95-10-T, Trial Chamber, Judgement, 14 December 1999, par. 54.

6 Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, 26 November 1968, Art. 1b; ICC, Situation in the Republic of Kenya, ICC-01/09, PTC II, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Kenya, 31 March 2010, par. 24; ICTY, Prosecutor v. Dusko Tadić, IT-94-1-T, Trial Chamber, Sentencing Judgment, 14 July 1997, par. 251; ITCY, Prosecutor v. Dusko Tadić, IT-94-1-T, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 141; ICTY, Prosecutor v. Zoran Kupreskić et al., IT-95-16-T, Trial Chamber, Judgement, 14 January 2000, par. 577; Cryer, R., 2010, An Introduction to International Criminal Law and Procedure. New York, United States: Cambridge University Press, par. 234; Werle, G., 2011, International Criminal Law Treaty, Valencia, Spain, Tirant Lo Blanch, par. 471; Schabas, W., 2010. The International Criminal Court: A Commentary on the Rome Statute, Oxfordshire, England: Oxford University Press, pp. 144 – 147.

In those cases, in which crimes against humanity are committed within the framework of an armed conflict, the acts of violence must be directed against persons and objects that do not constitute lawful targets under International Humanitarian Law (IHL)[7]. Violence exercised against those who may be the object of attack under IHL does not constitute a crime against humanity[8]. Likewise, collateral civilian damage that is not excessive in relation to the concrete and direct military advantage expected from the capture or destruction of the military objectives under attack cannot be considered crimes against humanity[9]. Furthermore, in those frequent cases where individuals whose status does not correspond to that of civilians are found within a civilian population, those latter do not lose their civil-

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7 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 80; ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 78.

8 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 78; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 1102; ICC, Situation in the Republic of Côte D'Ivoire, ICC-02/11-14, PTC III, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Côte D'Ivoire, 3 October 2011, par. 33; Werle, G., 2011, International Criminal Law Treaty, Valencia, Spain, Tirant Lo Blanch, p. 471.

9 Additional Protocol I to the Geneva Conventions of 1949 relating to the protection of victims of international armed conflicts, 1977, June 8, 1977, Art. 51.5 b) and 57; Additional Protocol II to the Geneva Conventions of 1949 relating to the protection of victims of internal armed conflicts, June 8, 1977, Art. 3.3; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07 - 2635, Trial Chamber II, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, par. 1104; ICTY, Prosecutor v. Milan Martić, IT-95-11-T, Trial Chamber, Decision, 8 March 1996, par. 10; TIPY, the Prosecutor v. Stanislav Galic, Case No.: IT-98-29-T, Trial Chamber I, Judgment, December 5, 2003, pars. 57 and 112; ICTY, the Prosecutor v. Milan Martic, Trial Chamber I, Judgment, June 12, 2007, Case No.: IT-95-11-T

ian status, as underlined by Article 50 (3) of Additional Protocol I, and the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)[10].

An attack against the civilian population must be "systematic or widespread"[11]. To be "systematic" is understood to refer to the organized nature of the acts of violence and their unlikely random occurrence. Likewise, the term "systematic" has been understood either as an organized plan in the development of a policy that follows a regular pattern and results in the continued commission of certain acts of violence, or as a pattern of violence consisting of the regular, non-accidental repetition of similar criminal conduct[12].

As to the term "widespread"[13], an attack is understood to have this nature when it involves acts of violence committed on a large scale. Accordingly, they are characterized by their massiveness, frequency, collective nature, severity, and by the multiplicity of victims[14]. Widespread attacks are defined whether they are carried out over a considerable geographical area over time, or in a small geographical

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10 ICTY, the Prosecutor v. Stanislav Galic, Case No.: IT-98-29-T, Trial Chamber I, Judgment, December 5, 2003, pars 135 – 136; ICTY, Prosecutor v. Zoran Kupreskić et. al., IT-95-16-T, Trial Chamber, Judgement, 14 January 2000, pars. 549; ICTY, the Prosecutor v. Tihomir Blaskic, Trial Chamber, Judgment, March 3, 2000, Case No.: IT-95-14-T, par. 214; ICTR, Prosecutor v. Clément Kayishema et al., ICTR-95-1-T, Judgement, 21 May 1999, par. 179 – 181; ICTR, Prosecutor v Jean Paul Akayesu, ICTR-96-4-T, Judgement, 2 September 1998, par. 582.

11 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009. Par. 83.

12 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 394.

13 Ibid, par. 95.

14 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 200, par. 83.

area in a more concentrated manner, so long as they affect a large number of civilians[15]. In this regard PTC II, in the decision authorizing the investigation into the situation in the Republic of Kenya, defined "widespread to mean the existence of many small-scale acts that, when repeated over time, affect many victims[16].

A systematic or widespread attack against the civilian population must be carried out in pursuance of a policy of a State or an organization. This reinforces the idea that the attack was organized and followed a regular pattern of conduct[17]. In addition, it must also have been carried out in the development of a common plan involving public or private resources. However, the policy does not need to be explicitly defined by the group[18]. In addition, it must also have been carried out in the development of a common plan involving public or private resources. However, the policy does not need to be explicitly defined by the group[19].

In all cases, the policy must emanate from local, regional, or national structures of the State or an organization having the capacity to carry out a systematic or widespread attack against the civilian population[20]. The definition of the term "organization" has been developed through jurisprudence, as it is not found in the SICC. Thus, in its decision authorizing the opening of an investigation into the situation in the Republic of Kenya, PTC II concluded that an "organization" exists under Article 7(2) of the SICC when: (i) it is hierarchi-

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15 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 395.

16 ICC, Situation in the Republic of Kenya, ICC-01/09, PTC II, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Kenya, 31 March 2010, par. 95.

17 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 396

18 Idem.

19 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 396.

20 Idem.

cally organized; (ii) it has an effective system to ensure compliance with the rules and orders issued by its superiors; and (iii) it has sufficient standing as an entity and has a trained military wing[21].

Moreover, the PTC III, in its decision authorizing the opening of an investigation into the situation in the Republic of *Côte d'Ivoire*, identified the following factors which could be of assistance in determining whether an organization exists: namely, that the group: (i) is under responsible command and has an established hierarchy; (ii) possesses the means to carry out a systematic or widespread attack against a civilian population; (iii) exercises control over part of the State's territory; (iv) directs its criminal activities against the civilian population as its primary objective; (v) expressly or tacitly manifests the intention to attack the civilian population; and (vi) is part of a larger group that meets all or some of the above-mentioned criteria[22].

Finally, there must be an objective nexus between the systematic or widespread attack against the civilian population and the specific conduct imputed to the defendant, such that the conduct was carried out as a result of the systematic or widespread attack[23]. Likewise, the defendant must be aware of the nexus that converts the charged conduct into part of the systematic or widespread attack against the civilian population[24]. For PTC I, this last element does not have to

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21 ICC, Situation in the Republic of Kenya, ICC-01/09, PTC II, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Kenya, 31 March 2010, par. 93.

22 ICC, Situation in the Republic of *Côte D'Ivoire*, ICC-02/11-14, PTC III, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Côte D'Ivoire, 3 October 2011, par. 46.

23 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 84 -86; ICC, Prosecutor v. Charles Blé Goude, ICC-02/11-02/11-186, PTC I, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, par. 124.

24 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 401; ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute

be understood as full knowledge of the precise details of the attack, which was carried out pursuant to the plan or policy of a State or organization[25]. Likewise, PTC I considers that knowledge of the attack may be inferred through circumstantial evidence, based upon: (i) the defendant's position within the military hierarchy; (ii) the importance of their role in the criminal campaign; (iii) their presence at the scene of the crimes; (iv) statements establishing the superiority of their group over the enemy; and (v) the general political and historical environment in which the events occurred[26].

3. The Function of the Confirmation of Charges Hearing and the Applicable Standard of Evidence for Its Implementation

According to Article 67(7) of the SICC, the standard of proof applicable to the confirmation of charges hearing requires that the Prosecution present "sufficient evidence" which establishes "substantial grounds to believe" that each of the crimes charged has been committed and that the accused is responsible according to the forms of authorship and participation provided for in Articles 25(3) and 28 of the SICC. This is therefore a higher standard of proof than the "substantial grounds" required for the issuance of an arrest warrant or summons pursuant to Article 58 of the SICC, but less demanding than the Trial Chamber's requirement, under to Article 66 of the

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on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 87.

25 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 402; CPI, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 88.

26 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 402; ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 88.

SICC, of the "guilt of the accused beyond all reasonable doubt" for the issuance of a conviction[27].

The evidentiary standard applicable to the confirmation of charges hearing requires the Prosecutor's Office to present concrete and tangible evidence that demonstrates a clear line of reasoning supporting its accusations against the accused in relation to each charge[28]. The content provided by the various Pre-Trial Chambers as to this standard allows for the ultimate purpose of the confirmation of charges hearing. This purpose is nothing other than to provide a procedural filter that ensures that only cases against those against whom there is compelling evidence that goes beyond mere suspicion

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27 Miraglia, M., 2008, Admissibility of Evidence, Standard of Proof and Nature of the Decision in the ICC Confirmation of Charges in Lubanga. Journal of International Criminal Justice, 6. 489-503; Olasolo, H., 2003. Corte Penal Internacional ¿Dónde Investigar? Valencia, Spain: Tirant lo Blanch, pp. 119 – 124; Schabas, W., 2010, The International Criminal Court: A Commentary on the Rome Statute, Oxfordshire, England: Oxford University Press.

28 ICC, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10-465, PTC I, Decision on the confirmation of charges, 16 December 2011, par. 40; ICC, Prosecutor v. Uhuru Muigai Kenyatta et. al., ICC-01/09-02/11-01, Decision on the Prosecutor's application for summonses of appear for Francis Muthaura, Uhuru Muigai Kenyatta and Mohammed Husein Ali, 8 March 2011, par. 58; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/01-01/06, PTC I, Decision on the confirmation of charges, 29 January 2007, par. 39; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 65; ICC, Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11, PTC I, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, par. 19; ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 29; ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 40; ICC, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014; ICC, Prosecutor v. Charles Blé Goude, ICC-02/11-02/11- 186, PTC I, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, par. 12.

are referred to oral trial[29]. In this way, the confirmation hearing fulfills a function of guaranteeing the rights of the defense against erroneous or unfounded allegations, while also acting as a mechanism for judicial economy by avoiding the need for oral trials, which can extend over years, when the evidence presented by the Prosecutor's Office is insufficiently consistent with the charges as laid[30].

It was in this context that during the confirmation of charges hearing in the Gbagbo case the question arose as to whether those acts of violence which, according to the Prosecution, constitute the global fact within which the conduct specific to the alleged crimes against humanity are framed must be proven by the same means of proof as those latter conducts.

To properly define the issue, it is necessary to consider that no Pre-Trial Chamber has to date held that the evidentiary standard must differ according to whether it is contextual or specific elements that are being proven. On the contrary, all of them have held that Article 61(7) of the SICC requires the Prosecutor to present sufficient

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29 ICC, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10-465, PTC I, Decision on the confirmation of charges, 16 December 2011, par. 41; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/01-01/06, PTC I, Decision on the confirmation of charges, 29 January 2007, par. 34; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 63; ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 9.

30 ICC, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10-465, PTC I, Decision on the confirmation of charges, 16 December 2011, par. 41; ICC, Prosecutor v. Uhuru Muigai Kenyatta et.al., ICC-01/09-02/11-01, Decision on the Prosecutor's application for summonses of appear for Francis Muthaura, Uhuru Muigai Kenyatta and Mohammed Husein Ali, 8 March 2011, par. 52; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/01-01/06, PTC I, Decision on the confirmation of charges, 29 January 2007, par. 37; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, pars. 63 and 64; ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 40.

evidence to establish "substantial grounds to believe" that the acts of violence that allegedly constitute both the overall act and the specific conduct alleged have occurred[31]. Accordingly, the issue is not one of possible variations in the applicable evidentiary standard but rather determining whether there are various pieces of evidence that can meet that standard, and if so, whether it is possible to propound that some of them are preferably used to prove contextual elements, while others are mainly used in relation to specific elements.

4. The Different Interpretations of the Pre-Trial Chambers on the Relevance and Admissibility of Direct and Indirect Evidence

In order to analyze the problem raised, it is necessary to first address the issues relating to the relevance and evidentiary value of the various pieces of evidence presented by the Prosecutor during the confirmation of charges hearings. In this regard, Rule 63(1) of the Rules of Procedure and Evidence (RPE) states that the evidentiary rules provided for in Article 69 of the SICC also apply to the confirmation of charges hearing. Consequently, the Pre-Trial Chambers must analyze the relevance, probative value, and potential impact of the evidence on the right to a fair trial when determining which pieces of evidence proposed by the Prosecutor are admissible.

In assessing the relevance of a particular piece of evidence, the decisive factor is the existence of a link between the fact sought to

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31 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 28 y 44; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, pars. 62, 66 and 67; ICC, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10-465, PTC I, Decision on the confirmation of charges, 16 December 2011, pars. 42 – 44; ICC, Prosecutor v. Kenyatta et al., ICC-01/09-02/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, 52, 52 and 60.

be proven and the evidence offered by the Prosecutor for that purpose[32]. Only if this nexus exists can it be argued that the piece of evidence in question can make the existence of the alleged fact "more probable"[33].

The analysis of the evidentiary value *a priori* of a piece of evidence requires taking into account factors such as credibility, reliability, and the source from which it comes. On this basis, the Pre-Trial Chambers have affirmed the distinction between "direct evidence" and "indirect evidence"[34]. The former is that which comes from sources that have been exposed firsthand to the facts sought to be proven, as is the case with oral testimony from direct witnesses (uncommon in confirmation of charges hearings) or their written statements (much more common at this stage of the proceedings).

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32 ICC, Prosecutor v. Kenyatta et. al., ICC-01/09-02/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 79; ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 66; ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 41.

33 ICC, Prosecutor v. Kenyatta et. al., ICC-01/09-02/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 79; ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 66; ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 41.

34 ICC, Prosecutor v. Kenyatta et. al., ICC-01/09-02/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 83; ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 69; ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 44.

There is a certain disparity in the treatment given by the various Pre-Trial Chambers to "indirect evidence," particularly in relation to newspaper articles. Thus, while for PTC I, such articles may constitute relevant and admissible evidence[35], for PTC II, newspaper articles generally contain the opinions of their authors, and not detailed information about the events analyzed. For that reason, only if the opinion expressed in them comes from a reliable source will they be admissible at the confirmation of charges hearing[36].

The disparity is less pronounced with regard to reports from international organizations, non-governmental organizations, and state authorities from countries not affected by the alleged crimes, since all Pre-Trial Chambers have admitted them, provided that they offer sufficient guarantees of impartiality to make them reliable[37]. Therefore, when proposing them, the ICC Prosecutor must present sufficient information about the source that prepared them, as well as the methodology used in their compilation and analysis of the evidence[38].

However, even in relation to these types of reports, significant disparities can be observed. While for PTC I in the Katanga case, the

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35 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 104-106, 137, 139-141, 304; ICC, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10-465, PTC I, Decision on the confirmation of charges, 16 December 2011, par. 43.

36 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009; pars. 41, 42, 52, 53; ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, pars. 74 and 75.

37 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008; pars. 78, 110, 137 and 141; ICC, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10-465, PTC I, Decision on the confirmation of charges, 16 December 2011, pars, 30-31; ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 68.

38 Ibidem.

acts of violence that constitute the overall fact of the crimes against humanity charged can be proven through such reports, or even newspaper articles[39], for PTC II in the Bemba, Ruto, and Kenyatta cases, indirect evidence not only has a lower probative value than direct evidence, but its exclusive function is to corroborate what is established through the direct evidence[40].

Consequently, for PTC II, the factual allegations of the Prosecutor's Office, whether they refer to contextual elements or to specific elements, must be proven through direct evidence (normally written statements); it is not possible to confirm any charge, when the facts presented by the Prosecutor's Office are based exclusively on indirect evidence[41]. As we will see in the following two sections, these differences will have a very notable impact on the different evidentiary models adopted by PTC I and PTC II in relation to the contextual elements of crimes against humanity.

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39 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 10.

40 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 52; ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 75; ICC, Prosecutor v. Kenyatta et. al., ICC-01/09-02/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 87.

41 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 51; ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 74; ICC, Prosecutor v. Kenyatta et al., ICC-01/09-02/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 86.

5. The Evidentiary Model of Pre-Trial Chamber I in the Katanga Case

The case against Germain Katanga centers on the attack led by militias under the command of the accused from the Ituri Patriotic Resistance Forces (IPRF) and his ally Mathieu Ngudjolo of the Integrationists and Nationalists Front (INF) in Ituri Province (Democratic Republic of the Congo) against the municipality of Bogoro on February 24, 2003.

In its indictment, the Prosecutor alleged that forces of the IPRF-INF alliance had attacked other localities in Ituri Province between February and March 2003, in which members of the Hema ethnic group were heavily represented. This resulted in the killing of approximately 900 civilians, mostly Hema, in the towns of Nyakasanza, Tchomia, and Katoto[42]. Furthermore, in late July 2003, IPRF and INF forces murdered approximately 600 Hema civilians in the villages of Mandro, Kilo, and Drodro[43]. On the basis of these allegations, the Prosecutor's Office asserted the existence of a systematic or widespread attack, launched in early 2003 by militias led by Germain Katanga and Mathieu Ngudjolo, against the Hema population of Ituri. The attack on Bogoro was merely one incident in this pattern of violence.

As to the Prosecutor's factual allegations concerning the specific elements of the crimes against humanity charged, they were limited to the events that occurred during the February 24, 2003, attack on Bogoro[44]. Thus, in relation to the crime of murder, the Prosecutor's Office emphasized that members of the IPRF and the INF, led respectively by Germain Katanga and Mathieu Ngudjo Chui, were armed with heavy weapons, automatic pistols, and machetes, and proceeded

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42 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, par. 410.

43 Idem.

44 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008, pars. 424, 434, 456 and 462.

to surround Bogoro from all roads leading into it[45]. As a result, the civilian population living in the municipality awoke to gunfire, while the assailants attacked the entire village, starting with the houses closest to their attack positions[46].

In its Decision on the Confirmation of Charges in the Katanga case, PTC I stated that the Prosecutor's Office had presented sufficient evidence establishing substantial grounds to believe that the attacks by the IPRF and INF militias on Nyakunde, Kilo, Tchomia, Katoto, Bunia, and Mandro had been carried out[47]. In reaching this conclusion, PTC I referred exclusively to reports from the United Nations Mission in Congo (MONUC), the United Nations Secretary-General, other international organizations, and of certain non-governmental organizations. In this way, it adopted an evidentiary model according to which it was possible to prove, with indirect evidence, the acts of violence alleged exclusively in relation to contextual elements.

The situation differed with regard to the events allegedly occurring during the attack on Bogoro, since these constituted the factual basis for the specific elements of the crimes against humanity charged. Thus, the Prosecutor's Office was required to submit written statements[48].

6. Pre-Trial Chamber II's Evidentiary Model in the Bemba, Ruto, and Kenyatta Cases

Unlike the Katanga case, the cases against Jean Pierre Bemba Gombo (former Vice President of the Democratic Republic of the Congo), William Samoei Ruto (Vice President of Kenya), and Uhuru Muigai Kenyatta (current President of Kenya), all of which were before Pre-Trial Chamber II, are characterized by the fact that the Prosecutor alleged the same acts of violence both in relation to the overall

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45 Ibid., par. 403.
46 Idem.
47 Ibid., par. 578.
48 Ibid., pars. 424-444, 456-465.

act of violence as well as with respect to the specific conduct charged as crimes against humanity. In other words, in these three cases, the incidents alleged to prove the contextual elements and the specific elements of the crimes against humanity were exactly the same.

On this basis, PTC II, in its Confirmation of Charges Decision in the Bemba case, affirmed that there were reasonable grounds to believe that the forces of the *Mouvement pour la Libération du Congo* ("MLC"), led by Jean Pierre Bemba, between October 2002 and March 2003, had carried out a systematic attack against the civilian population in the following towns in the south of the Central African Republic: Bangui, Bossangoa, Damara, Bassembele, Sibut, Bozoum, Bossemptele, Pk 12, Pk 22, and Mongoumba[49]. As a result, during the six months of the MLC's intervention in the Central African Republic to provide military assistance to then-President Patasse against the forces of his former Chief of Staff Bozize, who was attempting a coup d'état, at least six acts of murder and rape by MLC members were reported to the Central African authorities every day[50].

Subsequently, when analyzing the specific elements of the crimes against humanity charged, specifically murder and rape, PTC II also affirmed the existence of reasonable grounds to believe in their occurrence, based upon the exact same acts of violence, which occurred in the aforementioned localities, which it had found to be

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49 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, Bangui, pars. 1116, 117, 155 and 158; Bossangoa, pars. 101, 108, 116, 117, 123, 140, 141, 144, 146, 147, 149 and 150; Damara, pars. 101, 116, 117, 123 and 141; Bossembele, pars. 101, 117, 123 and 141; Sibut, pars. 116, 117, 123 and 141; Bozoum, pars. 116, 117, 123 and 141; Bossemptele, pars. 116 and 117; Pk12, pars. 101, 108, 116 and 117; Pk22, pars. 101, 117and 123; Mongoumba, pars. 99, 101, 117 and 141; Boy Rabe, pars. 101, 116 and 144; Fouh, par. 116.

50 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, pars. 108, 140.

proven to establish the existence of a widespread attack against the civilian population[51].

Subsequently, when analyzing the specific elements of the crimes against humanity charged, specifically murder and rape, PTC II also affirmed the existence of reasonable grounds to believe in their occurrence, based upon the exact same acts of violence, which occurred in the aforementioned localities, which it had found to be proven to establish the existence of a widespread attack against the civilian population.

Because the same incidents were addressed in the contextual and specific elements, PTC II required the submission of written statements, since this is the evidence required in all cases by the various Pre-Trial Chambers when it comes to proving the specific elements of the crimes against humanity charged at the confirmation of charges hearing[52].

In addition to the written statements, PTC II also mentioned other elements of "indirect evidence" in its decision, such as reports from international organizations, non-governmental organizations, national entities or authorities of the Central African Republic, and various media outlets[53]. As PTC II itself made clear, however, these elements of "indirect evidence" only serve the function of corroborating what had been established by the written statements of witnesses[54].

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51 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, par. 49, 141, 146, 147, 148, 150, 171, 172, 173, 174, 175, 176, 177, 179, 181, 182, 186, and 188.

52 ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, pars. 74, 226, 229, 231, 232, 252, 255, and 256.

53 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, Bangui, pars. 94, 99, 108, 115, 117, 123, 141, 186 and 188.

54 Ibid. pars. 47, 51, 52, 53, 147, 186.

The same evidentiary model in the Bemba case can be found in the Confirmation of Charges Decision in the case against William Samoei Ruto et. al., issued by PTC II itself. In this case, PTC II, in accordance with the allegations of the Prosecutor's Office, referred to the same acts of violence to prove the contextual and specific elements of the crimes against humanity charged.

Thus, PTC II affirmed the presence of reasonable grounds to believe that, between 30 December 2007 and 16 January 2008, Kalenjin youth gangs affiliated with the Orange Democratic Party (of which Ruto was then Secretary-General) launched a systematic attack against civilians affiliated with the then ruling National Unity Party (NUP) in Kenya[55]. According to PTC II, the attackers, armed with machetes, pangas, arrows, bows, petrol cans and firearms, carried out the acts of violence in the towns of Turbo Town, the El Doret area (Huruma, Kiambaa, Kimumu, Langas and Yamumbi), Kapsabet and Nandi Hills, while targeting members of certain ethnic groups such as the Kikiyus, Kambas and Kissis, who were perceived as supporters of the NUP[56].

The acts of violence that occurred in these four incidents (Turbo Town, El Doret, Kapsabet, and Nandi Hills) were the same ones which PTC II subsequently relied upon to affirm the existence of reasonable grounds to believe that the specific elements of the crimes against humanity charged occurred[57]. As a result, PTC II required that these incidents be substantiated through written statements, as evidence required in relation to the specific elements[58]. It also expressly referred to reports from intergovernmental and non-governmental organizations, but for the sole purpose of corroborating the content of the written statements[59].

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55 ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012. pars. 165 and 172.

56 ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, pars. 167 and 177.

57 Ibid, pars. 167-169, 223, 246 and 270.

58 Ibid, pars. 171, 179, 205 and 239.

59 Ibid, par. 239.

The same evidentiary model is also found in the Decision on the Confirmation of Charges in the case against Uhuru Muigai Kenyatta et. al., also issued by PTC II. Thus, based on the allegations of the Prosecution, PTC II affirmed reasonable grounds to believe that between 24 and 27 January 2008, members of the Mungiki group (a mafia-like organization commissioned by the NUP to commit serious acts of violence against members and supporters of the opposition Orange Democratic Movement (ODM)), following the presidential elections of 25 January 2008, carried out a series of acts of violence in and around Nakuru town against members of various ethnic groups, who were perceived as ODM supporters[60]. Likewise, the PTC II additionally found reasonable grounds to believe that on 27 and 28 January 2008, members of the Mungiki group also carried out a series of acts of violence in and around Naivasha town against members of the Luo, Kalenji, and Luhya ethnic groups (also perceived as ODM supporters). Likewise, the PTC II additionally found reasonable grounds to believe that on 27 and 28 January 2008, members of the Mungiki group also carried out a series of acts of violence in and around Naivasha town against members of the Luo, Kalenji, and Luhya ethnic groups (also perceived as ODM supporters)[61]. On the basis of these incidents, the PTC II declared the existence of a widespread attack against the civilian population near the OMD proven[62].

Subsequently, when analyzing the specific elements of the crimes against humanity charged, the PTC II affirmed their existence based on the same acts of violence it had previously analyzed when addressing the contextual elements[63]. As a result of this, the PTC II required

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60 ICC, Prosecutor v. Kenyatta et. al., ICC-01/09-02/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, pars. 102, 115 and 117.

61 Ibid, par. 120.

62 Ibid, pars. 115 and 142.

63 Ibid, pars. 233, 241, 254, 260, 267 and 281; Thus, for example, regarding the crime against humanity consisting of other inhumane acts, PTC II considered that during the attack on Naivasha, men identified as belonging to the Luo ethnic group were forced to remove their underwear and were then forcibly circumcised. Subsequently, at Nakuru General Hospital, around seven people were treated for circumcisions and penis amputations on January 25, 2008.

proof of these incidents through the submission of written statements, as the required evidence to establish the specific elements[64]. Furthermore, as in the Bemba and Ruto cases, it expressly referred to reports from intergovernmental and non-governmental organizations to corroborate the content of the written statements[65].

7. Conclusion

The question posed at the beginning of this paper does not have a clear answer in light of the various jurisprudential trends observed to date in the Pre-Trial Chambers. The main point of convergence is found in the application of the standard of proof provided for in Article 61(7) of the SICC for both the contextual and specific elements of the crimes against humanity alleged by the Prosecutor during the confirmation of charges hearing.

The consensus, however, ends here. Thus, the PTC I in the Katanga case held that indirect evidence may be sufficient to establish reasonable grounds to believe in the existence of the incidents exclusively alleged by the Prosecutor to demonstrate the existence of the global facts. For its part, PTC II in the Bemba, Ruto, and Kenyatta cases has required written statements in relation to all acts of violence alleged by the Prosecutor (without distinguishing between contextual and specific elements) and has emphasized the merely corroborative value of indirect evidence.

There may be various reasons for this disparity in criteria. On the one hand, the way in which the Prosecutor's Office has structured its indictments has not been uniform across the aforementioned cases. It was only in the Katanga case that the Prosecutor's Office alleged

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64 ICC, Prosecutor v. Kenyatta et. al., ICC-01/09-02/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, par. 234-237, 239, 245-247, 249, 250-252, 258-259, 261, 272 and 275.

65 ICC, Prosecutor v. Kenyatta et. al., ICC-01/09-02/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, pars. 247-248 and 262-263.

a pattern of acts of violence that went beyond the conduct actually charged as crimes against humanity. This could have influenced the different ways in which PTC I and PTC II have addressed the issue of the value of indirect evidence at the confirmation of charges hearing. However, this does not appear to be the only reason; the disparity in criteria appears to be a more fundamental issue.

The existence of two evidentiary models during the confirmation of charges stage creates significant legal uncertainty, which even led to the postponement of the confirmation of charges hearing in the Gbagbo case in July 2013. In this regard, it is worth noting that, despite the provisions of Article 21(2) of the SICC regarding the non-binding nature of ICC jurisprudence, the reiterative nature of the concepts and their method of application means that "precedent" in the ICC plays an important role. Unfortunately, this is not the case with respect to the issue under study, given the lack of uniformity in the jurisprudence.

It is necessary, therefore, to find a solution to this situation in order that we may have greater clarity regarding the value of indirect evidence at the confirmation of charges hearing. But, above all, it is necessary to strengthen legal certainty regarding how the evidentiary dynamic is addressed at the various procedural stages. Despite being a law under construction that responds to emerging realities, its development cannot affect the very essence of the ICC, which is none other than the search for truth, justice, and reparation for victims.

In our opinion, this could be achieved by considering the role that contextual elements play within the structure of crimes against humanity, in addition to the purpose of the confirmation of charges hearing itself. As we have seen, contextual elements reflect the essential global fact within which the conduct characteristic of crimes against humanity is framed. This demonstrates that the acts of violence for which the accused is allegedly responsible are but a small part of the broader attack to which the civilian population has been subjected. This reality, essential to the phenomenon of crimes against humanity, is "hidden" in the conception of these crimes contained in the jurisprudence of PTC II, as it makes no distinction between the broader dynamic of violence suffered by the civilian population and the specific acts specifically attributable to the accused. Therefore, in

our opinion, the PTC I approach best preserves the reality intended to be captured by the category of crimes against humanity.

We do not believe that this approach creates a conflict with the filtering function that the confirmation of charges hearing itself is intended to perform. On the contrary, the hearing is conducted based on the principle of selection of the evidence presented, which even affects the fact that the potentially exculpatory materials that must be revealed to the defense are not all of them, but only the majority[66]. We are not, therefore, facing an oral trial, nor even a mini-trial as some have called it. Rather, its function is to act as an efficient procedural filter, which prevents the prolongation of the proceedings, and where appropriate, accelerates the release of detainees, when the accusations of the Prosecutor's Office are shown to be unfounded or erroneous. The fact that the broader manifestations of violence suffered by the civilian population, which do not appear to fall within the defendant's sphere of responsibility, can be proven at this stage of the proceedings through various reports from organizations present at the scene, we do not believe would affect the achievement of the purpose of the confirmation of charges hearing. It would also allow for respecting the structure of crimes against humanity and more accurately reflecting the reality to which they relate.

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66 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07 - 2635, Trial Chamber II, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, par. 63,64 and 66; ICC, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10-465, PTC I, Decision on the confirmation of charges, 16 December 2011, par. 41 and 44; ICC, Prosecutor v. Ruto et. al., ICC-01/09-01/11, PTC II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, pars. 40, 43 and 51; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/01-01/06, PTC I, Decision on the confirmation of charges, 29 January 2007, pars. 34 and 36; ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, PTC II, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009, pars. 28 and 33.

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24. The loss of protected person status in armed conflicts

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1. Introduction

There is a need for precision regarding the circumstances under which the protection offered by international humanitarian law, and its extension over time, can be lost. Although the laws of war prohibit it, attacking members of the civilian population in the course of an armed conflict recurs. A good example of this situation is presented by Jorge Giraldo in the report of the Commission for the History of Conflict and Victims, where he states that in a conflict such as the Colombian one, which has left more than 250,000 dead and missing, the number of members of the armed groups killed in combat between 1985 and 2000 barely reached one for every eighty civilian

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fatalities, and which dropped to one for every three hundred and eighty in the years following[1].

The dynamics of armed conflicts and the interplay of interests that drive them often involve those who are not members of the parties to the conflict. Some people are forced to provide various services —domestic or sexual—, to provide information, or to finance the war effort. There are others, however, who are attracted by the benefits of war and decide to cooperate in its conduct. Regardless of whether civilians participate voluntarily or involuntarily in these or other activities during an armed conflict, however, International Humanitarian Law (IHL) requires that a distinction be drawn between who may be legitimately targeted and who may not.

In practice, this distinction is complicated because traditional elements for the identification of the protected population, such as the use of uniforms or the establishment of military settlements far from residential areas, are no longer sufficient. Nor is the shape of the battlefield determinative, due to new technologies and the migration of combat to civilian spaces. As Emily Crawford has stated:

> The participation of civilians in armed conflict disrupts the ability to clearly apply the principle of distinction. Civilians do not wear uniforms, do not openly carry their weapons, and can transition from 'combatants' to 'civilians' in a way that their counterparts in regular armed forces cannot. Thus, identifying when a civilian participates (or ceases to participate) is quite difficult[2].

It is for this reason, therefore, in a context in which the boundaries between enemy agent and civilian are blurred, it is crucial to establish criteria that allow for a clear and precise determination of when, and for how long, those who are not members of either party

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1 Giraldo J., 2015, *Política y Guerra sin Compasión*. En Eduardo Pizarro León Gómez & Víctor Manuel Moncayo Cruz (Ed.), *Contribución al Entendimiento del Conflicto Armado Colombiano, Comisión Histórica del Conflicto y de sus Víctimas*.

2 Crawford, E., 2011, Regulating the Irregular – International Humanitarian Law and the Question of Civilian Participation in Armed Conflicts, University of California, Davis, 18(1), pp. 163–190.

to the conflict lose their protection and become a legitimate target of attack.

To answer this question, the first part of this paper will analyze the concept of a protected person under IHL. The second part will then examine in detail the concept of "direct participation in hostilities". It will pay particular attention to the elements that an act must entail in order to acquire such status. Included in this analysis are acts that do not result in the loss of protected person status, such as indirect participation in hostilities and self-defense.

Because the loss of protected person status extends only so long as one actively participates in hostilities, it becomes very important to distinguish between acts of sporadic or temporary participation and acts of repeated and persistent participation. Therefore, the third and final part of this paper focuses on analyzing the temporality of direct participation in hostilities.

2. Protected Persons in Armed Conflicts

2.1. Protected Persons in International Armed Conflicts

Articles 48, 51(2), and 52(2) of Additional Protocol I (AP I) for international conflicts, and Article 13(2) of Additional Protocol II (AP II) for conflicts of a non-international character, enshrine the principle of distinction between members of the parties to a conflict and the civilian population[3]. According to this principle, members of the civilian population may not be subject to attack by the parties to the conflict unless they directly participate in the hostilities[4].

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3 ICJ, Nuclear Weapons Advisory Opinion, 1996, p. 226, par.79; The International Court of Justice (ICJ) has affirmed that the rules contained in the principle of distinction have customary scope and are therefore binding on all States, including those that are not party to the treaties in which they are contained.

4 United Nations, General Assembly, 1968, Resolution 2444 (XXIII), Respect for Human Rights in Armed Conflicts, 19 December; United Nations War Time Commission, Hostages, The Hostages Trial, XV Law Reports of Trials of War Criminals, London, 1947; Any action or omission that constitutes

Neither the Geneva Conventions nor AP I contain a definition of "civilian population". Consequently, who constitutes the civilian population is defined in the negative sense; these are understood to be those who (a) are not members of the armed forces of the parties to the conflict; (b) are not members of irregular armed groups acting on their behalf; and (c) do not participate in a *Levée en Masse* [5].

In international armed conflicts, all groups and units that, according to their internal law, comprise or are attached to their armed structures, including units of the land, sea, and air forces, the police and military intelligence, reservists, and, where appropriate, civilian police and intelligence units, are considered to be members of the armed forces of the parties to the conflict[6]. In addition to being armed and organized, the armed forces must operate under responsible command and be subject to an effective regime of internal discipline "that enforces, *inter alia*, the rules of international law applicable to armed conflict"[7]. Furthermore, their members must have their own uniforms and insignia that allow for their identification[8]. Members of the armed forces do not enjoy protection while they re-

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direct participation in hostilities automatically results in the loss of protection and may give rise, in accordance with the domestic legal systems of the parties involved in the conflict, to criminal responsibility for resorting to the use of armed force without having the right to do so.

5 International Committee of the Red Cross (ICRC), 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

6 Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977; Geneva Convention I (GC I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

7 Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977.

8 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

main members. This condition applies regardless of their roles and remains in effect during temporary leave and training periods[9].

Those who are part of irregular armed groups, such as militias or volunteer corps[10] also lack protection[11]. These armed organizations are structurally and legally separate from the armed forces of the parties to the conflict, but they have a sufficient level of military organization to allow them to carry out military operations on their behalf[12]. Irregular armed groups must, in all cases, conduct hostilities[13]. Their agreement to do so may be explicit or tacit. It will be explicit when the group declares that it is acting for the benefit of one of the parties, while it will be tacit when it can be inferred from the behavior of the armed group that it is fighting for[14].

Finally, participants in a *levée en masse*, meaning the inhabitants of an unoccupied territory who choose to take up arms, spontaneously and without sufficient organization, to resist a nearby enemy, are also denied protection[15]. Participants in a *levée en masse* do not enjoy protection during their involvement.

In addition to the civilian population—which, as we have seen, is composed of those who are not members of the armed forces or irregular armed groups acting on behalf of one of the parties to the conflict, nor participating in a *levée en masse*—other protected sub-

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9 Ibid, pp.1001 and 1003.

10 Geneva Convention (GC III) relative to the Treatment of Prisoners of War, 12 August 1949.

11 Of the three groups mentioned (Armed Forces, participants in a Levée en Masse, and members of irregular armed groups), only the first two have the right to: (a) use weapons against enemy actors; (b) not be brought to trial for acts of war that are lawful under International Humanitarian Law (IHL); and (c) be treated as prisoners of war. (GC III)

12 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

13 Ibid, p.1001.

14 Idem.

15 Geneva Convention (GC III) relative to the Treatment of Prisoners of War, 12 August 1949.

jects are religious[16], medical[17], and civil protection personnel[18] of the parties to the conflict so long as they do not directly participate in the hostilities.

Likewise, those who are subject to protection are those who are not members of the parties to the conflict and accompany them without directly participating in hostilities. This can include war correspondents[19], suppliers[20], and members of work units or services related to the welfare of combatants[21], among others[22].

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16 Geneva Convention (GC III) relative to the Treatment of Prisoners of War, 12 August 1949; Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977; Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

17 Geneva Convention I (GC I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977; Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977.

18 Additional Protocol to the Geneva Conventions of 12 August 1949, (PA I).

19 Geneva Convention (GC III) relative to the Treatment of Prisoners of War, 12 August 1949; Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977.

20 Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949.

21 Idem.

22 Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977; Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977.

Finally, those who are captured by the adversary[23], surrender and lay down their arms [24], are unable to defend themselves due to illness or injury[25], or are reintegrated into civilian life, which also includes inactive reservists[26] are subject to protection.

It should be noted that, within the context of international armed conflicts, both members of the civilian population and other persons subject to protection are protected from acts of violence carried out by the enemy, that is, by the party to the conflict with which they are not affiliated. This affiliation has traditionally been understood in terms of nationality; due to the link it creates between the individual and the State of their nationality[27]. However, the International Criminal Tribunal for the former Yugoslavia has stated that, on occasions, it is ethnicity, and not nationality, that is decisive when establishing affiliation with one of the parties to the conflict[28]. Furthermore, the Fourth Geneva Convention extends the status of protected person to stateless persons, as well as to refugees in a territory that is subsequently occupied by the belligerent party of their nationality, but from which they no longer receive diplomatic protection[29].

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23 Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977.

24 Convention (IV) (C. IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

25 Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977.

26 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

27 Geneva Convention IV, (CG.VI), Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

28 ICTY, Prosecutor v. Dusko Tadic, Case No IT-04-1-AR72-A, Appeals Judgement, 15 July 1999.

29 Ibid, par. 164,

2.2. Protected Persons in Non-International Armed Conflicts

Within the context of non-international armed conflicts, all those who are not members of the armed forces of the State in whose territory the conflict is taking place are, in principle, protected persons[30]. However, this protection is automatically lost upon becoming a member of an organized armed group [31]. Likewise, protection is also lost when, even without becoming a member of an organized armed group, activities are undertaken involving direct participation in hostilities on behalf of one of the parties to the conflict.

Because the observations made regarding State armed forces in international armed conflicts are also applicable to non-international armed conflicts, we will focus our analysis on cases of loss of protection due to joining an organized armed group, understood as an organization having a hierarchical structure and responsible command, which facilitates control of operations and discipline of the group, and which has the capacity to carry out coordinated and sustained military operations over time, with a certain degree of intensity of violence[32]. It is not necessary, however, that it enjoy the same weapons capabilities as a State's armed forces[33].

Not all persons who collaborate with an organized armed group should be considered members of that group. The International Committee of the Red Cross (ICRC) (2008) distinguishes between members in the strict sense, that is, those who lack protection, and persons who, despite being part of the group [affiliated civilians], do

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30 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

31 Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977.

32 Olasolo, H., 2007, *Ataques Contra Personas o Bienes Civiles y Ataques Desproporcionados en Situación de Combate,* Tirant lo Blanch, 1° edition.

33 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

not engage in activities that directly involve hostilities and therefore retain their protection (p. 1008).

The so-called "functional criterion" is determinative in distinguishing between those who are members of the organized armed group and those who do not have this status. According to this criterion, members of the group are only those who assume a continuous combat function within an organized armed group[34]. Therefore, membership is not determined by a conclusive act of affiliation, nor is it necessarily expressed through the use of uniforms, badges, or identification cards[35].

Based on the functional criterion, individuals who prepare, execute, or command the military operations of an organized armed group maintain a continuous combat function[36]. This also applies to those recruited, trained, and equipped by the group to conduct hostilities on its behalf, even if they have not carried out any hostile act[37]. Meanwhile, individuals who continuously accompany or support an organized armed group, but whose role does not directly involve them in hostilities, should not be considered members of the group and are therefore not legitimate targets of direct attack[38]. Similarly, individuals who limit their activity within the group to recruitment, financing, or training are also in the same situation, unless they have an additional role that directly links them to hostilities[39]. The same protection applies to individuals who acquire, manufacture, and maintain weapons or who perform intelligence work outside of specific military operations[40].

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34 Williamson, J.A., 2010, Challenges of Twenty-First Century Conflicts: A Look at Direct Participation in Hostilities. Duke Journal of Comparative and International Law, 20, pp. 457-471.

35 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

36 Ibid, p. 1007.

37 Idem.

38 Ibid, p. 1008.

39 Ibid, p. 1021.

40 Idem.

Based on the foregoing, Schmitt considers that being a member of an organized armed group, while performing a continuous combat function, is equivalent to directly participating in hostilities on a prolonged basis. Consequently, as with those who are members of a State's armed forces, members of organized armed groups are exempt from protection for the duration of their membership. Thus, even when they are not engaged in military operations at a given time, such as while on leave, they can be attacked[41].

But then what happens if individuals who accompany the group without engaging in a continuous combat role periodically take up arms to carry out military operations? Schmitt explains the problem in the following terms:

> […] according to the Interpretive Guide's approach, members of an organized armed group who have a continuous combat role may be attacked at any time, while those who periodically take up arms should be treated as civilians [protected persons] who take a direct part in hostilities and who may only be attacked when carrying out their direct participation activities. In practice, it will be difficult to distinguish between the two categories. For example, if an individual was identified as participating in past hostilities, how would an attacker know that such participation was merely periodic when subsequently carrying out an operation against the group to which the first individual belongs?[42].

As a possible response to this problem, the ICRC has defined two ways to identify members of an organized armed group. The first is to observe whether the person carries weapons, insignia, or uniforms specific to the group. The second is based on conclusive conduct by the subject, demonstrating that he or she performs a continuous combat function, going beyond spontaneous, sporadic, or temporary acts carried out during a specific military operation. The application

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41 Schmitt, M., 2010, The interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis. Harvard National Security Journal, 1, pp. 5-44.

42 Ibid, p. 22 -23.

of these criteria must be supported by information that, in light of the prevailing circumstances, can be considered reasonable[43].

Schmitt questions the ICRC's solution because the carrying of such elements as weapons, uniforms, or insignia is not always exclusive to the armed wing of an organized group or to those performing continuous combat functions. Hence, the information obtained in this regard may be ambiguous[44]. If membership is unclear, the distinction between members and civilians affiliated with an organized armed group becomes impractical, because even the latter could be targeted due to their activities involving direct participation in hostilities.

In this situation, Article 50 (1) of AP I appears to provide a solution by establishing that in case of doubt as to whether a person is protected or not, protection must be chosen. Thus, if there is no certainty that an individual is a member of an organized armed group, he or she should not be directly attacked, as his or her status as a protected person is presumed, unless the attack is carried out when he or she is engaged in activities of direct participation in hostilities[45].

3. Loss of protection due to direct participation in hostilities

3.1. The concept of direct participation in hostilities

Articles 51.3 of AP I and 13.3 of AP II establish that protected persons retain their protection unless and until they take a direct part in hostilities and for such time as such participation lasts. A distinction must therefore be made between acts considered direct participation

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43 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

44 Schmitt, M., 2010, The interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis. Harvard National Security Journal, 1, pp. 22.

45 Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977.

in hostilities and those of indirect participation that do not entail a loss of protection. To do so, it is necessary to start with Article 3(1) common to the four Geneva Conventions of 1949, which establishes that:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

The scope of this provision is controversial due to the variations in the term "active participation" used in the English version[46]. In both Common Article 3 and other provisions of the Geneva Conventions and their Additional Protocols, the adjectives "active" and "direct" are used to describe participation in hostilities[47]. In this context, the ICRC has affirmed that the terms 'active' and 'direct' represent the same value and degree of individual participation in hostilities, meaning that 'direct participation' and 'active participation' are synonymous[48]. In reaching this conclusion, the ICRC relies primarily on the fact that the French and Spanish versions of the text consistently use the expressions *'participent directement'* and *'participan directa'*.

Likewise, the International Criminal Tribunal for Rwanda[49] has held that:

> […] Common Article 3 is for the protection of 'persons not taking an active part in hostilities' (Common Article 3 (1)), and Article 4 of Additional Protocol II is for the protection of 'all persons not taking a direct

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46 The English text of common article 3 makes a reference to: "Persons taking no active part in the hostilities […]".

47 Vid. Art. 3(1) Common to the 1949 GC; Art. 2, Annex I (GC I, 1949), Draft Agreement Relating to Hospital Zones and Localities; Art. 40 GC IV; Art. 43(2),47(2)(b),51(3),67(1)(e),77(2) y 77(3) AP I; Art. 4(1), 4(3)(c)(d), y 13(3) AP II.

48 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

49 ICTR, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, 2 September 1998.

> part or who have ceased to take part in hostilities'. These phrases are so similar that, for the purposes of the Chamber, they can be treated as synonyms.

Notwithstanding the above considerations, the International Criminal Court (ICC), in the Lubanga case, drew a distinction between direct participation and active participation when interpreting the content of the war crime regarding the use of children in hostilities who were under 15 years of age[50]. For the ICC, the former refers solely to participation in combat, while the latter has a broader meaning. Thus, active participation includes all types of activities linked to combat (such as sabotage, espionage, or the protection of military objectives), as well as other activities related to assisting in the execution of military operations, which make an effective contribution to hostilities[51]. According to the ICC[52] active participation in hostilities by children under 15 years of age includes both direct participation and certain acts or omissions considered, within the classic distinction between direct and indirect participation, as activities of "indirect participation"[53].

However, the fact that the ICC used the term "active participation" in a broad sense in the Lubanga case does not imply that it can be extended beyond the scope of the war crime concerning the use of children under 15 years of age in hostilities. To date, the ICC has not ruled on the impact of this interpretation on the loss or absence of protection.

Referring to the commentaries on Article 51 AP. I, Bosch clarifies that direct participation in hostilities is superficially defined as those "acts of war which by their nature or purpose are directed at causing actual harm to the personnel or equipment of enemy armed

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50 ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/01-01/06, TC I, Judgment pursuant article 74 of the Statute, 14 March 2012.

51 Idem.

52 Ibid, pp. 623-629.

53 For a critical view of the division between active and direct participation, see Jenks, 2013, pp. 120-122.

forces"[54]. However, according to international custom or international treaties, there is no concept that indicates the type of individual actions that should be understood as acts of direct participation in hostilities[55].

For his part, Dinstein cites some of the activities that have been accepted as direct participation in hostilities, including: participating in the preparation and planning of a military mission, operating sophisticated combat weapons (drones or unmanned aerial vehicles), collecting information about the enemy, carrying out activities that have a direct relationship (geographical and temporal) with hostilities as a civilian contractor and acting as an involuntary human shield[56].

3.2. Elements of the definition of direct participation in hostilities

In order to stipulate what types of conduct should be understood as "direct participation in hostilities" for the purpose of distinguishing between those that lead to the loss of protection and those that do not [indirect participation][57], the ICRC has sustained that hostile acts during the conduct of hostilities must: (a) seek to inflict a certain level of damage on the military or operational capability of the counterparty to the conflict [damage threshold]; (b) have a causal relationship with the damage sought to be caused [direct causation

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54 Bosch, S., 2014, The International Humanitarian Law and the Notion of Direct Participation in Hostilities- A Review of the ICRC Interpretative Guide and Subsequent Debate. PER, 17(3), pp. 999-1046. doi:http://dx.doi.org/10.4314/pelj.v17i3.05.

55 Idem.

56 Yoram D, 2013, Direct Participation in Hostilities. Tilburg Law Review, Vol. 18, pp. 3-16.; Attacks on involuntary human shields should always be considered illegal, as they are under IHL. However, taking into account the principle of proportionality, they may be considered collateral damage depending on the contextual circumstances.

57 ICRC, 2011, International Humanitarian Law and the challenges of contemporary armed conflicts, Report, 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November - 1 December; ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

between the act and the damage]; and (c) be designed to cause expected damage that benefits one party to the conflict and harms the other [belligerent nexus][58].

3.2.1. The Harm Threshold

The ICRC has stated that for an act to qualify as direct participation in hostilities, the resulting damage must meet a certain threshold, either because it causes death, injury, or destruction of protected persons or objects, or because it produces damage of a specifically military nature (known as an "adverse military effect")[59].

This first element does not require the actual occurrence of the damage or an assessment of its magnitude; it is sufficient that there is an objective probability of causing it[60]. Accordingly, what must be analyzed is the harm that is reasonably expected to result from the action or omission carried out in the course of an armed conflict by a person who, in principle, enjoys protection[61].

Consequently, the harm threshold required for direct participation in hostilities could be met if the action has the potential to injure or destroy protected persons or objects. However, this action must be part of the war strategy within the framework of an armed conflict —as is the case with deportations— or have a clear connection with ongoing hostilities[62].

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58 Idem.

59 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

60 Bosch, S., 2014, The International Humanitarian Law and the Notion of Direct Participation in Hostilities- A Review of the ICRC Interpretative Guide and Subsequent Debate. PER, 17(3), pp. 999-1046. doi:http://dx.doi.org/10.4314/pelj.v17i3.05.

61 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

62 Schmitt, M., 2010, The interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis. Harvard National Security Journal, 1, pp. 5-44

Likewise, the harm threshold would also be reached when "adverse military effects" occur, which for the ICRC includes damage consisting of killing or injuring members of a party to the conflict or destroying its military property[63].

This definition of the harm threshold has, however, been criticized "for being narrow and unduly difficult to satisfy"[64]. For this reason, Schmitt prefers to refer to "acts harmful to the enemy"[65], a term that, in his opinion, better corresponds to the expressions used in the provisions of AP I[66]. For Schmitt, the concept of "acts harmful to the enemy" includes any "act whose purpose or effect is to harm the adverse party by facilitating or impeding military operations." This definition would encompass both direct harm inflicted on the enemy during military operations and any deliberate attempt to hinder them[67]. It would therefore include acts of sabotage and activities that restrict or disrupt the military operations (or military capability)

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63 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

64 Bosch, S., 2014, The International Humanitarian Law and the Notion of Direct Participation in Hostilities- A Review of the ICRC Interpretative Guide and Subsequent Debate. PER, 17(3), pp. 999-1046. doi:http://dx.doi.org/10.4314/pelj.v17i3.05.

65 Schmitt, M., 2010, The interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis. Harvard National Security Journal, 1, pp. 5-44

66 Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977; Olasolo, H., 2007, *Ataques Contra Personas o Bienes Civiles y Ataques Desproporcionados en Situación de Combate*, Tirant lo Blanch, 1°Edition; The AP I establishes that: (a) the sick, wounded, and shipwrecked "refrain from any act of hostility" and may be attacked as long as they pose a threat to the enemy, regardless of whether or not they are able to defend themselves; (b) medical units lose their protection when "outside their humanitarian function, acts harmful to the enemy"; and (c) civil defense organizations and, in general, personnel participating in "acts harmful to the enemy" lose their protection.

67 Schmitt, M., 2010, The interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis. Harvard National Security Journal, 1, pp. 5-44.

of a party to the conflict, as long as they affect the deployment of its personnel, logistics, or communications. This would be the case, for example, with the destruction of, or electronic interference with, military computer networks and the interception of the telephone lines of the opposing party's high command, with a view to affecting a specific military operation.

Schmitt therefore contends that the concept of "direct participation in hostilities" should not be limited to acts that cause harm or detriment to the enemy, but should also include those that benefit one of the parties to the conflict[68]. This would also include activities that increase the capability of one of the parties to the conflict to carry out certain military operations, whether imminent or not. In this author's words:

> […] it would be very restrictive to exclude certain cases of capability enhancement. Examples include the recruitment of suicide bombers and the purchase of materials for the creation of bomb vests. […] This being so, the criterion must be expanded to include capability enhancement activities, which involve more than simply improving general military capability with respect to those related to specific operations, or classes of operations that are relatively imminent[69].

3.2.2. Direct Causation Between Act and Damage

The second element of the concept of direct participation in hostilities is the causal connection between the action or omission in question and the resulting damage[70]. Because this element deals with causality, the nature of the relationship between cause (act) and effect (damage) must be analyzed in order to understand the difference between acts of "direct" and "indirect" participation in hostilities[71].

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68 Ibid, p. 727

69 Idem.

70 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

71 Schmitt, M., 2010, The interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis. Harvard National Security

The ICRC proposes three factors to determine when the causal link is direct. First, the damage caused must result from a single causal sequence. This rules out individual conduct that is limited to preserving or expanding the military capability of one of the parties to the conflict[72]. The required proximity between the act and the damage seeks to avoid the excessive scope of the principle of distinction, in order to preserve, as far as possible, the protection of civilians in contexts of armed conflict[73].

Schmitt has suggested that the expression "a single causal sequence" should not be taken literally, since some military activities require complex preparation and the execution of several actions in order to implement them[74]. Consequently, a more comprehensive view of participation is required, extending "…as far upwards

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Journal, 1, pp. 5-44; ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

72 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December, p. 53; The ICRC provides some relevant examples to help understand what types of actions are excluded from direct participation in hostilities because they have an indirect causal link with the harm caused or intended to be caused: " For example, imposing a regime of economic sanctions on a party to an armed conflict, depriving it of financial assets, or providing its adversary with supplies and services (such as electricity, fuel, construction material, finances and financial services) would have a potentially important, but still indirect, impact on the military capacity or operations of that party. […] scientific research and design, as well as production and transport of weapons and equipment unless carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm".

73 Bosch, S., 2014, The International Humanitarian Law and the Notion of Direct Participation in Hostilities- A Review of the ICRC Interpretative Guide and Subsequent Debate. PER, 17(3), pp. 999-1046. doi:http://dx.doi.org/10.4314/pelj.v17i3.05.

74 Schmitt, M., 2010, The interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis. Harvard National Security Journal, 1, pp. 5-44; Bosch, S., (2014), The International Humanitarian Law and the Notion of Direct Participation in Hostilities- A Review of the ICRC Interpretative Guide and Subsequent Debate, PER, Vol. 17(3), pp. 999-1046. doi:http://dx.doi.org/10.4314/pelj.v17i3.05.

and downwards as possible, provided there is a causal link."[75]. Melzer, however, rejects Schmitt's position because he considers it too broad and would allow that: "…any act connected with the resulting harm through a causal link could automatically qualify as 'direct' participation in hostilities"[76].

The second factor pointed to by the ICRC is the need to assess the integrity of the act, since certain actions, which in isolation may be considered minor, may reach the threshold of harm if carried out in conjunction with others. According to the ICRC:

> […] when a specific act does not in itself directly cause the required threshold of harm, the direct causation requirement will be met if the act constitutes an integral part of a specific and coordinated tactical operation that directly causes such harm[77].

In other words, any action that directly contributes to the preparation and conduct of a specific military operation will be considered to be direct participation, even if it occurs outside the battlefield. This will be the case for identifying military objectives, training for the use of a certain types of explosives to be used in a specific operation or locating an enemy military deployment zone. On the other hand, acts that are not part of a specific military operation but merely contribute to the general preparedness of the armed group do not meet the direct causation requirement. This is the case for general physical training or training in the use of certain conventional weapons or devices.

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75 Bosch, S., 2014, The International Humanitarian Law and the Notion of Direct Participation in Hostilities- A Review of the ICRC Interpretative Guide and Subsequent Debate, PER, 17(3), pp. 999-1046. doi:http://dx.doi.org/10.4314/pelj.v17i3.05.

76 Melzer, N., 2010, Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC 'S Interpretative Guidance on the Notion of Direct Participation in Hostilities. N.Y.U International Law and Politics, 42, pp. 831-916.

77 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

Since the means of warfare currently do not need to be on the battlefield to cause harm to the enemy, the persons operating them can directly participate in hostilities at considerable distances from the place where they are carried out. In addition, there are individuals who, while in the zone of hostilities, do not take a direct part in them, since their activity only indirectly supports those who perform continuous combat functions. For this reason, the ICRC establishes as a third factor that what this implies is that that both temporal and geographical proximity should be understood as auxiliary (but not conclusive) criteria for assessing, in each situation, whether an act meets the requirement of direct causality[78].

In the Strugar case, the ICTY held that, based upon the three factors mentioned above, it had to be concluded that any action that contributes to the general war effort or to activities in support of the war (by any of the parties to the conflict) does not meet the direct causation requirement and is considered an act of indirect participation in hostilities - which therefore would not entail the loss of protected status[79]. The general war effort refers to "all activities that objectively contribute to the military defeat of the adversary"[80], while activities in support of the war are "political, economic or media actions that support the general war effort"[81]. Given that both types of actions tend to increase the armed group's capacity to cause harm, but are not related to specific military operations, nor do they direct-

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78 Schmitt, M., 2010, The interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis. Harvard National Security Journal, 1, pp. 731-732.

79 ICTY, Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgment, 17 July 2008.

80 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

81 Some examples of general warfare efforts include the manufacture, production, and shipment of weapons and military equipment, as well as the construction and repair of roads, airport gates, bridges, and other infrastructure unrelated to specific military operations. In the case of support activities in warfare, the ICRC mentions political propaganda, financial transactions, agricultural production, and non-military industrial production.

ly affect the adversary, the protected persons taking part in them are considered to be only indirectly participating in hostilities[82].

3.2.3. The Belligerent Nexus

The third element of the definition of direct participation in hostilities highlights the specific purpose of the act. The objective of the act can be none other than to produce the required threshold of harm in support of one of the parties to the conflict and to the detriment of the other[83]. From this statement it follows that to establish whether or not a belligerent nexus exists, it is necessary to analyze the objective purpose of the act, which can normally be deduced from its preparation. There will be no belligerent nexus when, for example, "civilians act in self-defense or in defense of others, exercise acts of power or authority over certain persons or territories, or act violently against other civilians"[84].

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82 ICRC, 1987, Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949, Geneva, Martinus Nijhoff Publishers, par. 1679; In this regard, the ICRC commentary to the AP I affirms that "[u]ndoubtedly there is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit Indirectly. The population cannot on this ground be considered to be combatants, although their possible presence near military objectives (Article 52 - General protection of civilian objects, paragraph 2) does expose them to incidental risk. […] Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place".

83 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

84 Bosch, S., 2014, The International Humanitarian Law and the Notion of Direct Participation in Hostilities- A Review of the ICRC Interpretative Guide and Subsequent Debate. PER, 17(3), pp. 999-1046. doi:http://dx.doi.org/10.4314/pelj.v17i3.05.

Some authors criticize the ICRC's approach to this third element because, according to it, the belligerent nexus requires that one of the parties to the conflict benefits from the harm it causes to another. However, this excludes acts of violence that simultaneously affect the different parties involved in the conflict, since there are situations of civil opposition to all parties involved in the conflict[85].

Furthermore, if the nexus of belligerence is indispensable for determining participation in hostilities, what happens with respect to those acts that directly enhance the military capability of one party's operations, without resulting in direct and immediate harm to the opposing party? Schmitt asserts that the only requirement that should be inferred from the belligerent nexus is the specific purpose of the protected person's act of supporting one party to an armed conflict when it engages militarily in confrontation with another party[86]. This position was adopted by the ICC in the Lubanga case, which held that the use of child soldiers to guard military objectives or as bodyguards for military commanders constitutes "the active use of such children in hostilities"[87].

Given the difficulty of determining the belligerent link in practice, the ICRC has stated that "the eventual belligerent link must be based on information reasonably available to the person who must determine it and must always be inferred from factors that can be objectively verified"[88]. It will be crucial therefore to determine whether the protected person's conduct, in light of the circumstances prevailing at the time and place in which it is carried out, can reasonably be perceived as an act intended to support one party to the detriment of the other.

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85 Schmitt, M., 2010, The interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis. Harvard National Security Journal, 1, pp. 5-44

86 Ibid. p. 34

87 ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/01-01/06, TC I, Judgment pursuant article 74 of the Statute, 14 March 2012.

88 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

Finally, it is important to differentiate between the belligerent link and concepts such as subjective intent or hostile intent, which are related to subjective circumstances, such as the protected person's mental capacity or willingness to incur liability. In general, these conducts do not influence the belligerent nexus and, consequently, there is a possibility that even those who are forced to participate directly in hostilities[89] or children who are recruited despite not yet being of legal age to do so may lose their protection[90].

4. Situations of Legitimate Self-Defense by Protected Persons

Would villagers, who do not directly participate in hostilities but decide to fire their hunting rifles at enemy armed forces units attacking their village with the clear intention of killing all its inhabitants lose their protection? As can be noted from this question, situations of self-defense carried out by protected persons are particularly problematic since, although they are not considered acts of direct participation in hostilities, they are difficult to distinguish from them. This is because they can reach the required threshold of harm and are the result of a direct causal relationship between the act and the harm although, due to the circumstances in which they occur, acts of self-defense lack a belligerent nexus. This is because self-defense does not aim to cause harm or support one or the other party to the conflict but is "…a legitimate expression of individual autonomy and sovereignty"[91].

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89 Geneva Convention IV, (CG.VI), Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, art. 40; It should be noted that civilians protected under GC IV cannot be forced to perform work that they have "directly related to the conduct of military operations" or to serve in the armed forces or auxiliary forces of the enemy.

90 Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977; Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977.

91 Tonkin H., 2005, Defensive Force under the Rome Statute. Melbourne Journal of International Law, 6, pp. 1-32.

Article 31(1)(c) of the ICC Statute (SICC) establishes self-defense, defense of a third party, or defense of property as a defense against individual criminal liability. These are reasonable, proportionate, and necessary acts exercised to provide protection to oneself, third parties, or objects essential to a military operation from imminent and unlawful acts of force[92].

As applied to the case of protected persons, self-defense must comply with the three requirements set forth in Article 31(1)(c) of the SICC. First, there must be an imminent and unlawful danger of the use of force against a person or object essential to a military operation. Second, the response to such danger must be appropriate, proportionate, and necessary, and with there being available in the circumstances no less harmful measure in order to avoid the threat of imminent and unlawful aggression. Finally, the response must be intended to repel the aggression[93].

Regarding the first requirement regarding the imminence of the threat, Tonkin sustains that this consists of the urgency to react to an objective risk which represents potential negative effects on the persons or property being protected[94]. For the threat to be objective implies that it is real, that is, that it is not based solely on assumptions. The person defending themselves, for example, must be pointed at by a weapon. They may not, however, assume that they will be attacked by an armed person approaching them, and therefore believe they have the right to react before something happens. Furthermore, since the outcome of the attack is unknown, the defensive reaction may stem from the potential for harm, even if it is later proven that the threat could not cause harm, as would occur, for example, in the case of an attacker threatening a group of civilians with a non-explosive bomb vest[95].

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92 Olasolo, H., 2007, *Ataques Contra Personas o Bienes Civiles y Ataques Desproporcionados en Situación de Combate,* Tirant lo Blanch, 1° Edition.

93 Tonkin H., 2005, Defensive Force under the Rome Statute. Melbourne Journal of International Law, 6, pp. 1-32.

94 Idem.

95 Ibid., p. 10-11.

Additionally, there must be an assessment as to whether the threat of attack is objectively unlawful. This requires a judgment about the act itself, not the perpetrator[96]. Olasolo suggests in this regard that ICC jurisprudence should resolve whether the term "unlawful use of force" refers only to physical force or also includes psychological aggression, such as coercion produced through threats[97].

Regarding the second requirement, it is expected that the reaction to danger be appropriate to avoiding the danger or repelling the aggression. It is also required that, in the circumstances of the case, there be no less harmful measure that would achieve the same result[98].

Regarding the purpose of repelling the aggression, Olasolo has argued that there is no need for the person defending themselves to do so with the specific motivation of avoiding the danger; it would be sufficient to know that they are acting in a manner that is suitable, necessary, and proportional to the aggression[99]. In any case, it is important to note that the protected persons' motivation for resorting to arms must always be assessed in order to determine whether an act constitutes self-defense or active participation in hostilities, which, as we have seen, always requires a nexus of belligerence.

As Olasolo has indicated, the scope of self-defense in combat situations must be defined. Therefore, it can only be accepted under the assumption that protected persons take up arms in the face of an imminent threat of unlawful use of force by the enemy, which puts their lives, the lives of others, or assets essential to carrying out a military

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96 Idem.

97 Olasolo, H., 2007, *Ataques Contra Personas o Bienes Civiles y Ataques Desproporcionados en Situación de Combate*, Tirant lo Blanch, 1° Edition.

98 Tonkin H., 2005, Defensive Force under the Rome Statute. Melbourne Journal of International Law*, 6, pp. 1-32*; for Tonkin, Proportionality requires that the magnitude of the threat not be exceeded, since it understands that responding to an imminent danger cannot legally justify causing greater harm than the threat potentially represented. However, this position seems to confuse self-defense with necessity, where the harm caused by the response to prevent imminent harm cannot exceed the magnitude of the harm itself.

99 Idem.

operation at immediate risk[100]. This will prevent prolonged armed confrontations between armed groups and protected persons from being classified as self-defense, as they could not be the target of an attack if they were claimed to be acting in self-defense. As this author has stressed, in the absence of an adequate delimitation of the scope of application of self-defence, we may find that in situations such as the siege of Sarajevo, besieged Bosnian Muslim civilians could, for a period of several years, fire in self-defence at the Serbian troops surrounding them without the latter having the right to respond militarily[101].

5. Temporality of Direct Participation in Hostilities

5.1. Sporadic Direct Participation in Hostilities

The question regarding the temporary nature of direct participation in hostilities concerns protected persons who sporadically or temporarily become involved in hostilities and then return to civilian life, regaining their protection[102]. Therefore, the expression "for the duration of such participation" does not apply to members of organized armed groups or the State's armed forces[103] who, in principle, may be subject to attack at any time due to their continuous combat functions.

When protected persons participate directly in hostilities, they may be subject to attack only during the period of their specific participation in a specific hostile act. This period includes preparatory

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100 Idem.

101 Olasolo, H., 2007, *Ataques Contra Personas o Bienes Civiles y Ataques Desproporcionados en Situación de Combate,* Tirant lo Blanch, 1° Edition.

102 TEDH, Kononov v. Latvia, judgment, may 17, 2010, case: 36376

103 Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977; Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977; Schmitt, M., 2010, The interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis. Harvard National Security Journal, 1, pp. 5-44

measures, deployment to the point where the military operation will be carried out and return from that point[104]. While "preparatory measures" include all specific acts aimed at carrying out a specific military operation, tending to cause a detriment to the adversary's military capability, "deployment" covers not only the movement of individuals to the site of the operation, but also all acts prior to it, such as loading war material onto trucks[105]. What has been said above regarding deployment also applies to return.

5.2. Repeated and Persistent Direct Participation in Hostilities

What happens when the direct participation of protected persons in hostilities is not merely sporadic or temporary, but occurs repeatedly and persistently? The ICRC maintains that protected persons who participate in hostilities in this manner will regain their protection each time a specific hostile act is terminated. This means that protection will be lost and resumed each time a protected person begins and ends an integral activity within a specific military operation[106]. This situation is known as the "revolving door," as it denotes how a person can continually enter and leave their sphere of protection, while effectively contributing to the military objectives of one party to the conflict and to the detriment of the other.

When a protected person's participation in hostilities is sporadic or temporary, the loss and reacquisition of their protection does not

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104 Melzer, N., 2010, Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC 'S Interpretative Guidance on the Notion of Direct Participation in Hostilities. N.Y.U International Law and Politics, 42, pp. 831-916.

105 Melzer, N., 2010, Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC 'S Interpretative Guidance on the Notion of Direct Participation in Hostilities. N.Y.U International Law and Politics, 42, pp. 831-916; Boothby, B., 2010, "And for Such Time As": The Time Dimension to Direct Participation in Hostilities. N.Y.U International Journal of Law and Politics, 42, pp. 741- 768.

106 ICRC, 2008, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Review of the Red Cross, Volume 90 Number 872, December.

generate as much controversy. This is because it can be established that, before participating in the specific hostile act that led to the loss of protection, the protected person had already spent a substantial amount of time without performing actions that could be classified as direct participation in hostilities (or had never performed any). Likewise, it can be observed that after participating directly in hostilities, they ceased to perform hostile acts for a considerable period.

Such would be the case of a peasant who, on a one-time basis, helps an organized armed group locate the camp of the armed forces patrolling the area, so that a surprise attack can be carried out against them. It should be noted that the main reason for protected persons to lose their protection in this case is not because they represent a threat to the opposing party, but because they have decided to participate directly in the conflict[107].

When it comes to protected persons who are frequently involved in hostilities, it is more difficult to determine where the loss of their protection begins and where it ends. Departing from the ICRC's position, some authors, such as Boothby, argue that in these cases, protection must be understood as a continuous loss, regardless of the intervals in which they do not perform functions that could be considered direct participation[108]. This position is based on the fact that the persistent participation of these persons is a clear indicator of future behavior[109]. Thus, people who are peasants during the day and take a direct part in hostilities at night would lose their protection on a continuous basis, given that it can easily be deduced from their repeated behavior that they will also take up arms the following day at nightfall. Consequently, to determine whether a protected person who repeatedly and persistently participates in hostilities has ceased

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107 Schmitt, M., 2010, The interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis. Harvard National Security Journal, 1, pp. 5-44

108 Boothby, B., 2010, "And for Such Time As": The Time Dimension to Direct Participation in Hostilities. N.Y.U International Journal of Law and Politics, 42, pp. 741- 768.

109 Ibid., p. 162.

to do so, according to these authors, requires a clear act of renunciation that leaves no room for ambiguity[110].

For his part, Melzer argues that when the conduct of a supposedly protected person leads to the conclusion that he or she is persistently and repeatedly participating in hostilities, it must be understood that he or she is exercising a continuous combat function on behalf of one of the parties to the conflict and is therefore not subject to protection against attacks by the opposing party. Melzer (2010) reaches this conclusion because:

> In practice, a civilian [protected person] who regularly and consistently participates directly in hostilities in support of a belligerent will almost always be affiliated with an armed force or organized group and, thus, may be considered a de facto member who assumes continuous combat functions for that group or force. […] This includes not only the individual who is armed full-time, but also private contractors hired to defend military objectives, as well as the notorious "farmer by day and fighter by night" who, supposedly in parallel with his or her peaceful daily life, assumes a continuous combat function that involves acts such as laying mines, or providing tactical intelligence or logistical support for specific attacks.

With the clarifications formulated by Melzer, the discussion about the "revolving door" appears to be resolved. Thus, if a protected person's behavior reveals continuity in participation in hostilities, they will lose their protection because they will be considered de facto to be performing continuous combat duties. In all other cases, including those in which there is doubt about a protected person's repeated participation in hostilities, it should be affirmed, following the ICRC's position, that protection is lost only during the intervals in which such participation persists.

Regarding the unambiguous act of renunciation doctrine proposed by Boothby, we believe it creates numerous practical problems due to the high probability that numerous members of one of the parties to the conflict either have no knowledge of the act of renunciation or are uncertain about the effective renunciation of a person who has continuously participated directly in hostilities.

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110 Idem.

6. Conclusion

Distinguishing between those who may be legitimate targets of attack and those who are not must take into account, to the extent possible, the circumstances and specificities of each type of participation[111]. First, it must be established whether the individuals targeted are part of the armed forces of a State or an organized armed group. To do this, it is necessary to analyze whether they perform a continuous combat function within the group. For this the following factors, among others, will be taken into account: whether they openly carry weapons, whether they wear uniforms, whether they were (or are being) trained for combat, or whether they receive any payment for serving in the ranks.

Obtaining information about these aspects is more accessible in the case of the armed forces, as formal documents exist that prove membership. However, it may be difficult in the case of organized armed groups operating in non-international armed conflicts, so circumstantial evidence will be necessary.

When a person cannot be deemed to be a member of the armed forces of a State or an organized armed group, it must be concluded that, in principle, they remain under the protection of IHL. However, this protection may be lost in the event of direct participation in hostilities. For this to occur, it will be necessary to analyze whether the alleged act of direct participation in hostilities meets the requirements of the threshold of harm, direct causation, and belligerent nexus. In application of these requirements, any protected person who performs acts that constitute an integral part of a specific military operation, which has the objective and capacity to harm the adversary and thereby benefit one of the parties to the conflict, will be deemed to have "directly participated in hostilities" and will lose their protection. It is not essential that the protected person's contribution, whether made on or off the battlefield, have the capacity to cause harm to the opposing party, but it is required that they make a

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111 ICTY, Prosecutor v. Perisic, Case No. IT-04-81-T, Judgment, 6 September 2011.

significant contribution to a specific military operation that has such a capacity.

However, acts of support for the general logistics of the war effort of one of the parties to the conflict do not constitute direct participation in hostilities, as is the case with contractors and civilian employees, both of the armed forces and organized armed groups, who retain their protection unless they assume continuous combat functions or directly participate in specific military operations.

In addition, conduct carried out in self-defense cannot be classified as acts of direct participation in hostilities, and therefore, the protected persons who carry them out do not lose protection.

Finally, considering that protection is lost during the time during which a person directly participates in hostilities, the frequency with which direct participation in them must be analyzed for each specific case. If participation is repeated, it can be concluded that the person performs continuous combat functions; that is, they may be considered a de facto member of the group for whose benefit they carry out hostile acts. If, on the other hand, participation is sporadic (or with long intervals separating one act of participation from another), the loss of protection will only occur while the act of direct participation in hostilities is taking place. In case of doubt, it should be stated that protection is lost only during the intervals during which such participation persists. Furthermore, in the latter case, if there is doubt about direct participation in hostilities at a specific time, it will be necessary to refrain from using violence against the person concerned.

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25. Contributions by international criminal jurisprudence with respect to the evidence of sexual crimes

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1. Introduction: Evolution of the International Legal Regulation of Evidence for Sexual Crimes

Sexual crimes —which have particularly undermined the integrity of countless women and minors—have historically been a consequence of armed conflicts, in which attacks against the civilian population are a daily reality[1]. Currently, far from the use of sexual

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violence in conflicts being reduced, it is frequently employed by the warring parties, regardless of sex or age, as a tactic of terror and subjugation, severely traumatizing the victims and profoundly affecting the well-being of the communities to which they belong[2].

The proliferation of crimes of a sexual nature has led to the gradual development of various international standards to define their main aspects, including the use and assessment of evidence. The starting point is the respective statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). None of these contain any express mention of evidence for sexual crimes or for the provision of victim testimony at trial. Both Articles 20 (1) and (4) and 22 of the Statute of the International Criminal Tribunal for the former Yugoslavia (SICTY), and Articles 19 (1) and (4) and 21 of the Statute of the International Criminal Tribunal for Rwanda (SICTR)[3], are limited to generic references to the protection of victims and witnesses in general, which must be developed within the rules of procedure and evidence.

Rules 75 (measures for the protection of victims and witnesses) and 79 (closed-door hearings) of the Rules of Procedure and Evidence of the ICTY, ICTR, and SCSL, set forth various measures to protect victims and witnesses. They allow evidence to be taken in camera, or to provide testimony through various electronic or special means. However, these provisions also contain no specific reference to victims of sexual crimes. Consequently, the only reference to the latter is found in Rule 96, common to the Rules of Procedure and Evidence of the ICTY (RPEICTY), the Rules of Procedure and Evidence of the ICTR (RPEICTR), and the Rules of Procedure and Evidence of the SCSL (RPESCSL), which regulates the taking of evidence in

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tigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court.

2 Pratt, M. y Werchick L., 2004, Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo. An assessment of programmatic responses to sexual violence in North Kivu, South Kivu, Maniema, and Orientale Province.

3 The Statute of the Special Court for Sierra Leone does not even include these general references contained in the SICTY and the SICTY.

sexual assault cases. It establishes the following basic principles: (a) corroboration of the victim's testimony is not required; (b) consent is not a valid defense if the victim has been subjected to, threatened with, or has reason to fear violence, coercion, detention, or psychological oppression against themselves or a third party; (c) before any evidence of the victim's consent is admissible, the accused must satisfy the Trial Chamber, in camera, of its relevance and credibility; (d) evidence regarding the victim's prior sexual conduct is inadmissible.

Based on this, Articles 68(2) and 69(2) of the Statute of the International Criminal Court (ICC) and Rules 70 and 71 of the ICC Rules of Procedure and Evidence (RPE) have developed what is to date the most detailed standard on the practice and assessment of evidence in sexual crimes. The first two provisions establish that, notwithstanding the public nature of the hearings, the competent Chamber, in order to protect, in particular, victims of sexual crimes and minors, may order that part of the oral proceedings be held in camera or that testimony be given through electronic or other special means (Art. 68(2)). This includes video or audio recordings or transcripts of written statements (Art. 69(2)).

Rule 71 of the RPE, for its part, establishes that "taking into account the definition and nature of the crimes within the jurisdiction of the Court, and subject to Article 69, paragraph 4, the Chamber shall not admit evidence of the past or subsequent sexual conduct of the victim or a witness." Furthermore, Rule 70 of the RPP establishes the following principles applicable to evidence in sexual violence cases:

The victim's consent may not be inferred (a) from any words or conduct of the victim where force, threat of force, coercion, or use of a coercive environment has diminished the victim's capacity to give free and voluntary consent; (b) from any words or conduct of the victim where the victim is incapable of giving free consent; or (c) from the victim's silence or lack of resistance to the alleged sexual violence.

The credibility, reputation, or sexual availability of a victim or witness cannot be inferred from the sexual nature of the victim's or witness's prior or subsequent behavior.

With the development of international standards on the practice and assessment of evidence in sexual crimes, a series of questions have arisen regarding the measures that should be adopted at the national and international levels to strengthen judicial mechanisms that bring alleged perpetrators to justice and provide victims with prompt and adequate reparation[4].

It is within this context that this paper analyzes the main jurisprudential contributions made by international criminal tribunals regarding the evidence used to prove the commission of sexual crimes. To this end, the text is structured into an introduction, a conclusion, and four sections, each dedicated to one of the four international criminal tribunals that we consider to have been most relevant in this matter: the ICTY, the ICPR, the SCSL, and the ICC.

2. International Criminal Tribunal for the Former Yugoslavia

In the cases Prosecutor v. Nikolić (2003), Prosecutor v. Furundzija (1998) and Prosecutor v. Kunarac et. al. (2001), in which the hierarchical rank of the accused was low, the object of the evidentiary activity before the ICTY has focused on (a) the existence of the crimes; and (b) their material commission by the accused themselves, their presence at the crime scene or, in the case of crimes committed by third parties when they were not present at the crime scene, their knowledge of their commission and their degree of influence over the material perpetrators.

In these cases, the testimony of the victims was used as the primary means of evidence. They were not required to be absolutely accurate or precise regarding the information provided in their statements (days, times, or even names of individuals). At all times, given the serious psychological impact, the rigid evidentiary requirements were not imposed in order to avoid double victimization[5]. In addition, in-

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4 Bastick, M., Grimm K. y Kunz R., 2007, Sexual Violence In Armed Conflict. Global Overview and Implications for the Security Sector.

5 ICTY, Case of the Prosecutor v. Anto Furundzija, Judgement, IT-95-17/1-T, 10 December 1998; ICTY, 2001, Case of the Prosecutor v. Dragoljub Kun-

direct testimony was also admitted, the probative value of which was increased when it was confirmed by other means of evidence, especially the statements of direct witnesses[6].

In the Kunarac et. al. case, one of the defenses presented expert evidence to demonstrate the defendant's sexual impotence and the resulting inability to commit a sexual crime[7]. In this scenario, however, despite corroborating the information presented by the expert, the Trial Chamber did not, give it great weight because it involved an illness suffered at a different time than the alleged sexual crimes[8].

There is a second type of case before the ICTY, which are those directed against higher-ranking superiors, in which the evidentiary pursuit has focused on demonstrating the existence of a Common Criminal Enterprise (CCE), from which the defendants used their hierarchical position to promote the commission of crimes by their subordinates in order to achieve the common objective of the CCE. The Krajisnic and Brdanin cases fall under this second typology[9].

In these cases, the evidentiary effort to demonstrate the existence of sexual crimes is lesser. It is focused, in addition to demonstrating the existence of a CCE[10], on establishing the concurrence of the objective and subjective elements of the accused's participation in

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arac, Judgement, IT-96-23-T& IT-96-23/1-T, 22 February 2001; ICTY, 2003, Case of the Prosecutor v. Dragan Nikolić, Judgement, IT-94-2-S, 18 December de 2003.

6 ICTY, Case of the Prosecutor v. Anto Furundzija, Judgement, IT-95-17/1-T, 10 December 1998; ICTY, 2001, Case of the Prosecutor v. Dragoljub Kunarac, Judgement, IT-96-23-T& IT-96-23/1-T, 22 February 2001.

7 ICTY, Case of the Prosecutor v. Dragoljub Kunarac, Judgement, IT-96-23-T& IT-96-23/1-T, 22 February 2001.

8 Ibid., pars. 807

9 ICTY, Case of the Prosecutor v. Momcilo Krajisnic, Judgement, IT-00-39-T, 27 September 2006; ICTY, 2004, Case of the Prosecutor v. Radoslav Brdanin, Judgement, IT-99-36-T, 1 September 2004.

10 Ibid., pars. 250-265; 883-886.

the acts[11], their knowledge of the punishable acts[12], and their intention that their subordinates carry them out[13]. In this context, proof of the accused's position of authority and their influence over their subordinates (the material perpetrators of the crimes) have acquired particular relevance.

The fact that the subject matter of evidence varies between the two types of sexual crimes cases here under analysis does not imply a substantial change in the means of proof employed, since in the Brdanin and Krajisnik cases, as well as in the Nikolic, Furundzija, and Kunarac et. al. cases, testimonial evidence was the principal means of proving the alleged facts[14].

In this regard, the Trial Chamber in the *Brdanin* case emphasized that the probative value of direct witnesses, including victims of sexual crimes, depends on verifying their objective reliability[15]. To this end, it is necessary to take into account the degree of compatibility between the testimony given at the oral trial and the written statements made before the trial[16]. On this issue, the Trial Chamber has recognized that some aspects of a witness's oral testimony may not be identical to the information contained in his or her prior written statements[17], since a witness may be asked questions at trial that

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11 ICTY, Case of the Prosecutor v. Radoslav Brdanin, Judgement, IT-99-36-T, 1 September 2004.

12 ICTY, Case of the Prosecutor v. Momcilo Krajisnic, Judgement, IT-00-39-T, 27 September 2006; ICTY, 2004, Case of the Prosecutor v. Radoslav Brdanin, Judgement, IT-99-36-T, 1 September 2004.

13 Ibid., pars. 987-1005; 2357 – 2366.

14 ICTY, Case of the Prosecutor v. Radoslav Brdanin, Judgement, IT-99-36-T, 1 September 2004; ICTY, 2006, Case of the Prosecutor v. Momcilo Krajisnic, Judgement, IT-00-39-T, 27 September 2006.

15 ICTY, Case of the Prosecutor v. Radoslav Brdanin, Judgement, IT-99-36-T, 1 September 2004; Other factors also taken into account by the Trial Chamber were the witnesses' knowledge of the acts allegedly constituting crimes, their lack of personal interest in the case, their integrity, and the fact that they are obliged to tell the truth under the terms of the solemn declaration they make.

16 Ibid., par. 26.

17 ICTY, Case of the Prosecutor v. Radoslav Brdanin, Judgement, IT-99-36-T, 1 September 2004.

were not previously put to him or her, or may, as a result of certain questions, recall details previously forgotten or omitted[18]. The Chamber also showed awareness that testimony concerning events that occurred at least ten years earlier may involve uncertainties due to the fragility of human perception[19], and that the absence of details does not necessarily imply its discredit[20]. Accordingly, the credibility of a witness who has previously recounted the essence of the events has not been rejected, notwithstanding the fact that certain contradictory details may be found in his or her testimony[21].

With regard to witnesses who did not directly witness the alleged events, the Trial Chamber has stressed that indirect evidence is admissible according to the practice and jurisprudence of the ICTY[22], such that the fact that a piece of evidence is indirect in nature (whether it has been heard from a direct witness, or is a mere "rumor"), does not necessarily deprive it of probative value[23], does not necessarily deprive it of probative value, since this depends on its voluntariness, veracity and reliability, in light of the other evidence presented[24]. This is also the case with written statements, in which the lack of an opportunity to question the person who made them, as well as the fact that a rumor is "first-hand", are relevant factors in attributing greater or lesser probative value to it[25]. However, what is clear is that the Trial Chamber in the Brdanin case has acknowledged that the probative value accorded to indirect evidence is often less than that accorded to the oral testimony of a witness examined under oath, although this will ultimately depend on the infinitely variable circumstances surrounding the individual pieces of evidence[26].

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18 Ibid., par. 34.
19 Ibid., par. 25.
20 Ibid., Footnote 21.
21 Ibid., par. 34.
22 Ibid., par 28.
23 Ibid., par. 29.
24 Ibid., Footnotes 25 -29.
25 Ibid., par. 29.
26 Ibid., Footnote 30.

Finally, with regard to documentary evidence, the Trial Chamber in the Brdanin case has admitted most of the documents submitted, varying the probative value attributed to them only in light of: (a) the general context of the other pieces of evidence[27]; and (b) the determination, through analysis of their origin and chain of custody, the authenticity of the documents submitted (including those containing the written statements of witnesses[28]).

Unlike in the Brdanin case, in the Krajisnik case, and despite the high volume of evidence admitted in the case (3,800 from the Prosecution, 330 from the Defense, and 27 submitted directly by the Chamber[29]), the Trial Chamber has not set out in such an exhaustive manner its treatment of such evidence, despite having adopted a general policy favoring the admission of evidence, provided that it is compatible with the spirit of the SICTY and general principles of law, particularly the principle of *indubio pro reo*[30].

In general terms, the Trial Chamber has rejected the probative value of evidence that, as a result of the overall record of the case, is unreliable or irrelevant for the purpose of reaching a judicial determination[31]. In particular, the Chamber has contrasted Krajisnik's own testimony with the evidence provided by the Prosecution, consisting mainly of direct witnesses (including victims of sexual crimes) and indirect witnesses, documentary evidence, statements in the media, intercepted telephone calls and minutes of meetings chaired by the accused, which has led it to reject the accused's allegations regarding his lack of knowledge of the alleged crimes, including crimes of a sexual nature[32].

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27 Ibid., par. 30.
28 Ibid., pars. 31 and 34.
29 ICTY, Case of the Prosecutor v. Momcilo Krajisnic, Judgement, IT-00-39-T, 27 September 2006.
30 Ibid., par. 22.
31 Ibid., Footnote 40.
32 Ibid., pars. 291, 304, 327, 372, 461, 545 and 1105.

3. The International Criminal Tribunal for Rwanda

In the cases against Jean-Paul Akayesu (mayor of Taba, Rwanda, who held exclusive control over his municipal and community police, and where at least 2,000 people of Tutsi origin were killed) and Théoneste Bagasora (director of cabinet at the Ministry of Defense during the armed conflict in Rwanda, and person in charge of managing the Ministry of Defense in the Minister's absence), the evidence given the greatest weight is the testimony of victims and other direct witnesses, the statements of indirect witnesses, and reports of the accused's visits to locations where the crimes were committed[33]. However, among these cases, both Trial Chambers have prioritized the testimony of victims of sexual crimes[34].

The evidence in the Akayesu case included a wide variety of first-hand witnesses, primarily victims, who testified that the accused witnessed rapes occurring in the Taba Town Hall premises itself as well as in its surrounding areas[35]. The Trial Chamber gave greater probative value to these testimonies than to the written reports and log sheets, which demonstrated visits to the Taba Town Hall and its surroundings while the alleged crimes were being committed[36].

The Trial Chamber addressed, in particular, two important issues regarding the assessment of the evidence: (a) the impact of trauma on the witnesses; and (b) issues of interpretation, together with cultural circumstances that could affect the understanding of the evidence presented[37]. Regarding the former, the Chamber cited Rule 96(i) of the ICTR, which specifically addresses testimonies of victims

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33 ICTR, Case of the Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, 2 September 1998; ICTR., 1998, Case of the Prosecutor v. Théoneste Bagosora, Judgement, ICTR-98-41-T, 18 December de 2008.

34 Ibid., pars. 449-460; 1724-1727.

35 ICTR, Case of the Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, 2 September 1998.

36 Ibid., par. 449.

37 ICTR, Case of the Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, 2 September 1998.

of sexual violence, emphasizing that corroboration is not required, as they enjoy a presumption of reliability[38].

Regarding the latter, the Trial Chamber has addressed a number of terms used interchangeably by witnesses (e.g., adultery, bedridden, taking by force, or coercion), which have been generically translated as "rape." Through consultations with its official interpreters, the Chamber has distinguished the specific contexts in which each term is used and indicated that, while understanding the context in which each term is used is critical to understanding its meaning, all of them refer to crimes within the jurisdiction of the ICTR[39].

In the case against Bagosora, in addition to the victims' testimony, which proved the commission of various sexual crimes[40] without the need for corroboration[41], the testimony of several experts was also admitted. This contributed to establishing a pattern of conduct within a specific place and time[42].

Likewise, the Trial Chamber used several witness testimonies presented by the defense to prove the systematic nature and pattern of conduct in the commission of sexual crimes, carried out by the organization headed by the accused, or at least with its acquiescence[43]. This situation arose particularly in relation to sexual crimes commit-

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38 Ibid., par. 134.

39 Ibid., pars. 152-153.

40 ICTR, Case of the Prosecutor v. Théoneste Bagosora, Judgement, ICTR-98-41-T, 18 December de 2008.

41 Ibid., par. 138.

42 Ibid., pars. 1728-1733.

43 The defendants' defense teams mostly presented testimonial evidence aimed at proving the defendants' innocence. In the case against Renzaho, witnesses such as HIN and PER denied the existence of the alleged rapes. Similarly, witnesses DBB and DCC in the Akayesu case stated that they had not heard of any rapes occurring in the municipality of Taba. The Trial Chamber, however, did not give probative value to these testimonies (and in some cases even rejected them), because they were either indirect witnesses whose probative value was not comparable to that of the eyewitnesses presented by the Prosecution, or because the defendants themselves had admitted that certain crimes of a sexual nature had been committed. However, this did not prevent the Trial Chambers from attributing some probative value to them for the construction of the contexts of the crimes.

ted on religious premises. Thus, several defense witnesses have testified to having witnessed crimes at locations such as the Saint Charles Lwanga Church[44], while the facts alleged by the Prosecution referred to crimes committed at the St. Josephite Centre[45]. In this situation, the Trial Chamber concluded that the defense witnesses reported very similar sexual acts, although committed in a different location, which, in the tribunal's opinion, established the context and pattern of conduct within a spatial and temporal framework[46].

The case against Sylvestre Gacumbitsi, leader of the National Revolutionary Movement for Democracy and Development (MRND for its initials in French), presents some important peculiarities due to the absence of direct witnesses to incriminate the accused. In this context, the Trial Chamber has attributed significant probative value to the testimony of an eyewitness who, without directly seeing the accused, recognized his voice as that used in public calls to persecute the Tutsis[47]. Furthermore, the Chamber emphasized that the fact that a rape victim has inconsistencies between her written statement and her oral testimony does not necessarily affect her credibility[48].

Finally, and also exceptionally, the Trial Chamber admitted radio recordings as evidence in the Renzaho case, having reached the conclusion that the accused had made public appeals through a radio broadcast, inciting the commission of rape against Tutsi women[49].

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44 Ibid., pars. 934-935.

45 Ibid., pp. 54-63.

46 Ibid., par. 1616.

47 ICTR, Case of the Prosecutor v. Théoneste Bagosora, Judgement, ICTR-98-41-T, 18 December de 2008.

48 The ICTR has also admitted, in the cases against Bagosora, Renzaho, and Akayesu, testimony that contained inconsistencies regarding dates and other aspects, arguing that the suffering experienced as a result of the violations and the context in which Rwanda found itself can leave serious psychological and mental consequences, which mean that victims cannot be more accurate in their statements.

49 ICTR, Case of the Prosecutor v. Tharcisse Renzaho, Judgement, ICTR-97-31-T, 14 July 2009.

4. Special Court for Sierra Leone

At the SCSL, crimes of a sexual nature have been the subject, in particular, of cases concerning members of the Armed Forces Revolutionary Council (AFRC) and the Revolutionary United Front (RUF)[50]. In both cases, the Prosecutor's Office has alleged that members of the AFRC and RUF committed widespread sexual violence (including rape and on occasion sexual slavery) against numerous women and girls[51]. This constituted a pattern of conduct in which the perpetrators abducted and detained victims, forcing them to perform sexual acts[52].

The parties in the AFRC and RUF cases presented mostly witness evidence, which is consistent with general practice before the CESL in relation to other types of crimes. While the RPESCSL establishes five types of evidence[53], documentary evidence, such as reports from international organizations or expert testimony, played a secondary role[54]. The testimony presented by the parties in the AFRC and RUF cases can be divided into two groups: (a) that from victims of sexual

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50 In January 2004, the SCSL Trial Chamber decided to group and try the accused according to their membership in the various armed groups involved in the conflict. As a result, the existing cases were grouped into four: (a) the case of Prosecutor v. Sesay, Kallon, and Gbao, involving senior leaders of the Revolutionary United Front (RUF); (b) Prosecutor v. Brima, Kamara, and Kanu, involving senior members of the Armed Forces Revolutionary Council (AFRC); (c) the case of Prosecutor v. Norman, Fofana, and Kondewa, involving senior members of the Civil Defense Forces (CDF); and (d) the case of Prosecutor v. Taylor, former President of Liberia. Only in the RUF, AFRC, and Taylor cases were crimes of a sexual nature charged.

51 SCSL, Case of the Prosecutor v. Issa Hassan Sesay, Indictment, SCSL-03, 07 March 2003; SCSL, 2003, Case of the Prosecutor v. Morris Kallon, Indictment, SCSL-03, 07 March 2003.

52 Idem.

53 RPESCSL, 16 January 2002; SCSL, 2007, Case of the Prosecutor v. Brima, Kamara y Kanu, Judgement, SCSL-04-16-T, 20 June de 2007; SCSL, 2012, Case of the Prosecutor v. Charles Ghankay Taylor, Judgement, SCSL-03-01-T, 18 May 2012.

54 SCSL, Case of the Prosecutor v. Charles Ghankay Taylor, Judgement, SCSL-03-01-T, 18 May 2012.; Human Rights Watch, 2002, We will kill you if you cry, Sexual Violence in the Sierra Leone Conflict.

violence; and (b) that given by those who directly observed the events or indirectly learned of them in one way or another.

With respect to both types of testimony, the Trial Chambers have taken consistency, coherence, and credibility as their assessment criteria. Thus, for each testimony presented, an individual analysis has been conducted to carefully compare each statement with the rest of the evidence presented by the parties[55].

Likewise, the Trial Chambers have decided to take into account the particular situation experienced by some individuals when testifying, since many of the witnesses presented at the hearing were testifying about events of which they have been victims, and as a result of which they have suffered damage to their physical and/or emotional integrity. Therefore, by evoking such acts during the taking of evidence, and considering the stress that testifying before an international court can cause, the high probability that the content of the testimony could be affected by this situation has been accepted[56]. In this context, the Chambers have deemed it unnecessary to engage in exhaustive scrutiny of witnesses during their testimony, because this might re-victimize them[57].

A comparative analysis of the two types of testimony mentioned above shows that the testimony of victims of sexual crimes was given greater evidentiary weight than the testimony of those who directly or indirectly knew about the alleged acts[58]. This conclusion is reached

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55 SCSL, Case of the Prosecutor v. Brima, Kamara y Kanu, Judgement, SCSL-04-16-T, 20 June de 2007; SCSL, 2012, Case of the Prosecutor v. Charles Ghankay Taylor, Judgement, SCSL-03-01-T, 18 May 2012.

56 Ibid. pars. 111 and 173.

57 Idem.

58 SCSL, Case of the Prosecutor v. Issa Hassan Sesay, Indictment, SCSL-03, 07 March 2003; There were very few cases in which the Prosecution offered sole testimony from individuals who, without being victims, had direct or indirect knowledge of the alleged acts and whose testimony was considered sufficient by the Trial Chamber to prove those acts. Such testimony was subject to strict analysis in accordance with the stipulated standards of proof and was notable for not being contested by the Defense. In contrast, the sole testimonies of victims of sexual violence crimes were more recurrent and were mostly considered sufficient to prove the crimes of rape and slav-

by considering the cases in which the Trial Chamber in the RUF case has accepted single, uncorroborated testimonies to prove some of the alleged acts[59].

Furthermore, given the difficulties in obtaining evidence demonstrating the presence of the various elements of sexual crimes, the SCSL Trial Chambers have affirmed the need to relax certain standards. They have also emphasized the need to establish guidelines for assessing the credibility of witnesses, particularly considering the context of coercion in which the victims find themselves at the time of the commission of the crimes[60].

5. International Criminal Court

The ICC's jurisprudence has developed, particularly in the Katanga and Bemba cases[61], a series of elements that complement the

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ery committed in Sawao and Bumpeh, even when their content was contested by the defense.

59 SCSL, Case of the Prosecutor v. Brima, Kamara y Kanu, Judgement, SCSL-04-16-T, 20 June de 2007; the Trial Chamber did not give probative value to the sole testimonies presented by the Prosecution in the AFRC case, considering them vague and lacking the necessary elements to establish the objective and subjective elements of the criminal offense.

60 SCSL, Case of the Prosecutor v. Issa Hassan Sesay, Indictment, SCSL-03, 07 March 2003.

61 ICC, Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of Charges, ICC-01/04-01/06, 29 January 2007; ICC, Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the confirmation of charges, ICC-01/05-01/08-424, 15 June 2009; ICC, Case of the Prosecutor v. Germain Katanga y Mathieu Ngudjolo Chui, Decision on the confirmation of charges, ICC-01/04-01/07, 30 September 2008; To date, the ICC has nine situations under investigation, involving 23 individual cases (ICC, n.d.). In developing this analysis, particular emphasis was placed on the cases against Germain Katanga, leader of the Patriotic Resistance Forces of Ituri (FRPI), who played an essential role in the planning and implementation of the attack on the village of Bogoro on February 23, 2003, and Jean Pierre Bemba, founder of the Congolese Liberation Movement (CLM) and its armed wing, the Congolese Liberation Army (CLA), which was one of the parties involved in the armed conflict in the Central African Republic.

provisions of the SICC and the RPE in respect to the practice and assessment of evidence in sexual crimes.

First, the facts constituting the crimes of sexual slavery and rape have been proven in both cases through oral testimony, both from direct victims who were kidnapped and raped by combatants, and from indirect witnesses whose statements have been corroborated by the direct victims[62]. In this way, the treatment of evidence at the ICC coincides with the trend observed in the rest of the international tribunals examined, since testimonial evidence prevails as the principal means of proof of sexual crimes[63].

Both cases involve the commission of crimes of a sexual nature. In contrast to these two cases, the Trial Chamber in the Lubanga case has not found the accused responsible for any crimes of a sexual nature. Although, during the oral proceedings, the victims' legal representatives requested that additional charges of a sexual nature be considered, the Appeals Chamber determined that, in order not to affect the rights of the accused, there was no basis for changing the legal classification of those acts that could be classified as crimes of a sexual nature, since the Prosecutor's Office had not charged them at the appropriate procedural moment. However, the Appeals Chamber itself pointed out that the problem presented did not prevent the configuration of the proven facts as crimes of a sexual nature from being taken into account in determining the sentence and establishing reparations. In view of this, the Trial Chamber evaluated direct testimony that proved various acts of rape committed by the Patriotic Forces for the Liberation of Congo (PFLC) commanders and soldiers against minors during their recruitment and training, including some victims being used as domestic slaves or being expelled from the armed group for becoming pregnant. The analysis of the evidence allowed the Chamber to study the most appropriate ways to compensate victims of sexual violence and to establish the need to prioritize assistance for victims belonging to particularly vulnerable groups, such as victims of sexual or gender-based violence.

62 ICC, Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the confirmation of charges, ICC-01/05-01/08-424, 15 june 2009; ICC, Case of the Prosecutor v. Germain Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436, 7 March 2014; ICC, Case of the Prosecutor v. Germain Katanga y Mathieu Ngudjolo Chui, Decision on the confirmation of charges, ICC-01/04-01/07, 30 September 2008.

63 Idem.

Second, within the framework of the confirmation of charges proceedings, it has been stipulated that, as a general rule, when assessing testimony from known sources, a case-by-case examination of its probative value must be conducted, taking into account factors such as: (a) the internal consistency of the testimony itself; (b) the set of other evidence presented at the oral trial; (c) the reliability of the source of the testimony; and (d) the defense's ability to challenge said source[64].

Third, within the framework of the confirmation of charges hearing itself, Pre-Trial Chambers I and II have made two important clarifications. On the one hand, the Chambers have indicated that not knowing the precise source of the testimony does not imply *per se* that the evidence is inadmissible, since such a situation may be reflected in the probative value that the Chamber attributes to it. The Chamber may require that it be compared with the general body of evidence in the case, thereby examining its consistency and veracity[65]. On the other hand, with regard to child witnesses, Pre-Trial Chamber II (PTC II) concluded in the Katanga case that, when assessing such testimony, it is essential to take into account the specific circumstances of child witnesses, including the difficulties in finding a complete, coherent, and logical explanation of the events experienced, or the fading of memories with the passage of time[66]. Therefore, based on the above, Rules 54(1)(b) and 42(9) of the SICC, and Rule 17(3) of the RPE, have been applied, so that experts in the treatment of minors are incorporated into these kinds of proceedings[67].

Together with witness testimony, various types of documentary evidence were presented in the Bemba case in particular, including

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64 ICC, Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the confirmation of charges, ICC-01/05-01/08-424, 15 June de 2009.

65 ICC, Case of the Prosecutor v. Germain Katanga y Mathieu Ngudjolo Chui, Decision on the confirmation of charges, ICC-01/04-01/07, 30 September 2008; ICC, Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the confirmation of charges, ICC-01/05-01/08-424, 15 June de 2009.

66 ICC, Case of the Prosecutor v. Germain Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436, 7 de March de 2014.

67 ICC, Case of the Prosecutor v. Germain Katanga y Mathieu Ngudjolo Chui, Decision on the confirmation of charges, ICC-01/04-01/07, 30 September 2008.

documents from the United Nations[68], one from Amnesty International (2004), and three from the International Federation for Human Rights[69]. These pieces of evidence were used in the context of the confirmation of charges to corroborate direct testimony and to demonstrate the large number of rapes that took place at the locations mentioned by the direct witnesses[70]. For this same purpose, the parties also submitted interview transcripts, videos, records from a wide variety of organizations, letters, photographs, and maps[71].

In conclusion, it is worth highlighting that, in 2014, the Prosecutor's Office published its policy document on sexual and gender-based crimes, which includes these types of crimes among its strategic objectives. It indicated it was determined to dedicate part of its resources and investigations to training its personnel and prosecuting the main perpetrators of sexual crimes[72]. Furthermore, in procedural and evidentiary matters, the Prosecutor's Office is committed to addressing the low reporting rate of these crimes due to social, cultural, or religious factors, the stigma attached to the victims, and the lack of available evidence[73].

6. Conclusion

Within the area of international criminal law, the provisions contained in Articles 68(2) and 69(2) of the SICC and Rules 70 and

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68 United Nations, 2002, Central African Republic Weekly Humanitarian Update.

69 International Federation for Human Rights (IFHR), 2002, *Communiqué de presse de la FIDH daté du 5 novembre 2002.*

70 ICC, Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the confirmation of charges, ICC-01/05-01/08-424, 15 June de 2009.

71 Ibid., par. 11.

72 International Criminal Court, Office of the Prosecutor, 2014, Policy Paper on Sexual and Gender-Based Crimes.

73 Idem; More importantly, the prosecutor's policy will be aimed at protecting the safety, physical and psychological health, dignity, and privacy of victims and witnesses during the investigation. It also establishes that it will seek to prosecute sexual crimes on their own merits, regardless of whether they are subsumed under other types of crimes.

71 of the RPP constitute the most developed regulations to date in the field regarding the practice and assessment of evidence in sexual crimes. These rules have come as a consequence of the long process developed through the ICTY, the ICTR, and the SCSL- It began with the recognition of the extremely serious nature of acts of sexual violence and the resulting need to adopt specific measures aimed at prohibiting, preventing, punishing, and providing redress for them.

The development of the current substantive and procedural rules concerning sexual crimes has not, however, provided a solution to some of the major technical and procedural challenges arising from the high level of legal requirements necessary for their investigation and prosecution. Issues such as the difficulty in obtaining reliable testimony, the frequent lack of eyewitnesses, or the requirement in some instances of direct knowledge of one's superior authority, to give just a few examples, have been addressed in practice so far, with varying degrees of success, in the manner detailed in this paper.

The jurisprudence addressing these issues, which points out the tendency observed in the four international criminal tribunals analyzed to prioritize testimonial evidence (particularly the testimony of victims) as the primary means of proof for crimes of a sexual nature (despite the frequent lack of eyewitnesses), also serves as a starting point for strengthening an evidentiary system focused on protecting the dignity and integrity of victims. This system, without prejudice to the rights of the accused, must serve as a reference for national legal practitioners in exercising criminal jurisdiction against those responsible for international crimes of a sexual nature.

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26. The application of indirect authorship by organized power structures to crimes of sexual violence: particular attention to the cases in which they are configured as crimes against humanity and war crimes

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1. Introduction

In Colombia, the effects of the armed conflict have been devastating and have particularly affected certain sectors of the population that are manifestly vulnerable, such as those women who, when finding themselves immersed in conflict zones, suffer every kind of violence, including sexual violence.

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Rape[1], classified in the Colombian Penal Code as carnal access (i.e., sexual penetration[2]), has traditionally been considered in Colombian criminal doctrine as a crime that must be committed by the perpetrator personally. This means that only the person who physically commits the act can be held criminally responsible; its commission cannot be delegated to another. *Contrario sensu*, someone acting through an intermediary could not commit the crime.

However, the Justice and Peace Chamber of the Superior Court of the District of Bogotá questioned the possibility of charging paramilitary commanders with rape crimes committed by members of the Blocs or Fronts they led. From a theoretical perspective, this would be equivalent to charging the crime through indirect perpetration[3].

It is within this context that this article analyzes the possibility of applying indirect perpetration through organized power structures in crimes of sexual violence. To this end, it first presents the vulnerable status of women within the framework of the Colombian armed conflict and the Colombian State's obligations in this regard. It then analyzes the question from a legal and doctrinal perspective and concludes by examining the possible answers that can be provided by the jurisprudence of international tribunals, comparative law, and the jurisprudence of the Criminal Cassation Chamber of the Colombian Supreme Court of Justice (SCJ).

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1 According to the Elements of Crimes (EC) of the International Criminal Court (ICC), the crime of rape is committed by anyone who "has invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ or of the anal or genital orifice of the victim with an object or other body part" when "the invasion is committed by force or threat of force or by coercion, such as that caused by fear of violence, intimidation, detention, psychological oppression or abuse of power, against that person or another person or by taking advantage of a coercive environment, or has been carried out under conditions in which the person was incapable of giving free consent". This conduct may constitute a crime against humanity under Article 7 (1) (g) (1) of the ICC Statute, and a war crime under Articles 8 (2) (b) (xxii) (1) and 8 (2) (e) (vi) (1) of the ICC Statute.

2 Colombian Criminal Code, Law 599 of 2000, art. 205.

3 Indirect authorship is a form of authorship where the commission of the crime is done through another person.

2. The obligations of the Colombian State regarding the vulnerability of women in situations of armed conflict

2.1. The vulnerability of women in the Colombian armed conflict.

In Ruling 092 of 2008[4] (which elaborated on Judgement T-025 of 2004)[5], the Colombian Constitutional Court (CC) identified up to ten circumstances which demonstrate the vulnerability of women within the context of the Colombian armed conflict[6]. Among them, the Constitutional Court first mentioned "sexual violence, sexual exploitation, or sexual abuse in the context of the armed conflict"[7].

The Court specifically noted the existence of repeated complaints regarding cases of sexual violence, and in particular rapes resulting

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4 Constitutional Court of Colombia, 2008, *Ruling 092 of 3 March 2009. M. P. Manuel José Cepeda Espinosa.*

5 Constitutional Court of Colombia, 2004, Decision T-025 of 22 January 2022. M.P. Manuel José Cepeda Espinosa; In Decision T-025 of 2004, the Colombian Constitutional Court declared the existence of an "unconstitutional state of affairs" with respect to forced displacement in the country; In Constitutional Court of Colombia, (2008), Ruling 092, M.P. Manuel José Cepeda Espinoza; specifically, upon finding significant violations of the fundamental rights of the displaced population, the Court issued several orders aimed at halting these violations and guaranteeing the effective enjoyment of those rights. However, the Court declared that this state of "massive, systematic, profound, and persistent" violation of the fundamental rights of this population persisted, particularly affecting women.

6 Constitutional Court of Colombia, 2008, Decision (Auto) 092 22 January, M.P. Manuel José Cepeda Espinosa; In the area of prevention of forced displacement, the Constitutional Court has identified ten (10) gender risks in the context of the Colombian armed conflict, that is, ten specific vulnerability factors to which women are exposed due to their female condition within the context of the Colombian internal armed confrontation, which are not shared by men, and which together explain the disproportionate impact of forced displacement on women; National Commission for Reparation and Reconciliation, 2011, Historical Memory Group, Mujeres y guerra, víctimas y resistentes en el Caribe colombiano. Bogotá: Ediciones Semana; Law 1448 de 2011, The Victims and Land Restitution Law recognize that women are a group at greater risk of the violations contemplated in Article 3 of this Law.

7 Constitutional Court of Colombia, 2008, Decision (Auto) 092 22, M.P. Manuel José Cepeda Espinosa.

from a war strategy of armed actors operating outside the law[8]. It was through this perspective that the Court concluded that sexual violence against women was not presented as an ordinary and isolated punishable act, but rather as a regular pattern of war actions aimed at obtaining a strategic military advantage[9].

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8 Constitutional Court of Colombia, 2008, Decision (Auto) 092 22, January, M.P. Manuel José Cepeda Espinosa; These acts against women include "(a) acts of sexual violence perpetrated as an integral part of larger-scale violent operations—such as massacres, takeovers, looting, and destruction of villages—committed against women, young women, girls, and adults of the affected locality by members of armed groups outside the law; (b) deliberate acts of sexual violence committed not within the framework of larger-scale violent actions, but individually and premeditatedly by members of all armed groups taking part in the conflict, which in themselves are part of (i) war strategies focused on intimidating the population, (ii) retaliation against real or alleged supporters of the enemy side through the use of violence against women in their families or communities, (iii) retaliation against women accused of being collaborators or informants of one of the armed groups in conflict, (iv) advances in (v) territorial and resource control, coercion for various purposes within the framework of the advancement strategies of armed groups, (vi) obtaining information through kidnapping and sexual subjugation of victims, or (vii) simple ferocity […]".

9 National Commission for Reparation and Reconciliation, 2011, National Commission for Reparation and Reconciliation, 2011, Historical Memory Group, Mujeres y guerra, víctimas y resistentes en el Caribe colombiano. Bogota: Ediciones Semana; pp. 216 et. seq.; however, it is worth mentioning that not all sexual violence in Colombia is related to the internal armed conflict. The Colombian case differs from situations such as that of the Central African Republic, currently before the International Criminal Court (ICC), where the sexual violence that underpins the Prosecutor's accusation is solely associated with the context of armed conflict; Benetech & Corporación Punto de Vista, (2011), Using Quantitative Data to Assess Conflict-Related Sexual Violence in Colombia: Challenges and Opportunities. Bogotá: Opciones Gráficas Editores; Indeed, sexual violence was not always carried out as a military strategy. Cases like those seen in the Colombian Caribbean show that such violence was part of the social control exercised by paramilitaries in the region but also fueled the perpetrators' sexual appetites.

A paradigmatic example of this situation can be seen in the case of the Colombian Caribbean region[10], where the sexual violence committed against women between 1997 and 2005 was closely related to the rise of paramilitarism[11] and the social control it exerted over the inhabitants of the region. According to the Historical Memory Group of the National Reparation Commission (now the National Center for Historical Memory), this violence, when committed as a war strategy, and served two main purposes.

On the one hand, it was used as punishment against women who did not adhere to the standards of behavior imposed by paramilitary groups[12], who sought to subdue the civilian population[13]. In these cases, sexual violence was perpetrated against specific victims who were generally social leaders, women who rejected paramilitary impositions, or were partners of men identified as enemies of the organization.

On the one hand, it was used as punishment against women who did not adhere to the standards of behavior imposed by paramilitary

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10 *Verdad Abierta, 2011, Fallo Simbólico contra la violencia sexual en el conflicto armado*, Bogotá; However, this is not the only region in Colombia where criminal behavior directly targeting women has occurred.

11 National Commission for Reparation and Reconciliation, 2011, Historical Memory Group, Mujeres y guerra, víctimas y resistentes en el Caribe colombiano, Bogota, Ediciones Semana; p. 52; In reconstructing this context, we emphasized the premeditated nature of the series of actions undertaken by the paramilitaries between 1997 and 2005 to achieve their goals. This organization sought, through the use of a repertoire of terror and the consolidation of alliances, the expulsion of the guerrillas, the conquest of strategic territories, and to become an unquestionable authority in the Colombian Caribbean.

12 National Commission for Reparation and Reconciliation, 2011, Historical Memory Group, Mujeres y guerra, víctimas y resistentes en el Caribe colombiano, Bogota: Ediciones Semana, p. 158.

13 It is interesting to note that between the Argentine Juntas (authoritarian regime that existed in Argentina from 1976 to 1983 composed of successive military juntas) and the paramilitaries in Colombia, although they are different apparatuses of power, one of legal origin and the other illegal, there is a parallel in the use of sexual violence as a method to subdue certain populations.

groups, who sought to subdue the civilian population. In these cases, sexual violence was perpetrated against specific victims who were generally social leaders, women who rejected paramilitary impositions, or were partners of men identified as enemies of the organization.

On the other hand, sexual violence against women was also used to "sow the seed of one's own" and in that way destroy the enemies. In these cases, the victims were women who did not necessarily commit "infractions" against "paramilitary social norms"[14]. They were, thus, undetermined victims who, although part of a community that the paramilitaries sought to dominate, were not singled out for their behavior.

2.2. Obligations relating to the protection of women in the Inter-American human rights system

The American Convention on Human Rights (ACHR) and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (referred to herein as the Belém do Pará Convention[15]), to which Colombia is a State Party, provide special protection to women given their conditions of vulnerability[16], In applying these obligations, the Inter-American Court of Human Rights (IACHR) has affirmed that, within the framework of armed conflicts, sexual violence against women merits special attention. This translates into the obligation of the State Parties, including Colombia, to adopt measures aimed at preventing, investigating, and punishing sexual crimes against women[17], and in particular, the

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14 National Commission for Reparation and Reconciliation, 2011, Historical Memory Group, *Mujeres y guerra, víctimas y resistentes en el Caribe colombian*o, Bogotá, Ediciones Semana, p. 158.

15 The adoption of the *Belém do Pará* Convention reflects a common concern throughout the hemisphere about the seriousness of the problem of violence against women and its relationship to historical discrimination (Case Campo Algodonero, 2009, Par. 61)

16 Velazco Arroyo J. C., 2007, *Discriminación Positiva, Diversidad Cultural y Justicia, Revista de Filosofía Daimon*, 41, pp. 141-156.

17 Interamerican Court of Human Rights (IACtHR), Ituango Massacres case v. Colombia, Preliminary Exception, Substance, Reparations amd Costs, 1 July

obligation to ensure that the investigation of such crimes leads to the actual punishment of the perpetrators, especially if state agents are involved[18],

The scope of these obligations is specified in the criminal case of Miguel Castro Castro Prison vs. Peru[19], in which the IACHR indicated that State Parties must provide: (i) "the necessary mechanisms to resolve the real inequality in which women may find themselves when seeking access to justice"[20] [21], while taking into account (ii) the specific condition of women, whom violence particularly severely affects[22]. All of this falls within the framework of a justice system that

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2006; IACtHR, Case Ximenes Lopes vs. Brazil., Substance, Reparations and Costs, 4 July 2006; IACHR, Case Servellón García and Others vs. Honduras, Substance, Reparations and Costs, 21 September 2006; The State Parties condemn all forms of violence against women and agree to adopt, by all appropriate means and without delay, policies aimed at preventing, punishing and eradicating such violence and to carry out the following: […] act with due diligence to prevent, investigate and punish violence against women.

18 IACtHR, Case Vera Vera and Other vs. Ecuador, Preliminary Exception, Substance, Reparations amd Costs, 19 May 2011), par. 87; IACtHR, Case of the Miguel Castro Castro Prison vs. Peru, Substance, Reparations and Costs, 25 November 2006, para. 256; IACtHR, Case Goiburú and Others vs. Paraguay, Substance, Reparations and Costs, 22 September 2006, par. 177; IACtHR, Case Servellón García and Others vs. Honduras, Substance, Reparations and Costs, 21 September 2006, par. 119; Artícle 7.b of the Belém do Pará Convention, interpreted in light of Articles 5, 1.1 and 2 of the American Convention on Human Rights.

19 IACtHR, Case of the Miguel Castro Castro Prison vs. Peru, Substance, Reparations and Costs, 25 November 2006, par. 256.

20 Rincón, T., 2010, *Verdad, justicia y reparación: la justicia de la justicia transicional*, Bogota, Editorial University of Rosario, Bogota, pp. 143.

21 This protection that the State must provide is aimed at restoring balance within the framework of the unequal treatment that has historically been bestowed upon women.

22 Rincón, T., 2010, Supra, Note 20, p. 143; Recognition of this differentiated and disproportionate impact is essential to expanding and strengthening the capacity of criminal justice authorities to adequately assess the specific, particular, and distinct harm that a female victim may suffer. It also creates the conditions for satisfying—within the criminal process—the need for differentiated treatment of women, for example, in the care they must receive,

seeks truth, justice, and reparation[23]. Thus, the protection of women in the Inter-American Human Rights System (IACHR) implies that State Parties must not only promote adequate and effective access to justice, but also (i) adapt "the classification of such conduct as an expression of criminal and incarceration policy"[24]; and (ii) implement special methods to investigate the causes and reasons for crimes that affect women in a particularly discriminatory manner.

In situations of armed conflict, these obligations also apply, regardless of whether the violence against women resulted from a strategic plan developed by an armed actor or not. This position makes perfect sense in the Colombian case, where the paramilitary leadership did not always order the commission of this violence, but it did contribute to creating an environment that favoured and encouraged it[25].

Thus, we see that, given the particular vulnerability of women in the Colombian armed conflict, the State has specific obligations aimed at alleviating this situation. This requires, among other things, adapting its criminal and incarceration policies, as well as its approach to prosecuting those criminally responsible.

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the protection they must be assured, and the collection and evaluation of evidence.

23 Ibid., p. 143; The State has the obligation to investigate the events. Establishing how these events occurred, why they happened, and who the perpetrators were—both perpetrators, masterminds, and potential accomplices—is not a burden on the victim or her family, nor is it a matter of mere private or individual interests; it is an obligation of the judicial authority.

24 Ibid., p 144; Establishing a gender-differentiated criminal and penitentiary policy responds to the particular vulnerability of women, which results, among other factors, from behaviors entrenched in contemporary society. Indeed, it has been recognized that "the inequality women suffer in the enjoyment of their rights is deeply rooted in the tradition, culture, and history of different societies."

25 National Commission for Reparation and Reconciliation, 2011, Historical Memory Group, *Mujeres y guerra, víctimas y resistentes en el Caribe colombiano*, Bogotá, Ediciones Semana, p. 218.

3. Legal-Doctrinal Analysis

Sánchez-Vera explains that the category of "crimes of personal commission" crimes (*delitos de propia mano*) has been developed to include those crimes that, by their very nature, cannot be delegated to another person[26]. In this sense, as Claus Roxin states, "personally-inflicted crimes are those that can only be carried out through the actual bodily execution of the typical actions"[27].

Sexual crimes, and rape in particular, have traditionally been viewed as "crimes of personal commission" because the incentive and/or satisfaction of the perpetrator has been considered an objective element of the criminal offense, which meant that the act of penetrating the victim could not be delegated to another person.

Likewise, as Fernando Velásquez states[28], in Spain, the traditional conception of crimes of personal commission only allowed for direct perpetration, excluding indirect perpetration, improper material co-perpetration, or indirect co-perpetration.

However, this traditional position has been challenged by some scholars by way of two main arguments. The approach first was developed by authors such as Maqueda (1992), Choclán Montalvo[29], and Sánchez-Vera[30], who consider that the category of "crimes of personal commission" has lost relevance and value within criminal law doctrine. According to this doctrine, this, category corresponds to a naturalistic conception of the governing verb of the criminal offense – a view that while dominant in the classical school of criminal law,

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26 Sánchez-Vera Gómez-Trelles, J., 2004, *El denominado "delito de propia mano". Respuesta a una situación jurisprudencial. Madrid: Editorial Dykinson*, p. 31.

27 Ibid.

28 Velásquez Velásquez, F., 2004, *Manual de Derecho Penal Parte General, Bogotá, Editorial Temis*, pp. 454; Velásquez Velásquez, F. 2009, *Derecho Penal General Parte General, Cuarta edición, Bogotá, Editorial Comlibros y Cia*, pp. 879; Mir Puig, S. 2005, *Derecho Penal, Parte General. Séptima Edición. Montevideo, Editorial B de F*, pp. 386.

29 Choclán Montalvo, J. A., 1995, *¿Es el delito de violación un delito de propia mano?, A propósito de la STS de 2 de noviembre de 1994*, AP 3, 39 y ss.

30 Sánchez-Vera Gómez-Trelles, J., 2004, Supra, note 28, pp. 193-194.

was overtaken by the evolution of the modern concept of action[31]. Consequently, the current practice is that criminal offenses in the special section must be systematically interpreted in conjunction with the general section of the Penal Code, thereby excluding strictly literal interpretations of the criminal offenses, which are the result of counterproductive rigor[32] [33].

Based on this premise, Sánchez-Vera distinguishes between factual and legal circumstances. The former would be delegable since the indirect perpetrator can instrumentalize another person to commit the crime (so, for example, if a person decides to rape a woman and cannot do so due to a lack of erection, they can instrumentalize a third party to commit the rape). This situation would arise particularly when, as in the case of crimes against humanity or war crimes, sexual crimes would be being used as a war strategy against the enemy. According to this position, either the legislator uses the expression "one who with his own hand" in the description of the crime or, if not, there would be no reason, derived from the literal wording of the law, that the execution of factual circumstances such as those described could not be delegated[34].

Regarding the legal circumstances, these would not be delegable since the person who decides to commit the crime cannot instrumentalize another person, given that they have a special duty of care. This would occur, for example, in the case of malfeasance, which has also traditionally been considered a crime committed by one's own hand because it must necessarily be committed by a public official or authority. However, according to Sánchez-Vera, this impossibility of delegation is not due to the fact that these crimes are committed

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31 Ibid.

32 Ibid.

33 Along this order of ideas, a literal interpretation of the criminal offence also excludes the figure of a co-perpetrator in conduct that is classified by the legislator with the expression "he who…". Similarly, a woman could not be criminally liable because the pronoun "he who" is masculine. However, despite the literal meaning of the offense, this interpretation is not followed in practice.

34 Sánchez-Vera Gómez-Trelles, J., 2004, Supra note 26, p. 197-207.

by one's own hand, but rather because they involve violations of the legal duties inherent to the perpetrator.

The second argument challenging the majority position that classifies sexual crimes, and rape in particular, as crimes committed by one's own hand[35], has come "particularly from those who defend the objective material theory of control of the crime —derived from Welzel— and based on the concept of the protected legal right"[36].

According to this argument, developed by scholars such as Muñoz Conde and Gómez Rivero (2004), the description of the criminal offense does not expressly require any encouragement or satisfaction of the perpetrator. Consequently, for these authors, a conception of rape from the perspective of the perpetrator of the punishable act (in which encouragement or satisfaction would play an important role as an objective element of the offense) should be avoided. Rather, the configuration of the crime should be based on the legal right of the victim that the criminal law seeks to protect. Thus, since the determining factor is the protected legal right, which consists of the victim's sexual freedom and integrity, the sexual satisfaction of the perpetrator takes on a secondary, if not irrelevant, position[37].

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35 Bacigalupo, E. 1999, *Derecho Penal Parte General. Buenos Aires: Editorial Hammurabi*. p. 512; By resolving these issues, individuals holding high positions in a hierarchical power structure can be held accountable for sexual crimes committed by their subordinates. While there has been no real debate in the Colombian context, and the concept of personally committed crimes is often taken for granted, the imminent need for a genuine discussion on this issue requires us to revisit these issues, which have been insufficiently debated.

36 Federal Chamber of Appeals of Mendoza, Luciano Menéndez case, November 23 2011, pp. 55.

37 Ibid., p. 56; "A view of this nature would merely consecrate a focus on the attacker, forgetting the victim of the attack, when in reality, the prohibition of the act is aimed at protecting the legal rights of potential victims. The Colombian Penal Code, Vol. I, Title IV, establishes crimes against sexual freedom, integrity, and development as a clear reference to the legally relevant rights that are intended to be protected by classifying conduct such as violent carnal access.

As a consequence of defining sexual crimes as an attack on the victim's sexual freedom and integrity, the legal justification is lost for maintaining the distinction between the possibility of being an indirect perpetrator in a case of personal injury or torture, and the impossibility of being so in cases of rape[38]. This conclusion is reinforced in the context of armed conflict situations, because in these situations, sexual violence loses its strictly individual character and takes the form of an attack on the civilian population, particularly detained women, as a military strategy[39].

4. Application by International Criminal Tribunals

4.1. International Criminal Court

Articles 7(g) and 8 of the Statute of the International Criminal Court ("ICC"), unlike the Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), independently define the sexual crimes of rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, and other sexual abuses of similar gravity as specific criminal offenses against humanity and as war crimes.

4.1.1. Case of Germain Katanga and Mathieu Ngudjolo

The ICC applied the concept of indirect perpetration to this type of crime in its decision confirming charges against Germain Katanga and Mathieu Ngudjolo[40]. In this case, the acts were committed in the

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38 Ibid., p. 56, There is no reason why co-authorship and indirect authorship can be accepted when a certain action is carried out on the body of a victim, for example, stabbing a victim in the abdomen with a knife (injuries, homicide) or applying electric shocks using an electric cattle prod, hanging the victim for hours by the wrists, or inflicting any kind of physical and/or psychological pain (torture), and at the same time rejecting it when the action on the victim's body consists of an act that socially has a sexual connotation.

39 Ibid.

40 Germain Katanga was commander in chief of the organized armed group named *Force de Résistance Patriotique* en Ituri (FRPI); Mathieu Ngudjolo was

Ituri region, in the village of Bogoro in the northeast of the Democratic Republic of the Congo[41]. It was there that the accused defendants were alleged to have jointly planned and prepared the attack on Bogoro to take control of the town, as it was an important communications hub in the region. This required causing the displacement of the Hema ethnic group living there (approximately 7,000 people) and defeating the contingent of the Congolese Patriotic Union (UPC) defending it. During the attack, sexual crimes were committed, including sexual slavery against the women of Bogoro, among other crimes[42] [43], Indeed, after the attacking forces took control of the town, the women were forced to become "wives" of their attackers, to cook for them, obey their orders, and engage in acts of a sexual nature, including rape[44].

Through the evidence presented during the hearing on the confirmation of charges, it was demonstrated that there were substantial grounds to believe that these sexual acts took place in an atmosphere of coercion, which was conducive to the commission of the crimes. To elaborate on the concept of coercion, Pre-Trial Chamber (PTC) I of the ICC cited the judgment of the International Criminal Tribunal for Rwanda ("ICTR") in the Akayesu case, which states that:

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commander in chief of the organized armed group named *Front des Nationalistes et Intégrationnistes* (FNI); These groups joined together principally to fight members of the Hema ethnic group represented by the *Union des Patriotes Congolais* (UPC) and by its armed wing the *Forces Patriotiques pour la Liberation du Congo*, FPLR.

41 ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07; Decision on the confirmation of charges, 30 September 2008. The conflicts between the UPC and the union between IPRF and FNI are framed by the desire to control the Ituri region and exploit its natural resources, including gold, diamonds, and coltan. Indeed, the main objective of both organizations was to gain control over Ituri. Furthermore, these conflicts are framed by the tensions that existed between the different ethnic groups in the region, primarily the Hema and the Lendu. The UPC represents the Hema, the IPRF represents the Ngiti, and the FNI represents the Lendu.

42 Ibid., par. 348.

43 Additionally, they committed murder, child recruitment, and destruction of property, as war crimes and crimes against humanity, respectively.

44 ICC, Supra, note 41 par. 349.

> A coercive environment does not require physical force. Rather, threats, intimidation, extortion, and other forms of coercion that provoke fear or desperation may constitute coercion, which may be inherent in certain circumstances, such as armed conflict or military presence[45].

In this context, the concept of indirect perpetration through organized power apparatuses is developed[46]. In effect, this mode of responsibility is based on the understanding that perpetration is not limited to those who materially carry out the objective elements of the crime, but also encompasses those who, as in this type of case, control its commission[47].

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45 ICTR, Prosecutor v. Paul Akayesu., Trial Judgement, Case IT-96-4-T, 2 Septiembre 1998, par. 688.

46 ICC, Supra, note 41; Olasolo, H., 2013. *Tratado de Autoría y participación en Derecho penal internacional*, Valencia, Spain, Tirant lo Blanch: PTC I specified the characteristics that the concept of indirect authorship through organized power apparatuses must have in order to speak of indirect authorship in this type of organization. The first element is that the accused person must have control over the organization. This implies that both the leader and the subordinates must be members of the same organized power apparatus. Consequently, the scope of application of indirect authorship is more limited than that of superior responsibility, since it requires that the leader and the perpetrator belong to the same organization and that the organization be organized hierarchically, such that there is a hierarchical relationship (superior-subordinate) between the leader and the perpetrator of the crime. The second element, which combines with the first, is that the organization must be organized hierarchically. The third element is that the execution of crimes is ensured through almost automatic compliance with the superior's orders. In relation to this element, PTC I spoke of the fungibility of the organization's members. Through this phenomenon, it recognized that organized power apparatuses are structured in such a way that orders issued by superiors must be carried out almost automatically. However, PTC I noted that automatic compliance with superior orders, while always requiring a hierarchical organization, can be the result of factors other than the fungibility of its members, as is the case with subjecting minors to particularly cruel and harsh training.

47 Ambos K. & Grammer C., 2003, *Dominio del hecho por organización. La responsabilidad de la conducción militar argentina por la muerte de Elisabeth Kasemann en Revista Penal*, 12, p. 28.

The PTC I concluded that there were substantial grounds to believe that Katanga and Ngudjolo were responsible for having jointly planned and ordered the attack on Bogoro. Furthermore, the PTC I also concluded that the accused made their respective contributions to the common plan through the organizations they led (for Katanga it was the FRPI (Patriotic Resistance Force in Ituri) and for Ngudjolo it was the FNI (National Integrationist Front). The fact that these were hierarchical military structures, within which compliance with orders was almost automatic given the fungibility of their members, combined with the power of command the accused had over them and the use of that power to carry out their respective contributions to the common plan, justified, in the PTC I's opinion, the application of indirect co-authorship in the present case[48].

In particular, the application of indirect co-authorship in relation to sexual crimes is noteworthy. Indeed, according to the PTC I, both suspects were aware and mutually accepted that carrying out their shared plan to occupy the village of Bogoro could result in the commission of sexual crimes. This was on the understanding that rape constituted a common practice in the Ituri region, which was acknowledged by soldiers and their commanders. This was aggravated by the fact that these same soldiers had previously committed crimes of rape and that Katanga and Ngudjolo had received reports on how previous attacks had been carried out and knew the fate of the women and girls who had been previously captured[49]. Therefore, the majority of PTC I, with Judge Anita Usacka's dissenting opinion[50], charged the defendants with eventual intent to commit acts of indirect co-perpetrators.

Despite the charges having been confirmed by the PTC I, Trial Chamber II ("TC II") in the end acquitted both defendants of the sexual crimes with which they were charged. In the case of Mathieu

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48 ICC, Supra, note 41, pars. 444-568.

49 Ibid.

50 It should be noted that Judge Usacka's dissenting opinion is unrelated to the application of the concept of indirect authorship but rather to her doubts regarding the inclusion of the concept of eventual intent in the ICC Statute.

Ngudjolo, the TC II acquitted him because the Prosecutor's Office failed to prove, beyond a reasonable doubt, his status as a military leader either before or after the attack on the village of Bogoro. Since a fundamental element of this mode of responsibility, namely the leadership role, failed, the TC II ruled out the possibility of attributing criminal liability to Ngudjolo as an indirect co-perpetrator and therefore acquitted him of all charges[51].

With regard to Germain Katanga, TC II concluded that the Prosecutor's Office had also failed to demonstrate either the existence of an organized power apparatus within the militia that carried out the attacks on Bogoro, or the control that Katanga was alleged to have exercised over the crimes committed by that militia, within the meaning of Article 25(3)(a) of the ICC Statute[52]. It was for this reason that the charge as an indirect perpetrator was unsuccessful. However, in the exercise of the power granted to it by Article 55 of the Rules of Court, TC II decided to modify the mode of responsibility attributed to Katanga and opted to apply the mode of responsibility established by Article 25(3)(d) of the ICC Statute, which corresponds to complicity, where the perpetrator's contribution ceases to be "essential" and becomes "significant." Even as an accomplice, TC II did not find Katanga criminally responsible for the sexual crimes, since it considered that there was insufficient evidence to demonstrate that these were committed extensively and repeatedly during the attack on Bogoro, thus ruling out the possibility that the recorded sexual offenses were part of a common purpose or plan[53].

In any case, it is worth emphasizing that, both with respect to Mathieu Ngudjolo and Germain Katanga, TC II did not consider that the application of indirect co-perpetration to sexual offenses implied an inadequacy of the mode of responsibility for the alleged crime. On the contrary, it was the Prosecutor's Office's evidentiary deficien-

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51 ICC, Prosecutor v. Mathieu Ngudjolo. Judgment pursuant to Article 74 of the Statute, ICC-01/04-02/12-3, 18 December 2012, pars. 110 - 111 and 490-503.

52 ICC, Prosecutor v. Germain Katanga. Judgement issued on the application of Article 74 of the Statute, ICC-01/04-01/07-3436, 7 March 2014.

53 Ibid.

cies that led the TC II to declare the two defendants unaccountable for the sexual crimes they had been charged with.

4.1.2. Case of Omar Al Bashir

Another ICC case involving sexual crimes is that of Omar Al Bashir[54], who, according to PTC I, is alleged to have committed war crimes, crimes against humanity, and genocide[55] against members of the Fur, Massalit, and Zaghawa ethnic groups in the Darfur region of Sudan[56] between March 2003 and July 14, 2008 (the date on which he was indicted by the Prosecutor's Office).

Among the various crimes he was charged with was the crime against humanity of rape, allegedly committed by members of the Sudanese armed forces, police, and intelligence services, as well as by militants from allied "Janjaweed" militias[57]. According to the PTC

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54 Currently President of the Republic of Sudan.

55 PTC I issued a second Arrest Warrant on 12 June 2010, stating that: There is reasonable ground to believe also that as part of the unlawful attack by the Government of Sudan against the above-mentioned portion of the civilian population of Darfur and having knowledge of such attack, Government of Sudan forces subjected throughout the Darfur region: (i) thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of rape; (ii) civilians belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of torture; and (iii) hundreds of thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of forcible transfer.

56 The context in which the aforementioned crimes were carried out occurred after the attack on El Fasher Airport in April 2003, apparently carried out by militias contesting the Al Bashir regime. These militias included the Sudanese People's Liberation Movement and Army (SPLM) and the Justice and Equality Movement (JEM). Following this attack, Al Bashir, as President of the Republic of Sudan, decided to launch a counterinsurgency attack in which he not only mobilized all Sudanese state structures but also called on the paramilitary militias known as the Janajaweed.

57 The Janjaweed militias were used as an armed support apparatus in the pursuit of the plan to pursue the insurgency launched by Omar al-Bashir. The ICC Prosecutor asserts that the Janjaweed's mobilization against persecuted ethnic groups allowed al-Bashir to disguise the conflict as purely tribal, unrelated to state-orchestrated action. This mobilization was carried

I Al Bashir would be responsible for these crimes as an indirect perpetrator (or alternatively, as an indirect co-perpetrator[58]), pursuant to 25(3)(a) of the ICC Statute, given that, as both the *de jure* and *de facto* commander of the armed forces and having control over the "apparatus" of the Sudanese State, he would have been able to direct the State's various branches in the coordinated execution of the common plan[59]. However, this case has not developed further because Al Bashir remains at large.

4.1.3. The Case of Jean-Pierre Bemba

In the case against Jean-Pierre Bemba, the accused was also charged with the crime of rape committed by forces of the *Mouvement de Libération du Congo* ("MLC"), both as a crime against humanity under Article 7(1)(g) of the ICC Statute and as a war crime under Article 8(2)(e)(vi)[60]. Jean-Pierre Bemba was the commander-in-chief of the MLC during the operations they conducted in the Central Af-

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out through financing and the promotion of tribal chiefs to high-ranking government positions, as well as through the release of tribal leaders from prison. Furthermore, the mobilization was encouraged by the high command of the Sudanese government. Indeed, senior officials participated in the promotion and recruitment of militias. Among them, Ahmad Harun spent several months in Darfur, mobilizing, arming, recruiting, and financing the creation of these militias. Thus, the creation of an armed apparatus parallel to that of the State, based on tribal organizations, was carried out by the Sudanese government and under the direction and supervision of Omar Al Bashir. (ICC, 2008, Public redacted version of Prosecution's Application under Article 58).

58 ICC, Prosecutor v. Omar Hassan Al Bashir, ICC-02/05-01/09-1, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009, par. 7.

59 Ibid., ICC, Prosecutor v. Omar Hassan Al Bashir, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95, 12 July 2010.

60 ICC, Supra note 58 pars. 188, 288; ICC, Prosecutor v. Jean-Pierre Bemba Gombo, Warrant of arrest for Jean Pierre Bemba Gombo replacing the warrant of arrest issued on 23 May 2008, ICC-01/05-01/08-1, 23 May 2008, par. 21; According to the PTC III in its arrest warrant, the crimes, allegedly committed in the villages of PK12, Fouh, Boy-Rabe and Mongoumba, between October 2002 and March 2003, were the result of the execution of a common plan between Angel-Felix Patassé, president at that time of

rican Republic (CAR) in support of forces loyal to the then President of the CAR, Ange-Félix Patassé. The common plan between Bemba and Patassé was to keep Patassé in power, while Bemba would receive logistical and strategic support[61]. This mobilization took place within the framework of the armed response to the attempted coup d'état orchestrated by François Bozizé, former Chief of Staff of the CAR Armed Forces[62].

Although the arrest warrant considered Bemba to be indirect co-perpetrator of the crimes, because, as he controlled the MLC both *de jure* and *de facto*[63], and he was fully aware of the essential nature of his contribution to the execution of the common plan[64], decision did not uphold the characterization of being an indirect co-perpetrator. It resorted instead to the responsibility of the superior under Article 28 of the ICC Statute as a form of charge[65].

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the CAR, and Jean-Pierre Bemba, president and commander-in-chief of the Movimiento por la Liberación de Congo (MLC).

61 Ibid.

62 ICC, Prosecutor v. Jean-Pierre Bemba Gombo. Supra, note 60, par. 9.

63 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, Warrant of arrest for Jean Pierre Bemba Gombo replacing the warrant of arrest issued on 23 May 2008, ICC-01/05-01/08-1, 23 May 2008 pars. 52 – 55, 75 – 81and 83; On the hierarchical structure of the MLC; on the essential nature of Bemba's contribution to the implementation of the common plan; on Bemba's awareness of his leadership position within the MLC and his role in implementing the common plan

64 Ibid., paras. 69 – 72. The common plan consisted of: (i) Jean-Pierre Bemba sending a significant portion of the MLC forces to CAR territory to militarily support Patassé in the latter's conflict with troops led by François Bozizé; and (ii) Patassé providing logistical and strategic support to Bemba against the then President of the Democratic Republic of the Congo, Joseph Kabila.

65 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, 15 June 2009 pars. 374, 401.

4.2. International Criminal Tribunal for the former Yugoslavia (ICTY)

In the ICTY, sexual crimes, and rape in particular, have not been treated as an independent criminal offense, but rather as part of other crimes against humanity, such as persecution, torture, or other inhuman treatment. This was the case, for example, in the case against Moncilo Krajisnik[66], vice-president of the self-proclaimed Serb Republic of Bosnia, who was convicted in the first instance as an indirect co-perpetrator of sexual crimes based on the so-called "common criminal enterprise at the leadership level"[67]. According to Olasolo, this is a *sui generis* form of indirect co-perpetration—it is the result of the joint application of co-perpetration under the common criminal enterprise (CCE) doctrine and indirect authorship through organized power apparatuses[68], —it is the result of the joint application of co-perpetration under the common criminal enterprise (CCE) doctrine and indirect authorship through organized power apparatuses—through which the ICTY has declared senior political and military leaders criminally responsible as indirect co-perpetrators for crimes materially committed by their subordinates[69].

In the case of Moncilo Krajisnik, the underlying crime for which he was convicted was persecution as a crime against humanity[70]. This was as a result of the inhuman treatment committed by Bosnian Serb forces in 35 municipalities within the territory of the Serbian Republic of Bosnia between July 1, 1991, and December 30, 1992, with the

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66 This is true not only in the Krajisnik case but also in the Martic case, as well as in the indictments in the Karadzic and Mladic cases.

67 ICTY, Prosecutor v. Momčilo Krajisnik, Judgement, IT-00-39-T, 27 September 2006, par. 4; Momcilo Krajsnik was President of the Congress of the self-proclaimed Serbian Republico of Bosnia y Herzegovina, later renamed the Spraska Republic, and of the key members, number two, of its Presidency.

68 Olasolo, H., 2013, Supra, note 46, pp. 393 – 397.

69 ICTY, Prosecutor v. Radoslav Brdanin, Judgement. IT-99-36-A, 3 April 2007, par. 413.

70 In addition to persecution, Momcilo Krajisnik is accused of extermination, murder, deportation and other inhumane acts such as crimes against humanity.

common purpose of forcibly displacing the non-Serb population from that territory[71]. According to the Trial Chamber, such inhuman treatment primarily took place in detention centers, where Muslim and Croat detainees were raped or sexually abused. For example, in the detention centers in Foca, women and girls were regularly abused at the Bukovica Motel, at the work centers in Buk Bijela, at Srednja Skola, and at the Karaman house in Miljevina. Sexual abuse also occurred at the Luka concentration camp in Brcko[72].

Despite not being present at the scene, the Trial Chamber concluded that Krajisnik played a central role in the execution of the common plan by helping to establish and consolidate the Serbian Socialist Party and the structures of the Bosnian Serb Republic in Bosnia and Herzegovina. This included public officials, war commissions, and the Ministry of the Interior, which were used to commit the crimes in furtherance of the common plan[73]. Likewise, according to the Trial Chamber, Krajisnik also deployed his political skills at both the national and international levels to facilitate the implementation of the common plan[74].

The Appeals Chamber dismissed the legal classification made by the Trial Chamber, finding that there had been a deficient application of the common criminal enterprise doctrine, because it failed to sufficiently determine the group of individuals who comprised the CCE[75]. Despite this, the Appeals Chamber recognized Krajisnik's re-

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71 ICTY, Prosecutor v. Momčilo Krajisnik, Judgement. IT-00-39-T, 27 September 2006, pars. 775 et. seq.

72 For example, in the same decision (paragraph 804) it is noted that while a subordinate of Krajisnik, Dragoljub Kunarac, raped a woman in the detention center in Foca, he expressed that rapes against Muslim women were a way in which the Serbian population demonstrated its superiority over the Muslim population.

73 ICTY, Prosecutor v. Momčilo Krajisnik, Supra note 71 par. 1120.

74 Ibid.

75 For the Appeals Chamber, while it was not necessary to name every member of a common criminal enterprise (CCE), and it was sufficient to refer to them through a category of persons (e.g., "armed forces of the Serb Republic of Bosnia"), it was not possible to go so far as to fail to specify the group to which the CCE members belong. Consequently, for the Appeals Chamber, the Trial Chamber erred in its decision by naming "local politi-

sponsibility, taking into account that the campaign of persecution against the non-Serb population was carried out on the orders of the accused, that the territory in which the persecution took place was controlled by Krajisnik and his forces, and that the victims were in a particularly vulnerable situation. Thus, the appeal judgment does not reject the application of indirect perpetration for sexual crimes.

Subsequently, the ICTY Prosecutor has applied the concept of CCE to the leadership level, as in the Third Amended Indictment of 27 February 2009 against Radovan Karadzic, former President of the Republika Srpska, and in the Second Amended Indictment of 1 June 2011 against Ratko Mladic, former Commander-in-Chief of the General Staff of the Army of the Republika Srpska. Both Indictments bear significant similarities, alleging a campaign of persecution, including acts of sexual violence, with the common purpose of the permanent forced displacement of Muslims and Croats from those territories claimed by the Bosnian Serbs in Bosnia and Herzegovina[76].

5. Application in Comparative Law

In domestic law, the Spanish and Argentine jurisdictions have been the most notable in overcoming the traditional position regarding the modes of liability related to crimes of sexual violence.

The Criminal Chamber of the Spanish Supreme Court, in its judgement of November 2, 1994, delivered by Justice Bacigalupo Zapater, declared that in the crime of rape, the perpetrator's interest may consist simply in harming the legal right protected by criminal

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cians, military and police commanders, paramilitary leaders, and others" as members of the CCE. This indeterminacy was aggravated by the fact that it did not specify the period during which the crimes occurred.

76 ICTY, Prosecutor v. Radovan Karadzic, Third Amended Indictment, IT-95-5/18-PT, 27 February 2009, par. 6; ICTY, Prosecutor v. Ratko Mladić, Second Amended Indictment, IT-09-92-I, 1 June 2011, par. 5; It is important to note that in the Karadzic case, the appeal judgment in accordance with Rule 98 bis of the Rules of Procedure and Evidence, the analysis focuses more on the genocidal intent within the Third Category of CCE (Prosecutor v. Karadzic, 2013, pars. 111 – 116).

law (the victim's freedom and sexual integrity) and not necessarily in obtaining direct sexual and bodily satisfaction. Consequently, the Criminal Chamber affirmed that there was no obstacle to the application of forms of perpetration other than direct perpetration, such as indirect perpetration, in relation to the crime of rape[77]. Consequently, a direct perpetrator would be the person who carries out the bodily action of sexually accessing the victim, while an indirect perpetrator would be the person who, through the control they exercise over the direct perpetrator, ensures the commission of the action[78].

More recently, the Federal Court of Appeals of Mendoza /Argentina), in its ruling of November 23, 2011, convicted Luciano Benjamín Menéndez, Brigadier General in command of the Third Army Corps based in Córdoba, as the indirect perpetrator of rapes committed by the Information Department of the Mendoza State Police (D2) in various penitentiary centers in that state during the Argentine military dictatorship between 1976 and 1983[79].

The Federal Court decision is founded upon the recommendations made by the Committee on the Elimination of All Forms of Discrimination against Women to the Argentine State so as to "adopt proactive measures to publicize, prosecute, and punish incidents of

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77 Thus, the Court ends up accusing a woman who had committed violence against the victim of indirect perpetration of the violent sexual assault. For the Justice, violence at the time of the crime is a necessary element that allows the rape to take place and is, therefore, "a manifestation of consortium in the act and, consequently, of perpetration in the strict sense.", Spanish Supreme Court, 1994.

78 Spanish Supreme Court, STS 13921/1994, Ra 8386*, Justice Bacigalupo Zapatero, 2 November 1994.*

79 *Cámara Federal de Apelaciones de Mendoza (Federal Appeals Chamber of Mendoza, Argentina), Luciano Menéndez case, 23 November 2011*; The evidence reviewed by the Chamber indicates that between 1975 and 1983, the Mendoza Police Information Department (D2) operated as a detention center for those who were politically motivated dissidents or considered part of the subversion. This department housed both police and army personnel who committed torture and rape. The position of Luciano Benjamín Menéndez, Commander of the Third Army Corps and head of Zone 3 in the "fight against subversion," led the Chamber to infer that Menéndez gave verbal orders for the crimes to be committed at D2.

sexual violence perpetrated during the former dictatorship, within the framework of trials for crimes against humanity, in accordance with the provisions of Security Council Resolution 1820/2008, and to provide reparations to the victims"[80]. Thereafter it then considered that indirect authorship by organized power apparatuses was applicable to the present case, given that the Military Junta exercised control over the planning and preparation of state terrorism carried out through a policy of forced disappearances, torture, extrajudicial executions and other crimes against humanity committed against alleged opponents of the military regime[81]. The judgment emphasized, in particular, the essential role played by Lieutenant General Jorge Rafael Videla in consolidating the organized power apparatus through which such crimes were carried out[82].

The Federal Court recognized that the commission of sexual crimes, especially the rape of women and men, responded to the systematic nature of a state policy that sought to "fight subversion"[83]. This policy was implemented through various methods aimed at subduing the will of victims, such that sexual violence was merely one of the methods employed which were aimed at making this policy of annihilating subversion effective. The crimes committed were primarily carried out by subordinates, in compliance with directives issued by their superiors[84]. High-ranking officers were responsible for the

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80 Ibid., pp. 22 and 113.

81 Although the Court does not expressly state so, the ruling suggests that: 1) there was an authority with the capacity to command; 2) because the State itself was the organized apparatus, the immediate perpetrator was fungible; 3) that while the conduct complied with the domestic legal framework, it violated international treaties recognized by the Argentine State; 4) because the subordinates were security agents, such as the State Police and Army, they were willing to automatically comply with the Junta's orders and policies.

82 Federal Appeals Chamber of Mendoza, Argentina, Supra, note 78.

83 To understand the substance of the ruling, it is necessary to explain its context. The Military Juntas took over in February 1975, following Decree 261/75, which ordered the Army General Command to establish a policy to neutralize and/or annihilate subversion in the province of Tucumán.

84 *Cámara Federal de Apelaciones de Mendoza*, Supra, note 78 p. 47; The attacks occurred because they were planned and their execution was determined,

generic directives against subversion, regardless of the fact that the policy reflected in said directives made no express mention of the commission of rape or other sexual abuse against the victims.

The Federal Court affirmed that the criminal offense of rape in the Argentinian Penal Code in force at the time the alleged acts were committed, between 1976 and 1983, did not require the satisfaction of the incentive or gratification of the perpetrator. Consequently, the determining factor in the crime of rape would be the violation of the victim's protected legal right (consisting of her sexual freedom and integrity), which would make the sexual satisfaction of the perpetrator completely irrelevant[85]. Consequently, rape would neither constitute a crime committed by one's own hand, nor would indirect perpetration be excluded from its scope of application.

6. Application in proceedings conducted within the framework of the Justice and Peace Law in Colombia

In the various proceedings that have been conducted under the Justice and Peace Law 975 of 2005, we found that the Chamber for Legal Determination (*Sala de Conocimiento)* of the Superior Court of the District of Bogotá has applied the theory of indirect perpetration through organized power structures to cases involving sexual crimes, especially in relation to the crime of rape.

In the case of Edgar Ignacio Fierro Flórez, which was the first time that the concept of indirect perpetration by organized power

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in both the chain of transmission of directives and in the execution of the harmful act. It is not the case that senior or middle management knew about and tolerated such attacks, and that their failure to prevent them placed them in breach of duty derived from their position as guarantors and makes them responsible for it. What we are dealing with is a commissioned intervention consisting of issuing orders, or relaying them within their general framework, aimed at the annihilation of the "subversive enemy," regardless of the means used to achieve that end.

85 Ibid., p. 56; A vision of this nature would simply focus on the attacker, forgetting the victim of the attack, when in reality, the prohibition of the action is aimed at protecting the legal rights of potential victims.

apparatus was applied in sexual crimes[86], fact number 23 relates that members of the *Bloque Norte* (Northern Bloc) – José Pablo Díaz Front of the United Self-Defense Forces of Colombia (AUC for its Spanish initials) – had carnal access to Ms. C. B. and subsequently committed murder in retaliation for refusing to pay a sum of money demanded by this paramilitary group[87]. When Fierro Flórez learned of these events, he ordered the execution of one of the individuals who brutally committed the rape and murder[88]. Given this situation, the Prosecutor's Office charged him with homicide of a protected person (for Ms. C. B.), aggravated homicide (for the death of one of his subordinates), torture, sexual assault, extorsion of property, and illegal possession of weapons[89]. Fierro Flórez accepted the charges as an indirect perpetrator given that the acts were committed by his subordinates[90]. The Chamber for Legal Determination confirmed that this was the correct basis for charging this type of sexual crimes[91].

The application of indirect perpetration by organized power apparatuses to sexual crimes was subsequently developed in the procedural orders reviewing the legality of the charges in the cases against Miguel Ángel Melchor Mejía Munera et. al., and Ramón Isaza et. al., the latter having already received a first-instance sentence. In the first case, since the defendants were members of the Vencedores de Arau-

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86 *Tribunal Superior del Distrito Judicial de Bogotá* (Superior Tribunal of the District of Bogota), Order for Review of The Legality of Charges Against Edgar Ignacio Fierro Flórez and Andrés Mauricio Torres León. Rad. 110016000253–2006–81366, 14 December 2010; Superior Tribunal of the District of Bogota, First Instance Sentence against Edgar Ignacio Fierro Flórez and Andrés Mauricio Torres León. Rad. 110016000253–2006–81366, 7 December 2011.

87 Superior Tribunal of the District of Bogota, Decision (Auto) on the Review of The Legality of Charges against Edgar Ignacio Fierro Flórez and Andrés Mauricio Torres León. Rad. 110016000253–2006–81366, 14 December 2010, par. 320.

88 Ibid.

89 Ibid. par.327

90 Ibid.

91 Superior Tribunal of the District of Bogota, First Instance Sentence against Edgar Ignacio Fierro Flórez and Andrés Mauricio Torres León. Rad. 110016000253–2006–81366, 7 December 2011, par. 647.

ca Bloc of the United Self-Defense Forces of Colombia (AUC)[92], the Court considered that sexual violence, especially carnal access, could be understood as a form of torture in light of the jurisprudence of the Inter-American Court of Human Rights and international criminal tribunals[93]. Torture occurred because the violations went beyond the purpose of sexual gratification, having the purpose of humiliating, punishing, or degrading the victim[94].

In cases 7, 16, 20, 21, 28, and 34, which included crimes of sexual assault against a protected person, in heterogeneous and successive concurrence with other crimes such as torture of a protected person, homicide of a protected person, and forced disappearance, we find that Mejía Munera and Villa Zapata are primarily held responsible as indirect perpetrators for being commanders of this Bloc[95]. The reason the Court considered this type of perpetration was because, although they propunded a discourse of non-sexual assault, their indifference and disinterest showed tolerance for these behaviors, which the Court takes as a form of support. It is therefore understood that "[t]his support translates into encouragement, ease, or consent, that is, an implicit order"[96].

In the case against Ramón Isaza et al. the criminal liability of the commanders of the Peasant Self-Defense Forces of the Magdalena

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92 For information purposes the AUC was an armed group that existed in Colombia between 1996 y 2006.

93 Superior Tribunal of the District of Bogota, Decision (Auto) on the Review of The Legality of Charges against Miguel Ángel Melchor Mejía Munera and others, Rad. 110016000253-2008-83612, 4 September 2012, pp.196-203.

94 Ibid., pp. 215-217.

95 Ibid.; It is important to highlight that Fact No. 7 is the same as the one described in the José Rubén Peña Tobón case in Fact No. 2, given that José Peña Tobón and the other defendants were subordinates of Mejía Munera and Villa Zapata. In this case, Peña Tobón's commanders and alias "Tom" are convicted for their actions, which were carried out under the guise of indirect authorship in the Bloc.

96 Ibid.; Superior Tribunal of the District of Bogota, First Instance Sentence against Ramón María Isaza Arango and others. Rad. 110016000253-2007-82855, 29 May 2014.

Medio (ACMM)[97] was analyzed regarding various acts. This included act number 33, referring to acts of sexual violence, for which responsibility is attributed to Ramón María Isaza Arango, the top commander of the ACMM, and Walter Ochoa Guisao, commander of the Omar Isaza Front of this organization. Both the Legality Control Order and the first-instance judgment mentioned this incident, known as the "hunters' massacre," where 12 bodies were found in four mass graves, including that of Ms. A. M., who, according to the different statements of the defendants and the physical evidence provided, was the victim of rape before her death[98]. On this occasion, the Chamber also considered that sexual violence can occur in conjunction with torture, and for this reason, the charges of violent sexual access and torture of a protected person were legalized[99].

The Chamber for Legal Determination subsequently affirmed the criminal liability of Ramón María Isaza Arango and Walter Ochoa Guisao as indirect perpetrators[100] based on the rulings of: (i) the Federal Court of Appeals of Mendoza in the case of Luciano Menéndez, stating that the theory that one's own hand raises the requirement of sexual satisfaction of the agent, is not included in the criminal offense[101]; and (ii) the PTC I of the ICC in the decision confirming the

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97 The "*Autodefensas Campesinas del Magdalena Medio*" were another armed group which existed in Colombia from the mid-1980's until 2006.

98 Superior Tribunal of the District of Bogota, First Instance Sentence against Ramón María Isaza Arango and others, Supra, note 95, pars. 159 – 165.

99 Superior Tribunal of the District of Bogota, Decision (Auto) on the Review of The Legality of Charges against Miguel Ángel Melchor Mejía Munera and others; Supra, note 92, pars.881, 906 and 908; Superior Tribunal of the District of Bogota, Decision (Auto) on the Review of The Legality of Charges against Ramón María Isaza Arango and others, Supra note 95 pars. 879-886.

100 Tribunal Superior de Distrito Judicial de Bogotá. *Auto de control de legalidad de cargos de Miguel Ángel Melchor Mejía Munera and others.* Supra, note 92, pars.1001-1006; *Tribunal Superior del Distrito Judicial de Bogotá. Sentencia de Primera instancia de Ramón María Isaza Arango and others*, Supra note 95 pars. 1004-1008.

101 Tribunal Superior de Distrito Judicial de Bogotá. *Auto de control de legalidad de cargos de Miguel Ángel Melchor Mejía Munera and others*, Supra, note 92, pars. 989-992.

charges against Germain Katanga and Mathieu Ngudjolo and in the arrest warrants against Omar Al Bashir[102].

7. Conclusion

International and national realities have revealed that women are particularly affected by armed conflicts and are, therefore, vulnerable subjects who deserve special protection[103]. This protection entails, among other positive actions by the State, the effective investigation of crimes committed against them, and adapting its criminal policy and methods of prosecution to the specific context of armed conflicts.

Authors such as Sánchez-Vera (2004) consider that the traditional application of the "crimes of personal commission" category of crime to sexual crimes implies a limitation on the protection of the legal rights of the victim's freedom and sexual integrity. Thus, adopting a pro-victim perspective makes it difficult to sustain the application of this theory, which focuses on the specific motivation and/or satisfaction of the perpetrator.

The consideration of sexual crimes as personal commission crimes has not only received growing doctrinal criticism but has also been rejected by international and comparative jurisprudence. From an international perspective, the ICC and the ICTY increasingly apply indirect (co)perpetration through organized power apparatuses to sexual crimes. Likewise, we find that Spanish and Argentine jurispru-

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102 Superior Tribunal of the District of Bogota, Decision (Auto) on the Review of The Legality of Charges against, Miguel Ángel Melchor Mejía Munera and others, Supra, note 92, paras.973-996; Superior Tribunal of the District of Bogota, First Instance Sentence against, Ramón María Isaza Arango and others, supra note 95 par. 989.

103 Even to the point that the ICC and the Ad Hoc Tribunals (ICTY and ICTR) have considered that the lack of consent of the rape victim should not be proven and that "coercion" is considered an inherent element in circumstances such as armed conflicts and military presence, taking a clear position of safeguarding the rights of the victimized population.

dence cases are in concurrence that the satisfaction of the perpetrator is irrelevant, given that the law seeks to protect the legal right of the victim's freedom and sexual integrity, and it is in this sense that the law must be interpreted.

In particular, the ruling of the Mendoza Court of Appeals in Argentina, in the case against Luciano Benjamín Menéndez (2011), echoes Sánchez-Vera's position and recognizes that the seriousness of crimes, particularly sexual ones, committed through an organized power apparatus having a specific criminal policy, implies leaving behind the limits proposed by the category of "personal commission". Likewise, we find that this position has been adopted by the Justice and Peace Chamber in Bogotá based on its various rulings reviewing the legality of charges and sentences in the cases against Edgar Ignacio Fierro Flórez et al. (2011), Miguel Ángel Melchor Mejía Munera et al. (2012), and Ramón Isaza et al. (2012 and 2014).

All of this only underscores how the application of indirect perpetration through organized power apparatuses to sexual crimes, particularly when these constitute crimes against humanity and war crimes, has not only been accepted by international and national courts but also appears necessary to reflect the true scope of the responsibility of those leaders who use the organizations they lead to ensure their commission.

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Epilogue
Approaches to the concept of macrocrime in Colombian Justice and Peace legislation and jurisprudence

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1. Introduction

In Colombia, although the concept of the pattern of macro-criminality appears for the first time in the normative complex of Justice and Peace[1], it can be seen that jurisprudence had already made

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1 Article 15 of Law 975, as amended by Article 10 of Law 1592 of 2012, states that uncovering macro-crime patterns is essential to uncovering the truth about the actions of organized armed groups operating outside the law, as it is an effective tool for uncovering the context of widespread and systematic violence fueled by the existence of a non-international armed conflict in Colombia. Likewise, article 18 of the same law (in conjunction with articles 2.2.5.1.2.2.5 and 2.2.5.1.2.2.7 of Decree 1069 of 2015) states that, if there is a reasonable inference, based on the elements of proof, physical evidence, legally obtained information or voluntary version of the defendant of the Justice and Peace procedure, of the authorship and participation in punishable conduct that is part of a macro-criminality pattern dynamic, the appropriate procedure is to request a hearing before the competent Control Magistrate of Guarantees for the formulation of the respective charge. Likewise, the applicant(s) have the right to invoke an early judgment when, among other requirements, he/she/they accept facts that are part of a pattern of macro-criminality previously clarified by a ruling issued (article 18 of law 1592 of 2012, consistent with article 2.2.5.1.2.3.2 of Decree 1069 of 2015). To delve into the specific requirements to invoke the early termination of the process based on the same facts that were the subject of patterns revealed in a previous final judgment, see Supreme Court of Justice, Crim-

significant efforts to establish an approach to it, through the analysis of what were called trends or approaches[2]. These indicated what requirements should be taken into account for the construction of "macro-crime", specifically based on the logic and dynamics in which the commission of the most atrocious criminal conduct (genocide, crimes against humanity, serious violations of International Humanitarian Law) is developed. These are crimes which offend and endanger legal rights that transcend the simple individual orbit so as to insert themselves into what could be called supranational or universal legal rights.

This paper begins with a general approach to the concept of macro-crime, then addresses it from the perspective of Colombian law and its interrelation with the concepts of contextual analysis, patterns of macro-crime patterns, practice, modus operandi, plan, and policy. The paper concludes with a study of the macro-crime analyses conducted by the Supreme Court's Criminal Cassation Chamber and the Justice and Peace Chambers, and highlights the difficulties surrounding their application. In several judgments issued under Law 1592 of 2012, the judges reject the macro-crime patterns presented by the Prosecutor's Office, citing flaws, among others, of a methodologi-

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inal Cassation Chamber, interlocutory order of September 30, 2015. File 46,721. M.P: Eugenio Fernández Carlier. Finally, the revelation or discovery of macro-crime patterns also plays an essential role in the development of the concentrated hearing in the development of said special procedure (article 2.2.5.1.2.2.11 of Decree 1069 of 2015).

[2] For example, by way of illustration, see, among others, the judgment of September 24, 2015, issued by the Justice and Peace Chamber of Medellín (Cacique Nutibara Bloc). MP: Rubén Darío Pinilla Cogollo. Also, the judgment of December 14, 2014, by the same Court and the same reporting judge (Judgment against Jesús Ignacio Roldán Pérez). Beyond the fact that at the time the different procedural phases were being carried out, the guidelines of Article 17 of Decree 3011 of 2013 (which implements the reforms introduced by Law 1592 of 2012) were not strictly applied, the fact is that the judiciary made significant efforts to at least outline the identification of macro-crime patterns in the cases before it. Likewise, it is important to recall the approach to this phenomenon carried out by the Justice and Peace Court of Bogotá (Superior Court of Bogotá, Justice and Peace Court, 2014b).

cal nature. However, several dissenting opinions in these judgments present less rigid positions on the matter.

2. A First approach to the concept of macrocrime

Macro-criminality is the criminality of large collectives, state power apparatuses, and systems of political injustice[3]. It refers to system-conforming and situation-appropriate behavior within an organizational structure, power apparatus, or other contexts of collective action, such as macro-events which are relevant to war and international law[4]. It is qualitatively different from the so-called "normal" forms of crime and also from the so-called "special" forms (terrorism, drug crime, economic crime, etc.) due to the exceptional political conditions and the particularly active role played by the State[5].

While for Alfredo Alpaca, following the positions of Jäger and Haan, macro-crime is characterized as being a phenomenon that fundamentally includes the commission of various criminal acts that are—and this is fundamental—ordered, initiated, encouraged, or concealed by the authority of governments[6], the truth is that the commission of criminal acts with these characteristics are not only committed by governments but can also be committed by organized groups or power apparatuses (guerrillas, paramilitaries, for example) that have the organization, capacity, and logistics to carry them out.

The criminal acts studied under "macro-criminality" or macro-crime are of a complementary interest to International Criminal Law since, although an important contribution of a State nature is recognized, we must not forget the fundamental idea that it is ultimately individuals who plan, direct, and execute such acts and therefore

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3 Jäger cited in Alpaca, A., 2013, *Cuadernos de Trabajo del CICAJ N.°3, Macrocriminalidad y Derecho Penal Internacional*, p. 38.

4 Jäger cited in Ambos, K., 14 December 2015, Konrad Adenauer Stiftung, *Obtenido de La Parte General del Derecho Penal Internacional, Bases para una elaboración dogmática*, p. 48.

5 Ibid., p. 44.

6 Alpaca, A., 2013, Cuadernos de Trabajo del CICAJ N.°3, *Macrocriminalidad y Derecho Penal Internacional*, p. 17.

must be criminally responsible[7]. In this order of ideas, the concept of macro-criminality is limited to crimes under international law that endanger international peace and security (crimes against humanity, war crimes and genocide), and characterized by being configured as "system crimes"[8]. Consequently, macro-criminality requires, to a greater or lesser extent, planning for the commission of large-scale crimes, in which there is a conspiracy of people who plan and execute them, presenting extraordinarily cruel forms of acting in which the victims are left defenseless against the criminal machine. They are repeated over time, presenting common characteristics that account for this degree of organization, within a certain territory[9]. Accordingly, the commission of isolated acts, acts committed randomly without any connection, or acts that are the result of deviant individual conduct are excluded from the concept of macro-crime[10].

Law 1592 of 2012, which amended Law 975 of 2005, established the strategy for investigating system crimes. It incorporated a substantial change by establishing that the truth is no longer sought from the perspective of the individual acts of each perpetrator, using traditional investigative frameworks, but rather from the contexts, causes, and motives of the macro-crime patterns in the actions of the groups

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7 Ibid., p. 38.

8 Professor Héctor Olasolo notes that macro-crime can extend to other complex crimes since there is no impediment to some of the most serious manifestations of violence exercised by clandestine business structures whose main activity is transnational crimes, being classified as international crimes, in particular as crimes against humanity, and must therefore receive an appropriate response to their nature through international criminal law (Olasolo, 2015, p.131).

9 . Similarly, the Court of Cassation of the Supreme Court of Justice has stated that macro-crime, understood as a phenomenon that transcends the scope of the criminal enterprise to enter an organized and hierarchical criminal apparatus, oriented toward developing multiple criminal fronts within a broad geographic coverage, cannot be investigated in a traditional manner as if it were a large number of isolated events. (Supreme Court of Justice, Criminal Chamber, 2015).

10 Martínez, D., 2014, *Manual de análisis contextual para la investigación penal en la Dirección Nacional de Análisis y Contextos (DINAC) de la Fiscalía General de la Nación, Bogotá, Centro Internacional para la Justicia Transicional* ICTJ, p. 14.

to which they belonged[11], and thereby leaving the investigation and prosecution of individually punishable conduct in the hands of the ordinary justice system.

Professor Kai Ambos argues that the investigation of *macro-crime* is not limited to listing the criminal acts committed by members of Organized Armed Groups Outside the Law (GAOML) must also be guided by revealing the motives and reasons that led to the crimes and the connections between them[12]. It is for this reason that the Manual for Criminal Investigation in the National Directorate of Analysis and Contexts (DINAC) of the Attorney General's Office of Colombia establishes that:

> The identification and reconstruction of criminal plans requires two complementary operations. From the perspective of the criminal organization, a deductive operation is required: it is necessary to identify and characterize the modus operandi that transforms the objective (criminal policy or plan) into results. From the perspective of the facts (results), an inductive operation is required: it is necessary to identify and characterize possible patterns, that is, similar characteristics of the crimes committed and the relationships they have with each other, since their occurrence is necessary for the fulfillment of the objectives of criminal machinery. The connection between criminal policy or plan, modus operandi, crimes, and patterns is what characterizes organized or planned violence and distinguishes it from other forms of violence or crime[13].

In this way Law 1592 of 2012 introduces for the Justice and Peace system specific obligations for the Prosecutor's Office. The Office is required to uncover the macro-criminal pattern of criminal actions committed by organized armed groups outside the law, in which the contexts, causes, and motives of the aforementioned pattern must be reconstructed.

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11 Supreme Court of Justice, *Criminal Chamber, Interlocutory Order*, Rad. 41035, *29 May 2013*.

12 Supreme Court of Justice, *Criminal Chamber, Interlocutory Order*, Rad. 46721, *30 September 2015, p. 10*.

13 Martínez, D., 2014, *Manual de análisis contextual para la investigación penal en la Dirección Nacional de Análisis y Contextos (DINAC) de la Fiscalía General de la Nación, Bogotá, Centro Internacional para la Justicia Transicional ICTJ*, p. 44.

3. Elements inherent to the analysis of macro-crime: the concepts of context analysis, macro-crime patterns, practice, *modus operandi*, plan, and policy

The analysis of the macro-crime phenomenon requires the application of a whole series of closely related concepts, including context analysis, macrocrime patterns, practice, modus operandi, plan, and policy[14].

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[14] In this context, Law 1592 of 2012 also introduces the term prioritization, which, in our opinion, is not so much related to the establishment of macro-crime patterns as to the concentration of criminal prosecution on certain groups of individuals, particularly those known as the most responsible. In this regard, Directive 001 of 4 October 2012, of the Attorney General's Office, states that prioritization allows for the establishment of an order of attention among citizens' demands for equivalent justice, to guarantee access to the administration of justice, and having the objectives of citizen security, understanding the context of the armed conflict, ensuring legitimacy and effectiveness in the administration of justice, and addressing the demands of civil society. However, this does not mean that prioritization, at least in Colombia, is unrelated to the establishment of macro-crime patterns, because the second paragraph of Article 16A itself establishes that prioritization criteria will be aimed at clarifying the macro-crime pattern in the actions of organized armed groups outside the law and at revealing the contexts, causes, and motives thereof, concentrating investigative efforts on those most responsible. Regarding the establishment of objective, subjective, and complementary prioritization criteria, Bergsmo and Saffon emphasized that the adoption of clear, adequate, and publicly justified criteria for selecting and prioritizing cases of systemic crimes is crucial to guaranteeing the principle of equality before the law (and with it other important objectives of the transition), the coherence, effectiveness, and independence of the prosecution strategy, and the overall legitimacy of the criminal process. For their part, Forer and López Díaz place particular emphasis on the fact that the investigation must be based on the dynamics of the system in which the punishable acts were committed, the patterns of conduct of its members, the command and cooperation relationships between armed actors, in order to achieve a narrative that allows us to develop the dossier of each group and the general mapping of their activities, which will help us establish whether there was systematicity and concerted action to commit the crimes under the policies outlined by the hierarchical superiors of each GAOML. (Bergsmo & Saffon, 2011) (Ambos, 2015, pág. 26) (Forer & López Díaz, 2011).

3.1. Context analysis

In accordance with Directive 0001 of 2012, context is the framework of reference for essential aspects concerning the geographical, political, economic, historical, and social elements in which crimes have been perpetrated by criminal groups, including those in which public officials and private individuals collaborate. Context includes a description of the criminal organization's strategy, its regional dynamics, essential logistical aspects, communications networks, among other things[15]. In this sense, context analysis seeks to allow the investigation of criminal conduct not as isolated incidents, but as the result of the actions of criminal organizations within a specific context[16]. In this regard, it is argued that:

> The notion of context has two substantial functions, according to the policy design established by the Attorney General for the Prosecutor's Office. On the one hand, context is considered to understand crime in the context of its victims and the reality in which it occurs, so that the criminal investigation of the events related to the crimes under investigation and their operation, as well as the human rights violations and the harm caused, offers a complete truth. On the other hand, it serves to understand the strategy of the criminal organization, its internal and external functioning, regional dynamics, essential logistical aspects, and communication networks, among other things[17].

Since system crimes are not isolated events but arise as a result of the actions of criminal structures, the function of context analysis as a criminal investigation methodology for system crimes is to serve as a basis by which the Attorney General's Office is able to determine the logical lines of investigation, structure the charges through the

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15 Office of the National Prosecutor, Directive 0001 of 2012, *Colombia, 4 October 2012.*

16 Bernal and Barbosa., 2015, *El análisis de contexto en la investigación penal: crítica del trasplante del derecho internacional al derecho interno. Bogotá, Colombia: Universidad Externado de Colombia: Ver artículo 2.2.5.1.2.2.2 del Decreto 1069 de 2015, p. 22.*

17 Correa., 2015, *Análisis de contexto. Estudio desde el derecho constitucional. In B. &. Bernal, El análisis de contexto en la investigación penas: crítica del transplante del derecho internacional al derecho interno (pág. 143), Bogotá, Universidad Externado de Colombia, p. 143.*

consideration of elements of a different nature that surround the crime, and guide the investigations to be carried out to determine the underlying responsibilities for the actors' relationships with third parties[18].

Additionally, context analysis is also effective in helping to clarify the commission of criminal conduct and in determining the criminal responsibility of the most important members of the macro-criminal structure. It thereby offers strategies for carrying out collective reparations. However, this does not mean that it can be constituted as evidence, since, as the Criminal Cassation Chamber of the Supreme Court of Colombia recently emphasized:

> Context is a purpose, since even if the overall picture of macro-criminal conduct is demonstrated, it cannot simply establish responsibilities, nor is it in itself a means of accreditation. On the contrary, its composition must be informed by sources that ultimately demonstrate the other objectives of the process, that is, by the legally and validly provided evidence, such as technical and expert studies, statements, etc[19].

In this sense, as the Supreme Court has indicated, the elaboration of the context must follow objective parameters, meaning that this elaboration should not respond to constructions based on arbitrariness and ideological subjectivism. Consequently:

> It is not advisable, without a judicious and balanced prior evaluation, in the construction of context to resort to all sorts of documents, investigations, or statistics, since it is undeniable that each of them contains a transversal ideological burden, capable of distorting or rendering their contribution more or less reliable. Therefore, if these elements are accepted, it will be necessary for the judge to express, in the decision, unequivocally why a particular source demonstrates impartiality, seriousness, depth, and an effective approach to reconstructing the truth

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18 Fajardo Arturo, L. A., 2015, *Estado del arte en materia de derecho internacional de los derechos humanos y contexto. In B. and Bernal, Análisis de contexto en la investigación penal: crítica del transplante del derecho internacional al derecho interno, Bogotá, Universidad Externado de Colombia, p. 297.*

19 Supreme Court of Justice, *Criminal Chamber, Interlocutory Order*, Rad. 46721, *30 September 2015.*

> and, in that case, to proceed to extract excerpts that serve to construct the context[20].

In the same sense, the Constitutional Court of Colombia, in Judgment C-579 of 2013, has stated that although context analysis effectively contributes to dismantling macro-structures of criminality and revealing patterns of massive human rights violations, and so ultimately ensuring non-repetition[21], the use of this methodology as a substitute for evidence would not only violate the Political Constitution, but also an entire body of international human rights law that establishes the insurmountable respect for the fundamental right to due process in the criminal sphere[22].

3.2. Patterns of Macro-criminality

As Martínez has pointed out, a pattern refers to a series of events that, due to their frequency, spatial location, and nature, involve some degree of centralized planning and control. The use of patterns helps to determine whether a particular crime is part of a planned process. The legal inferences that can be derived from the analysis of patterns in the evidence will depend on the facts[23].

The Justice and Peace Chamber of Bogotá has emphasized in this regard that:

> According to international jurisprudence, a pattern is constituted by acts of a systematic, repeated, or widespread nature, which involve a specific modus operandi, in that they reveal widespread conduct that

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20 Ibid.

21 Constitutional court, Sentence C-579, *28 August 2013*.

22 Bernal Pulido, C., 2015, *Problemas teóricos y de derechos fundamentales del uso del análisis de contexto para la investigación penal en el derecho interno colombiano; In B. &. Bernal, En el análisis de contexto en la investigación penal: crítica del trasplante del derecho internacional al derecho interno, Bogotá, Universidad Externado de Colombia,* p. 63.

23 Martínez, D., 2014, *Manual de análisis contextual para la investigación penal en la Dirección Nacional de Análisis y Contextos (DINAC) de la* Office of the National Prosecutor, Bogota, *Centro Internacional para la Justicia Transicional* ICTJ, p. 21

> is clearly perceived as serious violations of human rights or international humanitarian law[24].

This raises the problem of translating the concepts emanating from international human rights jurisdictions that seek to establish whether States, not individuals, are responsible, given the flexibility of the evidentiary standards applied in these jurisdictions to establish the existence of macro-crime patterns. In this regard, it should be noted that the special jurisdiction for Justice and Peace analyzes criminal liability and must therefore adhere to evidentiary standards that respect fundamental rights such as due process and the right to a defense, which requires a rigorous and defined analysis based on the legal evidence duly submitted to the case.

Another problem with the notion of patterns of macro-criminality is its allusion to the concepts of widespread and/or systematic. These are attributes that constitute the essence of crimes against humanity. However, this systematic element is not required in war crimes. This is why, as Cote and Tarapués have affirmed in their analysis of Constitutional Court ruling C-579 of 2013, the expression 'war crimes committed systematically' must then indicate something distinct from just the sole connection between the crime to be investigated and the armed conflict[25]. Hence, in relation to war crimes, the expression 'patterns of conduct' is used to refer to the selection and prioritization of those behaviors that constitute serious violations of International Humanitarian Law, which are relevant enough to be

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24 Superior T Court of Bogotá, Justice and Peace Chamber, Ruling against the defendant Salvatore Mancuso and others, Rad. 1821, 31 October 2014b, par. 578.

25 Cote Barco, G., & Tarapues Sandino, D., 2014, *El marco jurídico para la paz y el análisis estricto de sustitución de la Constitución realizado en la sentencia C-579 de 2013*; In Ambos, *Justicia de Transición y Constitución, Análisis de la Sentencia C-579 de 2013 de la Corte Constitucional* (p. 253). Bogota: Temis; Furthermore, strictly speaking, an isolated incident may constitute a war crime under international criminal law, without it being essential to prove its systematic nature. It would be sufficient to prove its causal link to an armed conflict.

investigated and prosecuted only within the specific context of the Special Jurisdiction for Justice and Peace[26].

At the normative level, the definition of macro-criminality patterns is included in Article 16 of Decree 3011 of 2013[27], which regulates Law 1592 of 2012, such that they comprise the set of criminal activities, practices, and modes of criminal action that are carried out repeatedly in a given territory and over a period of time from which can be deduced the essential elements of the policies and plans implemented by the illegal armed group responsible for them.

Likewise, Article 2.2.5.1.2.2.4 of the aforementioned decree requires that the verification of the existence of a pattern of macro-crime must include, among other things, the identification of: (a) the most characteristic types of crimes, including their nature and number; (b) the purposes of the illegal armed group; (c) the *modus operandi* of the illegal armed group; (d) the ideological, economic, or political purpose of the victimization and, if applicable, its relationship to age, gender, racial, ethnic, or disability characteristics of the victims, among others; (e) the financing mechanisms of the illegal armed group's structure; (f) a qualitative sample of cases that illustrates the most characteristic types of crimes carried out by the illegal armed group. (g) documentation of the quantitative nature and number of illegal activities committed under the macro-crime pattern, using statistical means to the extent possible; (h) the processes of concealment of the crime and disappearance of evidence; and (i) identification of excesses or overreach in the communication, implementation, and execution of orders, if any. According to Justice and Peace jurisprudence, these elements must occur concurrently, and therefore any element that seeks to restrict their scope must be rejected[28].

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26 Those acts that constitute serious violations of IHL, which, according to the concept of macro-criminality patterns, are not investigated and prosecuted by the special jurisdiction of Justice and Peace, could, however, fall under the jurisdiction of other judicial bodies.

27 Article 2.2.5.1.2.2.3 del Decree 1069 of 2015.

28 Superior Court of Bogotá, Justice and Peace Chamber, againts Arnubio Triana Mahecha and others, Rad.2358, 16 December 2014c.

Taking the foregoing into account, the Prosecutor's Office must present a systematic, contextual view of what it is charging and accusing. It must establish the priority of the seriousness of the crimes, the conditions and the number of victims, a common pattern or design, their locations, the time of their commission, the social alarm they caused, and the command status of the perpetrators, among other aspects[29]. So that the function of the Prosecutor's Office is not passive, since it has the institutional duty to practice whatever evidentiary means is at its disposal, in order to confirm or report what was confessed by the demobilized person, and to highlight that in this verification work, it is only natural and obvious that the victims play a preponderant role, since, in turn, they can provide elements of judgment in one way or another[30].

3.3. Practice and Modus Operandi

Article 2.2.5.1.2.2.3 of Decree 1069 of 2015 includes the terms practice and modus operandi, so it is necessary to establish their relationship with patterns of macro-crime. Regarding the concept of practice, the Medellín Justice and Peace Chamber, based on the jurisprudence of international human rights tribunals, identifies three elements that characterize it: its systematicity, prevalence, and repeated nature, which are also present when developing the notion of a macro-crime pattern. Thus, according to this court, practice can be understood as the sum of *modus operandi* connected by a factual causal link[31].

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29 Supreme Court of Justice, *Criminal Chamber, Interlocutory Order*, Rad. 39.269, *17 October 2012*.

30 Supreme Court of Justice, Criminal Chamber, Interlocutory Order, Rad. 32.022, 21 September 2009.

31 Superior Tribunal of Medellín, Justice and Peace Chamber, Ruling against Olimpo de Jesús Sánchez Caro and others, Rad. 2008-83626, 16 December 2015; This ruling refers to decisions from both the European Court of Human Rights and the Inter-American Court of Human Rights. The Court also states that in relation to the concept of practice, H.L. Hart defines it as conduct of a general nature that can be perceived by internal or external observers, and from such observation, it can be concluded that the conduct

In terms of the modus operandi, it is also mentioned in articles 2.2.5.1.2.2.3, 2.2.5.1.2.2.4 and 2.2.5.1.2.2.7 of Decree 1069 of 2015. In this regard, it is worth mentioning what the author Morales Marín has emphasized that people have a special way of acting according to their specific characteristics. That is to say, each person has a special tendency to do things their own way, which is part of their habits, which they rarely ignore. This tendency of the individual to act in a particular and exclusive manner is also shared by criminals[32]. Of course, this is why we consider it valid to take this element into account and transpose it to that characteristic collective action in the dynamics of international crimes. For its part, the Justice and Peace Chamber of Medellín has concluded that the modus operandi is the way in which a practice is carried out; that is to say, the circumstances of the manner, time and place of the criminal act[33].

As we noted in relation to patterns of macro-crime, although in the area of international responsibility of States in international human rights courts, reference is made to how to identify practices and *modi operandi*, the evidence relating to these elements in a criminal proceeding must in all cases comply with the evidentiary standards that ensure due process and the right to a defense.

3.4. Plan or Policy

The Royal Academy of the Spanish Language defines the term policy as referring to the orientations or guidelines that govern the actions of a person or entity in a specific matter or field[34], a meaning that we consider the most appropriate for the purposes of this analysis. For its part, the Royal Academy of the Spanish Language itself defines the term plan as a project or systematic model of a public or

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is uniform and carried out by a group, although such group practice need not necessarily be totalitarian and universal (Standards for Investigations of Extrajudicial Executions).

32 Morales Marín, G., 2001, *Prueba penal y apreciación técnico-científica*, Gustavo Ibáñez, p. 252.

33 Superior Court of Medellín, Justice and Peace Chamber, supra, note 31.

34 *Real Academia Española, 2016. Diccionario de la lengua española.*

private action, which is prepared in advance to direct and channel it[35].

The definition of crimes against humanity contained in Article 7 of the Statute of the International Criminal Court requires, as a contextual element, the existence of a systematic or widespread attack directed against the civilian population in furtherance of the policy of a State or an organization. Ultimately, these are highly complex punishable acts that involve multiple acts of violence (attacks), involving the concurrence of several perpetrators, many of whom (especially the perpetrators) act anonymously within an entity[36]. In these circumstances, proving that the acts of violence are carried out in furtherance of a plan or policy, whether of a State or an organization, is complicated because, although a series of interrelated means are used to achieve the objective of attacking a civilian population, these are not directly presented in the form of an announced, explicit, or detailed plan[37].

In this regard, it is necessary to emphasize that the true criminal intentions of attacking the most precious interests of human beings are often hypocritically hidden and veiled behind a cloak of situations that appear to be legal, without it being easy to discover said criminal policy or plan at first glance. That is why the interpreter must resort to the technique of reasonable inference to unravel it, analyzing as a whole the concatenated existence of a series of events within a specific temporal and geographical context[38]. However, to

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35 Ibíd.

36 Jurovisc, Y., 2002. *Réflexions sur la specificité du crime contre l'Humanité en Revue Internationale de droit comparé. 55(3), p. 229.*

37 ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07-3436, CPI II, Jugement rendu en application de l'article 74 de Statut, 7 March 2014, par. 1109.

38 For example, the ICTY case law cites a number of situations that would lead to the presumption of the existence of a policy in this regard (Prosecutor v. Tihomir Blaskic, 2000, para. 204). It is cited, for example, that policy can be evidentiarily inferred from the general historical circumstances and the general political framework within which the criminal acts are inscribed, from media propaganda, from the mobilization of armed forces, from the adoption of discriminatory measures, from the scope of the violence exer-

correctly infer the existence of a policy and avoid hasty and inaccurate judgments, it is necessary to take into account that the actions and omissions that are intended to be inscribed within it conform to an evolutionary and dynamic process, which is why an *ex post facto* analysis of the entire chain of events must be carried out.

4. The analysis of macro-crime by the Supreme Court of Justice's Criminal Cassation Chamber and the Justice and Peace Chambers

The justice and peace process, unlike the criminal procedural model regulated by Law 906 of 2004[39], has as its basis the demobilization of illegal armed groups and is aimed at achieving national reconciliation and overcoming the armed conflict, in conformity with the commitments to truth, justice, reparation, and the guarantee of non-repetition inherent in a transitional process[40]. Thus, the facts must be constructed by all those involved, including the justice and peace judges, based on the confession of the accused and the subsequent investigation conducted by the prosecutor's office[41]. This does not

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cised, from the links between a military hierarchy and the political structure and its program, from the content of the political program, among others. These examples have been cited by ICC PTC II (Situation in the Republic of Kenya, 2010, para. 87). Likewise, the Jurisprudence of the First Instance Chamber II of the ICC also illustrates other examples that allow the existence of the policy of attacking the civilian population to be inferred: the fact of observing the repetition of several acts that are framed within a finalistic logic, the existence of preparatory activities, the collective mobilizations concerted and coordinated by the State or the organization (Prosecutor vs. Katanga, 2014, para. 1109) (Hansen, 2011, p. 12).

39 An adversarial process in which a confrontation between the accuser and the defense arises, which must be resolved by an impartial judicial official, in accordance with the principles of controversy, equality of arms, and immediacy of evidence, among others (Supreme Court of Justice, Criminal Chamber, 2013).

40 Supreme Court of Justice, Criminal Chamber, Interlocutory Order, Rad. 41035, 29 May 2013.

41 Supreme Court of Justice, Criminal Chamber, Interlocutory Order, Rad. 31.539, 31 July 2009.

imply a change in the role of the prosecuting body, since the goal is to construct a truth that is not merely formal, based on the participation of all interested parties[42].

In accordance with the above, the decisions that are taken within the justice and peace process have a greater argumentative burden when it comes to examining the phenomena of macro-crime and systematic and widespread human rights violations, also taking into account the international framework. Consequently, judicial officials[43] must not only analyze the specific case but contextualize it within the conflict, identify the patterns of violence and other actors, likely at a higher level, who also bear responsibility[44].

According to the Criminal Cassation Chamber of the Supreme Court, the most significant procedural act in the justice and peace law is the accusation: the indictment plus the formal and substantive legality review of the acceptance of charges[45]. In accordance with the reform to the justice and peace process established by Law 1592 of 2012 and Decree 3011 of 2013, this is presented at the condensed hearing for the formal and substantive review of the charges. For this reason, as the Criminal Cassation Chamber itself has emphasized, concentrated hearings are hearings that generate decisions that identify patterns of macro-crime[46]. For this reason, as the Criminal Cassation Chamber itself has emphasized, concentrated hearings are hearings that generate decisions that identify patterns of macro-crime. Therefore, the conceptualization of patterns of macro-crime must be presented at the concentrated hearing for the formal and material

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42 Ibid.

43 When referring to a judicial officer, the Court states that the Magistrate of First Instance could establish the context and reveal patterns of macro-crime.

44 Supreme Court of Justice, Criminal Chamber, Interlocutory Order, Rad. 32.022, 21 September 2009b.

45 Supreme Court of Justice, Criminal Chamber, Interlocutory Order, Rad. 29560, 28 May 2008.

46 Superior Tribunal of Bogotá, Justice and Peace Chamber, Supra, note 24, par.727.

control of the charges[47], taking into account the elements for their identification established in Article 17 of Decree 3011 of 2013.

In the ruling against defendant Salvatore Mancuso of 31 October 2014, an approach to macro-crime patterns is discussed. It established that announcing macro-crime patterns is a requirement assumed by the Prosecutor's Office and that it entails distinguishing them from group policies[48]. By establishing an approach to macro-crime patterns, it corrected the patterns presented by the Prosecutor's Office and established that setting the evidentiary standard exclusively on the voluntary version of the defendants generates a series of drawbacks. First, the macro-crime pattern is inappropriately restricted, thus generating a contradictory effect with respect to future cases that are taken through early sentencing, since, under the hypothesis put forward by the Prosecutor's Office, the pattern would be subject mainly to the condition of the victim as one who had links to subversion, but not to the factors warned about in Regulatory Decree 3011 of 2013, such as the structure, the *modus operandi*, and the relationships that made the operation of a specific Bloc possible, among others[49]. Secondly, using the voluntary version of the defendant as the only means of proof of a pattern of macro-criminality is insufficient since in many cases the identification of the pattern is based on what is revealed throughout the process, that is, it is constructed from the same facts and their circumstances[50]. In this order of ideas, the Prosecutor's Office can use any means of evidence to unveil the patterns of macro-criminality.

The Justice and Peace Chamber, in the same case, established that the quantitative criterion for determining macro-crime patterns is of special importance[51], but it is not sufficient, since quantitative and qualitative criteria must be taken into account to identify patterns of macro-criminality. Likewise, the determination of practice is an additional element that allows for the identification of macro-crime

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47 Ibid., par. 718
48 Ibid., par. 727.
49 Ibid., par. 728 et. seq.
50 Ibid., par. 728 et. seq.
51 Ibid., par. 731.

patterns that must be established together with the other elements, since on its own it is insufficient for the macro-crime criteria[52]. On the other hand, the Chamber recommends this as a convenient methodology to conceptualize the patterns from the Bloc to the fronts, not the other way around; consequently, the argument from the Front is valid as verification of the pattern[53].

In a previous ruling regarding the CUNDINAMARCA BLOC, the Justice and Peace Chamber made the following statement regarding the elements that the patterns macro-criminality established in Article 17 of Decree 3011 of 2013 must have and which, in its opinion, must be fully complied with:

> […] The Chamber, in order to recommend the use of interdisciplinary approaches to complement national and international jurisprudence in the prosecution of systemic crimes, recommends that to identify and analyze the existence of a pattern of behavior, it is necessary to take into account the following elements:
> a. A pattern must be easily recognizable, which means that it must have the sources of information and data processing tools that allow for empirical verification of its existence.
> b. A pattern must identify the different circumstances of time, manner, and place of occurrence. This implies addressing multi-causal perspectives in the analysis of criminal behavior by armed structures that benefit from transitional justice.
> c. A pattern must operate at the level of social, political, and economic structures, and not at the level of isolated individuals. This presupposes, for example, that the identification of patterns of criminal behavior must focus attention on both the roles of each social group that is victimized within the context of armed conflict, as well as the logic of violence at the level of the illegal armed group. This means that the unit of analysis for criminal patterns should not be the victim in their own unique way, but rather the victim within a context of social, political, and economic relations. Likewise, this means that the interaction of different commanders and patrol members must be analyzed under certain language codes and organizational rules, and not their actions in isolation.
> d. To identify patterns, different qualitative tools (interviews, focus groups with victims and perpetrators, documentary sources) and quantitative tools (statistical analysis) must be used. (data, correlations, re-

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52 Ibid., par. 734.

53 Ibid., par. 731.

> gressions, etc.) of analysis must be utilized to prove and support their existence[54].

Based on the foregoing, the Chamber did not accept the macro-crime patterns presented by the Prosecutor's Office because: (i) the Prosecutor's Office limited the concept of a pattern to criminal offenses, thus not using the concept of a criminal pattern defined by Decree 3011 of 2013; (ii) the absence of clear methodological criteria to identify elements such as the universe of victims, units of analysis, or samples, such that the Prosecutor's Office did not analyze the elements that constitute a criminal pattern; (iii) the absence of a multidisciplinary focus, as the Chamber did not find that the Prosecutor's Office had used multidisciplinary focuses that would allow for the construction of differential approaches from various disciplines, which ultimately prevents having conceptual and methodological references and a battery of variables that would help cross-reference data and allow for a more complete analysis of the activities carried out by illegal armed groups; and (iv) the sources of information were not verified or contrasted since only the voluntary version of the defendants was used to construct the patterns; and (vi) the Prosecutor's Office did not specify the type of sample and the technical criteria used to select the prioritized facts[55].

In particular, the Majority of the Chamber noted that the Prosecutor's Office should have constructed a 'sample' that met the requirements of representativeness and reliability. To meet these requirements, statistical experts indicate that the type of sample being used must be characterized (for example, whether it is a probability sample or a convenience sample) in order to adjust the statistical methods most appropriate for identifying the 'pattern'[56].

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54 Superior Tribunal of Bogota, Peace and Justice Chamber, Ruling against defendant Luís Eduardo Cifuentes Galindo and others, Rad. 2319, 1 September 2014, par. 950 et seq; Supreme Court of Justice, Criminal Chamber, Interlocutory Order, Ruling against defendant Salvatore Mancuso and others, Rad. 1821, 31 October 2014b, par. 781 et.seq.

55 Superior Tribunal of Bogotá, Justice and Peace Chamber, Ruling against defendant Luís Eduardo Cifuentes Galindo and others, Ibid.

56 Ibid., par. 998.

As can be seen, the construction of macro-crime patterns is not reduced to a successive or alternating enumeration of acts of violence, nor is it a requirement of rhetorical nature and purpose. On the contrary, through their revelation, pathways are opened up towards understanding the antecedents of all kinds prove to be determinant in the practices of violence, the common conditions of severity and representativeness of the acts, and, most importantly, the construction of the truth in its various dimensions (the latter being the exclusive formula for ultimately identifying the feasibility of the guarantee of non-repetition)[57].

Consequently, the judiciary, in the majority of their rulings issued pursuant to Law 1592 of 2012 and its regulatory decree, has rejected macro-crime patterns, whose identification must be based on the development of sophisticated and complex methodologies, both quantitative and qualitative, that support the establishment of macro-crime patterns in accordance with current regulations[58]. However, despite the above, the Chambers have chosen to issue their judgment.

This practice has generated controversy among the judges of the Justice and Peace Courts, as those who dissented consider that in the event of a rejection of the recognition of macro-crime patterns, the issuance of a judgment violates the spirit of the law[59]. Furthermore, for these judges, while the methodologies used to clarify a macro-crime pattern are a useful guide, they cannot fall into com-

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57 Superior Court of Bogota, Peace and Justice Chamber, Ruling against defendant Salvatore Mancuso and others, Supra note 54, par. 591.

58 Indeed, of the four sentences prioritized to date, in accordance with the modifications introduced by Law 1592 and its respective regulatory decree, the Chamber of the Justice and Peace Tribunal of Bogotá, by majority, has not accepted the macro-criminality patterns presented by the investigating body (Superior Tribunal of Bogotá, Justice and Peace Chamber, 2014) (Superior Tribunal of Bogotá, Justice and Peace Chamber, 2014c). Likewise, the Justice and Peace Chamber of Medellín only accepted one of the macro-criminality patterns submitted for its consideration (Superior Tribunal of Medellín, Justice and Peace Chamber, 2015).

59 Superior Tribunal of Medellín, Peace and Justice Chamber, Partial dissenting vote of Judge Juan Guillermo Cárdenas Gómez, Rad. 2008-83626, 16 December 2015, pp. 12 -23.

plex technicalities because they would violate the right to the truth. Consequently, in their opinion, as long as there is legally and timely obtained evidence that logically and sufficiently proves the existence of patterns, practices, or *modus operandi* that denote the existence of a macro-criminal plan or policy (thus excluding fortuitous criminal conduct or conduct unrelated to the systematic or widespread conduct of such structures), the patterns presented by the Prosecutor's Office should be recognized[60].

5. Conclusion

The development of macro-crime analysis, and the subsequent identification of patterns of macro-criminality, has a double connotation. First, it is a tool that helps develop a more efficient investigative methodology, as it does not focus solely on individual or isolated criminal acts, but rather indicates that these are carried out as a consequence of the systematic, widespread, and repeated actions of an extraordinarily complex criminal organization. Second, it is a tool that guarantees access to the truth in a much more effective manner, as these patterns must be framed within an objectively revealed context of widespread violence, in which the causes and motives that led to the emergence and development of behaviors that seriously violate human rights can be identified.

Macro-crime analyses are closely related to the concepts of context analysis, practice, modus operandi, plan, and policy, as they allow for the identification of patterns of criminal behavior. These patterns are understood as models of criminal behavior that bear similarity to one another because they are systematic, widespread, and repeated, and develop within a specific spatial and temporal context. These patterns allow for the discovery of an accumulation of of distinct practices which allude to the commission of illegal acts as well as the time, manner, and place in which it was specifically committed. They also

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60 Superior Tribunal of Bogota, Peace and Justice, Partial dissenting vote of Judge Lester González Romero, Rad. 2358 16 December 2014, pp. 966 – 970.

allow for a reasonable inference of the organization's plan or policy and the causes that generate this systematic violence, which worsens in situations of armed conflict.

Finally, within the scope of the regulations of the Justice and Peace Law in Colombia, although nothing would prevent the judges from rejecting in their judgment the patterns of macro-criminality presented by the investigating body (for example, because the existence of a plan or policy was not adequately established or because unconnected and isolated facts are presented), it would be more appropriate if there were more disagreement on the part of the judiciary, and through this means to have an open and frank dialogue and for it to be set forth through observations in the concentrated hearing[61], since only in this way will more coherent and well-founded judgments be subsequently constructed, contributing to the effective search for the truth. Since the judges (together with the other procedural actors) are obligated to assist in the construction of said truth, this could be seen as an interference in the duties of the Attorney General's Office.

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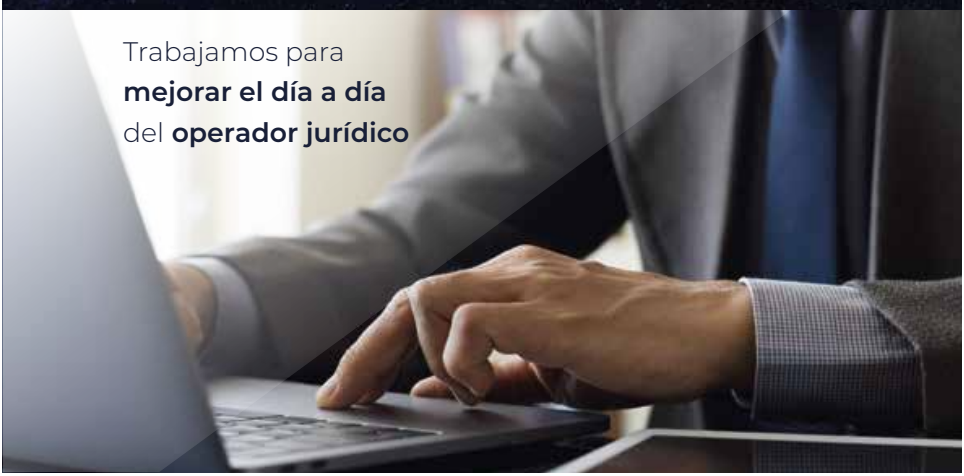

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