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51

THE TRILOGY ON THE ROLE OF THE INTERNATIONAL CRIMINAL COURT FROM NON-POSITIVIST PERSPECTIVES

PART I

Analytical approaches that adopt modernity and its subjectivities

Special Volume for the XV Anniversary of the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice

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PERSPECTIVAS IBEROAMERICANAS SOBRE LA JUSTICIA

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Volume 51

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Colección Perspectivas Iberoamericanas sobre la Justicia

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Note

This book is the first volume of *The Trilogy on the Role of the International Criminal Court from Non-Positivist Perspectives*, which has been elaborated for the XV Anniversary of the Ibero-American Institute of The Hague for Peace, Human Rights and International (IIH) (The Netherlands).

The Trilogy constitutes a revised, further elaborated and updated English version of the work published in Spanish in 2021: Olasolo, H., Urueña-Sánchez, M.I & Sánchez Sarmiento, A. (Eds.) (2021). *La función de la Corte Penal Internacional: visiones plurales desde una perspectiva interdisciplinar*. Volume 15 of the *Ibero-American Perspectives on Justice* Book Collection. Valencia (Spain): Tirant lo Blanch Publishing House (Spain), IIH & Joaquín Herrera Flores Institute (Brazil/Spain)[*].

The Trilogy is part of the work of the Research Network *Ibero-American Perspectives on Justice*, coordinated by the IIH. It is also part of the following Research Projects: (a) *La función de la Corte Penal Internacional desde las teorías de la justicia en el derecho internacional* (2019-2020), co-financed by the Faculty of Law of the Universidad del Rosario (Bogotá, Colombia) and IIH; and (b) *La respuesta del derecho internacional a la corrupción asociada al crimen transnacional organizado, a la luz de las dinámicas de comportamiento del sistema de narcotráfico marítimo por medio de simulación de sistemas sociales* (2020-2023) (reference number: Minciencias (Colombia) 70817: 2020-2023), co-financed by the Patrimonio Autónomo Fondo Nacional de Financiamiento para la Ciencia, la Tecnología y la Innovación Francisco José de Caldas (Colombia) and the Faculty of Law of the Universidad del Rosario.

Research Project 70817 is part of the Research Program *Estrategia de respuesta integrada desde el derecho público comparado e internacional para enfrentar en Colombia la corrupción asociada al crimen transnacional organizado, a la luz de una aproximación evolutiva a las dinámicas del narcotráfico marítimo por medio de simulación de sistemas sociales* (reference number: Minciencias 70593: 2020-2023). Both Program 70593 and the two aforementioned Research Projects have been led by Prof. Héctor Olasolo (Faculty of Law of the Universidad del Rosario) as principal researcher. The IIH has supported financially the publication of the books resulting from both Research Projects, as well as from the Research Networks *Ibero-American Perspectives on Justice* and *Responses to*

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[*] Volume 15 is available for free download at the following links: (a) https://editorial.tirant.com/es/libro/la-funcion-de-la-corte-penal-internacional-visiones-plurales-desde-una-perspectiva-interdisciplinar-hector-olasolo-alonso-9788413979571; and (b) https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-15-la-funcion-de-la-corte-penal-internacional.

Corruption associated with Transnational Organized Crime. This last Research Network was established in 2020 for the implementation of Research Program 70593.

All chapters of the Trilogy whose Spanish versions were included in Volume 15 of the aforementioned Book Collection have been updated until November 2023. The other chapters of the Trilogy have been updated up to the end of 2024.

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To the members of the International Law Clinic carried out through a partnership among the Faculty of Law of the Universidad del Rosario (Bogotá, Colombia), the Office of Public Counsel for Victims of the International Criminal Court (OPCV) and IIH (The Netherlands), and to the participants in the Course on "Critical Studies on International Law" of the Master's Degree in International Law of the Universidad del Rosario, for the enriching debates that we have held on the role of the International Criminal Court since the start of both programs in 2011 and 2018 respectively.

To the Research and Innovation Division and the Faculty of Law of the Universidad del Rosario (Bogotá, Colombia), as well as to the IIH (Netherlands), for the funding received to develop this project.

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To the IIH partners and to all those who have made it possible for the IIH, and its many activities, publications, and research networks, to have played the role of Ibero-American Platform in The Hague since its foundation in 2011.

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Table of Abbreviations

AC	Appeals/Appellate Chamber
AU	African Union
CAH	Crimes Against Humanity
CGG	Commission on Global Governance
CL	Criminal Law
DRC	Democratic Republic of the Congo
EAL	Economic Analysis of Law
ESCR	Economic Social and Cultural Rights
ECtHR	European Court of Human Rights
FPLC	*Forces Patriotiques pour la Libération du Congo*
GCs	Geneva Conventions
GJT	Global Justice Theory
GPGs	Global Public Goods
HRC	Human Rights Council of the United Nations
HRCom	Human Rights Commission of the United Nations
IACtHR	Inter-American Court of Human Rights
ICA	International Council on Archives
ICC	International Criminal Court
ICC OTP	Office of the Prosecutor of the International Criminal Court
ICC RPE	Rules of Procedure and Evidence of the International Criminal Court
ICC TFV	Trust Fund for Victims of the International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Criminal Justice
ICL	International Criminal Law
ICR	Individual Criminal Responsibility
ICtJ	International Court of Justice

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IJ	International Justice
IL	International Law
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
IOs	International Organizations
IR	International Relations
IRMCT	International Residual Mechanism for International Tribunals
LRA	Lord's Resistance Army
NGOs	Non-Governmental Organizations
OHCHR	Office of the High Commissioner for Human Rights
OPCV	Office of Public Counsel for Victims of the International Criminal Court
PTC	Pre-Trial Chamber
SCSL	Special Court for Sierra Leone
SLA	Sudanese Liberation Army
TC	Trial Chamber
TLC	Transnational Criminal Law
TRC	Theory of Rational Choice
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nation Secretary General
UPC	*Union des Patriots Congolais*
WMO	World Meteorological Organizations

Foreword

The trilogy on the role of the International Criminal Court (ICC) from non-positivist perspectives, that is presented in this foreword, has been prepared on the occasion of the XV anniversary of the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (IIH).

Three main goals can be identified in the innovative research work prepared under the academic direction of professors Héctor Olasolo, Mario-Iván Urueña-Sánchez and R.J. MacLean. First, it seeks to provide a broader interdisciplinary view of the role of the ICC through dialogue between philosophical and theological approaches, on the one hand, and approaches from international law (IL) and international relations (IR), on the other.

In this regard, it is worth bearing in mind that, although the doctrine has largely been limited until now to studying the ICC from traditional analytical perspectives based on legal positivism, it is no less true that a holistic understanding of the conditions that have favored the establishment and consolidation of the ICC as an institution requires going beyond the analysis of the ICC Statute and the international instruments that complement it. It is thus certainly relevant to promote dialogue with those other disciplines that can help to provide a better understanding of core aspects of its functioning.

In particular, both philosophy and theology have much to contribute in relation to the treatment of mass atrocities in human societies and in international society, and are therefore important when it comes to interpreting the role of the only permanent international criminal court (the ICC) that has been established so far to investigate and prosecute those most responsible for them.

The trilogy presents us with two axes of analysis of the ICC role (critical studies and subaltern historical-contextual approaches) that are transversal to the four disciplines from which this research has been developed.

Moreover, the trilogy addresses the ICC's role from other theoretical approaches, which, despite not being transversal to the four disciplines chosen, also allow a better understanding of some of its elements. Such approaches can be classified into three large groups:

1. Analytical approaches to IL and IR that adopt modernity and its subjectivities, regardless of whether they have a positivist foundation (information management and archival policy) or deviate from it (rational choice theory and global governance, justice and constitutionalism).

2. Non-positivist analytical approaches to IL and IR that denounce modernity and its subjectivities (constructivism, feminist theories, post-structuralism and queer theory).

3. Philosophical and theological perspectives that also reject positivism, modernity and its subjectivities (ethical, practical and symbolic horizons, justice as memory and emotions theory).

This structure clearly reflects the second goal of the trilogy: exploring the main questions raised by the ICC's role from analytical approaches that depart from normative positivism, and are often based on theoretical references that renounce modernity and its subjectivities (Frankfort School, post-structuralist, post-modern and post-colonial perspectives, Marxism or neo-Gramscianism), in order to build, on the basis of their own perceptions of international society and justice, alternative worlds. As a result, the trilogy presents a strong ethical commitment to the possibility of change.

In this way, the trilogy contains a pioneering research work in the study of international institutions from different disciplines and analytical approaches, providing a unique tool to explain and understand how non-positivist theories can be applied in practice to systematically analyze the role of a core institution of international justice such as the ICC.

These first two goals are of universal scope and, therefore, are not related per se to the Spanish and Portuguese languages or to the Ibero-American and Latin American regions. This is also the reason why the authors have been particularly careful to cite sources (doctrine, legislation and case law) in English and sometimes in French

and German, in addition to the existing references in Spanish and Portuguese.

Furthermore, given the difficulties in finding relevant sources in these last two languages on some of the topics addressed (especially on global governance, justice and constitutionalism, structuralism, post-structuralism, queer theory and emotions theory), most of the sources cited in these chapters are in English.

Finally, the third goal of the trilogy is to commemorate the XV anniversary of the IIH. Given that one of the main activities of the IIH is to foster dialogue between the thought of the Ibero-American academy and that of the doctrine of other geographical and cultural areas, the thoughtful research undertaken from early 2019 to November 2023 has resulted in an excellent opportunity to bring together around fifty Ibero-American researchers (mostly Latin Americans) from different disciplines to contribute with their points of view (which, to a large extent, are the result of the social, political, economic and cultural context in which they have been trained and have developed professionally and personally) on the aforementioned issues of universal relevance.

Through this, encouraging dialogue on the ICC's role with academics and professionals from other geographical and cultural areas, whose opinions are also undoubtedly influenced by the particular circumstances of their context, is sought.

To conclude, we would like to congratulate Salvador Vives and Tirant lo Blanch Publishing House (Spain), as well as the Joaquín Herrera Flores Institute (Brazil/Spain), for having taking the wise decision to launch and foster, together with the IIH, the Ibero-American Perspectives on Justice Book Collection, that, with this trilogy, reaches its 50th volumen since its start in the second half of 2018.

In The Hague (The Netherlands), on February 15th, 2025

HÉCTOR OLASOLO, CEES KOONINGS,
ROMINA CATERA & ISABEL DÜSTERHÖFT
Board of Directors, IIH

The Ibero-American Institute of The Hague for Peace, Human Rights and International Justice in its XV Anniversary (2011-2025)

Structure, Activites, Research Networks, Publications and Partners

1. FOUNDATIONS AND OBJECTIVES

The Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (IIH) was founded on June 1st, 2011 with the aim of becoming an Ibero-American platform in The Hague, so that the views of state and non-state actors from the region, including the academic community and civil society could be shared and debated with The Hague-based international organizations and tribunals, as well as with Dutch public and academic institutions and non-governmental organizations. This mission was based on the firm conviction that Ibero-American experiences and visions on issues related to the achievement of peace, the protection of human rights, the prevention of atrocious crimes and the fight against impunity are undoubtedly relevant and should be taken into consideration.

The establishment of the IIH was based on four main premises.

First, the understanding that The Hague-based international organizations tribunals have as their core goals the prevention of armed conflicts through the resolution of controversies, the consolidation of peace, the deepening of respect for and protection of the fundamental rights of all human beings, the prevention of atrocious crimes and the fight against impunity for those who plan, prepare, facilitate, commit, cover up and benefit from them.

Second, the fact that The Hague-based international organizations and tribunals operate in a context in which national actors are essential for the achievement of their goals. This reality is the result of a globalized international society in which: (a) the causes and

effects of conflicts are intertwined and have a transnational nature; (b) numerous actors in different instances and from different territories participate in the planning, preparation, assistance or concealment international crimes, such as aggression, genocide, crimes against humanity and war crimes; and (c) those who derive the greatest economic benefit from these crimes are often individuals and legal entities from third countries with no strong roots in those places hit by the suffering and desolation that their commission entails.

Third, the fact that, although the experience and vision of a variety of actors coming from those regions where violence has traditionally been suffered more intensely is essential to understanding such reality and seeking comprehensive solutions, the truth is that it is often third parties who take over the power to speak on their behalf.

Fourth, the need to correct this dysfunctionality so that it is the national actors themselves (academics, members of civil society, state officials, law practitioners and professionals of other disciplines) who can directly present their contributions. This process begins with the elimination of the linguistic barriers that continue to be important obstacles for national actors from non-English-speaking countries to be able to disseminate their experiences and views in The Hague, and for the case law of international tribunals to be known and applied by those in their countries of origin.

Based on the aforementioned, the IIH has sought during its first fifteen years of existence to fulfill its main goals, which, according to art. II of its Statute, are the following:

A. Research, formation, dissemination of knowledge and promotion of public and academic debate in relation to the afore mentioned matters.

B. Fostering the work of Ibero-American experts; (b) the exchange of experiences between Ibero-American experts and actors and experts from other regions (as well as OI officials); and (c) the contribution of the knowledge and experience of Ibero-American experts to the resolution of crisis situations at national and international levels.

C. Formulation, design, editing and publication of documents that reflect the main works of the IIH, as well as the publication of

research articles by young researchers and established Ibero-American academics in cooperation with external publishers.

D. Promotion of the use of the Spanish and Portuguese languages in the activities of the IIH.

2. STRUCTURE

To carry out its activities and meet its objectives, the IIH has developed the following structure over the last fifteen years:

A. A Board of Directors currently composed of the following members:

President: Héctor Olasolo Alonso (Spain/Colombia): Faculty of Law of the Universidad del Rosario (Colombia).

Treasurer: In process of renewal.

Secretary: Romina Catera (Argentina): Organization for the Prohibition of Chemical Weapons (The Netherlands).

Member 1: Cees Koonings (The Netherlands): Universities of Amsterdam and Utrecht (The Netherlands).

Member 2: Isabel Düsterhöft (Germany): The Hague University for Applied Sciences (The Netherlands).

B. An Advisory Board currently composed of the following members:

- Aguiar, José Carlos (Mexico): University of Leiden (The Netherlands).
- Beek, Suzan (The Netherlands).
- Bosdriesz, Hanna (The Netherlands): Ministry of Justice and Security (The Netherlands).
- Bobbio, Magali (Argentina/The Netherlands): International Criminal Court (The Netherlands).
- Buitrago, Esperanza (Colombia): Maastricht University (The Netherlands).

- Castresana, Carlos (Spain): *Tribunal de Cuentas* (Spain).
- Contreras, Diana (Mexico): Utrecht University College (The Netherlands).
- Fabián, Raimondo (Argentina): Maastricht University (The Netherlands).
- Lostal, Marina (Spain): University of Essex (United Kingdom)
- Marassi, Stefania (Italy): The Hague University of Applied Sciences (The Netherlands).
- Pansters, Wil (The Netherlands): University of Groningen (The Netherlands).
- Vervaele, John (Belgium): International Association of Criminal Law (AIDP).
- Villacis, Renan (Ecuador): Retired. Previously: International Criminal Court (The Netherlands).
- Willems, Piet (Belgium): The Hague University of Applied Sciences (The Netherlands).
- Van der Wilt, Harmen (Netherlands): Retired. Previously: University of Amsterdam (The Netherlands).
- Van Hoogstraten, Catherine (Perú): The Hague University of Applied Sciences (The Netherlands).
- Zaitch, Damián (Argentina): University of Utrecht (The Netherlands).

C. An Honorary Committee currently composed of the following members:

- Blattmann, René (Bolivia): Judge (2003-2012) and Second Vice-President (2006-2009) of the International Criminal Court (The Netherlands); Minister of Justice and Human Rights in Bolivia.
- Herrera Carbuccia, Olga (Dominican Republic): Judge (2012-2021) and President of the Trial Division (2017-2018) of the International Criminal Court.
- Odio Benito, Elizabeth (Costa Rica): Judge (2016-2021) and President (2018-2020) of the Inter-American Court

of Human Rights (2018-2020) (Costa Rica); Judge (2003-2006) and Second Vice-president (2003-2006) at the International Criminal Court (2003-2012); Vice-President and Minister of Justice of Costa Rica.

- Steiner, Sylvia (Brazil): Judge (2003-2016) and President of the Pre-Trial Division (2008-2011) of the International Criminal Court.
- Yañez Barnuevo, Juan Antonio (España): Ambassador of Spain to the United Nations (1991-1996 & 2004-2010); Head of the Delegation of Spain at the Rome Diplomatic Conference (1998) and at the Preparatory Commission for the International Criminal Court (1999-2002).

Furthermore, the IIH has the following four coordination areas: (a) ICC Moot Court (Spanish Version); (b) Blattmann Odio Benito & Steiner Essay Contest on International Criminal Justice, and Critical Studies on Justice Essay Contest; (c) Ibero-American Seminar on International Justice; and (d) Communications and Social Media. The persons responsible for each coordination area rotate every year. In 2025, the four coordination areas are under the responsibility of: Andrés Felipe Canizo Ramírez, Daniela Clavijo Fonseca, María Camila de la Peña Calderón, Mariana Molina Flórez and Laura Vacca Moyano.

More information can be found at: https://www.iberoamericaninstituteofthehague.org/organization/estructura.

3. ACTIVITIES

The activities carried out by the IIH since its foundation in 2011, can be classified into annual activities and non-periodical activities.

3.1. Annual Activities

The IIH organizes annually the following activities:

A. The Ibero-American Week of International Justice (2024: XI Edition):
https://www.iberoamericaninstituteofthehague.org/actividades/seminario-de-pensamiento-iberoamericano.

B. The Ibero-American Seminar on International Justice (2024: VIII Edition): https://www.iberoamericaninstituteofthehague.org/actividades/semana-iberoamericana-de-la-justicia-internacional-y-los-derechos-humanos.

C. The ICC Moot Court Competition (Spanish version) (2024: XII Edition): https://www.iberoamericaninstituteofthehague.org/actividades/concurso-de-simulacion-judicial-sobre-la-cpi.

D. The Blattmann, Odio Benito & Steiner Essay Contest on International Criminal Justice (CEBOS) (2024: XIII Edition): https://www.iberoamericaninstituteofthehague.org/actividades/certamen-de-ensayos-blattmann-odio-benito-y-steiner.

E. The Critical Studies on Justice Essay Contest (CECJ) (2024: VII Edition): https://www.iberoamericaninstituteofthehague.org/actividades/certamen-de-estudios-criticos-sobre-la-justicia

F. The International Law Clinic (2024: XV Edition): https://www.iberoamericaninstituteofthehague.org/actividades/clinica-internacional-sobre-derecho-internacional-penal-y-humanitario. See also: https://urosario.edu.co/clinica-juridica-internacional-ur.

3.2. Non-Periodical Activities

Among the many other activities carried out by the IIH since its foundation in 2011, it is worth highlighting the following:

A. Participation in the elaboration of the Model Course in Spanish on International Criminal Law and the International Criminal Court, offered by the Office of Public Information of the ICC Registry. The 16-session Model Course in Spanish can be downloaded for free at: https://www.iberoamericaninstituteofthehague.org/activities/model-course-on-international-criminal-law-and-international-criminal-court.

B. Organization between 2016 and 2019 of the Polyphonic Day of International Justice, which each year brought together at The Hague University of Applied Sciences (HHS) (The Netherlands) speakers from Africa, Asia, Eastern Europe and Latin-America to debate on current international justice issues. The Polyphonic Day was organized in partnership with the African Foundation for International Law (AFIL) (The Netherlands), Center for International and Comparative Law of the Lomonosov State University of Moscow (Russia), the Chinese Initiative on International Law (China), the Iranian Center for International Criminal Law (The Netherlands), The Hague Peace and Justice Project of The Hague Municipality and the Ministry of Foreign Affairs of The Netherlands and the HHS. Due to the 2020 Covid-19 Pandemic, this activity, which was part of the Ibero-American Seminar on International Justice was discontinued after its 4th Edition.

4. RESEARCH NETWORKS

4.1. The Ibero-American Perspectives on Justice Research Network

On June 10th, 2015, the *Ibero-American Perspectives on Justice* Research Network was established by the IIH. The Network is composed of following eight Research Groups: (a) philosophy; (b) psychology; (c) science and technology; (d) law/national justice; (e) law/international justice; (f) anthropology/community justice; (g) theology/transcendent justice; and (h) international relations and political science. Around 150 researchers from Latin America, Spain, Portugal and The Netherlands are currently part of the Network. In addition, some Groups also include the participation of researchers from other geographical areas such as Africa, Asia, Western and Eastern Europe and North America.

In the last ten years, the Research Network has addressed the following issues:

A. What is the meaning of the notions of transcendent/spiritual, community, state and international justice?

B. What are the ethical-material foundations, the forms of social, political and economic-financial organization, and the spiritual beliefs that underlie the notions of transcendent/spiritual, community, state and international justice?

C. Which interests do these concepts of justice satisfy and which ones do they leave unsatisfied?

D. What is the scope and practical reach of the institutions and enforcement mechanisms of transcendent/spiritual, community, state and international justice, and how have they evolved over time?

E. What function do they play in reducing the risks to the survival of Humanity?

F. Have these diverse concepts, institutions and mechanisms of justice a complementary, alternative or antagonistic relationship?

The current composition of the Research Network is as follows:

1. Network Director: Héctor Olasolo (Spain/Colombia): Universidad del Rosario (Colombia); IIH (The Netherlands).

2. Academic Coordinators of the Research Group on Philosophy: Edgar Antonio López (Colombia). Pontificia Universidad Javeriana (Colombia) & Leonardo Tovar. Universidad Santo Tomás (Colombia).

3. Academic Coordinators of the Research Group on Psychology: Francisco Maffioletti Celedón (Chile): Chilean Association of Legal and Forensic Psychology (Chile) & Lorena Contreras (Chile): Universidad Diego Portales (Chile).

4. Academic Coordinator of the Research Group on Science and Technology: Jorge Augusto González Herrera (Argentina): National University of Tucumán (Argentina).

5-6. Academic Coordinator of the Research Groups on National and International Law/Justice: Hector Olasolo (Spain/Colombia): Universidad del Rosario (Colombia); IIH (The Netherlands).

7. Academic Coordinator of the Research Group on Anthropology/Community Justice: Charlotth Back (Brazil): Joaquín Flores Herrera Flores Institute (Brazil).

8. Academic Coordinator of the Research Group on Theology/ Transcendent Justice: Juan Esteban Santamaría (Colombia): Pontificia Universidad Javeriana (Colombia) & John Jairo Pérez Vargas (Colombia): Universidad Santo Tomás (Colombia).

9. Academic Coordinator of the Research Group on International Relations and Political Science: Mario Urueña (Colombia): Universidad del Rosario (Colombia) & Miriam Dermer (Colombia): Universidad La Gran Colombia (Colombia).

The works of the Research Network are published after their evaluation by external peers in the Ibero-American Perspectives on Justice Book Collection, published by Tirant lo Blanch Publishing House (Spain), the IIH and the Joaquín Herrera Flores Institute (Brazil/ Spain). The nearly 20 volumes elaborated by the Research Network so far are available for free download at the following links:

- https://editorial.tirant.com/es/colecciones/perspectivas-iberoamericanas-sobre-la-justicia.
- https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia.
- https://repository.urosario.edu.co/collections/f4697391-fcb8-47d3-b77d-fde3aa51d6b0.

For more information about the Research Network, please visit the following link: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion.

4.2. The Responses to Corruption associated to Transnational Organized Crime Research Network

Since the agreement of the IIH Board of Directors on October 26, 2020, the IIH has institutionally supported and financed the publication of the works of the Responses to Corruption associated with Transnational Organized Crime, with its more than 300 researchers from Latin America, Europe and North America, distributed in the following Research Groups: (a) criminology; (b) international relations; (c) constitutional and electoral law; (d) administrative law; (e)

disciplinary law in the justice and security areas; (f) private law; (g) financial and tax law and international non-judicial cooperation; (h) criminal law; (i) criminal procedural law; (j) international judicial cooperation; (k) international criminal law; (l) international human rights law; and (m) foreign policy.

The plurality and interdisciplinarity of the members of the Research Network academically directed by Prof. Héctor Olasolo (Universidad del Rosario/IIH) have allowed for the organization of 20 international seminars between 2021 and 2024 on the different topics addressed by the Network[1].

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[1] The recordings of the International Seminars held between 2021 and 2024 can be viewed at the following links:
– International Seminar 1: *Introduction to Program 70593: Organized Crime Networks and the Response from Public and International Law*: https://www.iberoamericaninstituteofthehague.org/training-and-research/research-network-responses-to-corruption-associated-with-transnational-organized-crime/international-seminar-1-introduction-to-program-70593-transnational-organized-crime-networks-and-integrated-response-from-public-comparative-and-international-law.
– International Seminar 2: *Evolutionary Theory, Maritime Drug Trafficking and Ports*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-ii-teoria-evoluctiva-narcotrafico-maritimo-y-puertos.
– International Seminar 3: *Corruption and Transnational Organized Crime: Responses from Criminal Law*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-iii-corrupcion-y-crimen-organizado-transnacional-respuestas-desde-el-derecho-penal.
– International Seminar 4: Corruption and Transnational Organized Crime: *Responses from Criminal Procedural Law*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-4-corrupcion-y-crimen-organizado-transnacional-respuestas-desde-el-derecho-procesal-penal.
– International Seminar 5: *Corruption and Transnational Organized Crime: Responses from Administrative Law*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/

seminario-internacional-corrupcion-y-crimen-organizado-transnacional-respuestas-desde-el-derecho-penal-internacional.

– International Seminar 6: *Corruption and Transnational Organized Crime: Responses from Disciplinary Law in the Justice and Security Areas*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-6-corrupcion-y-crimen-organizado-transnacional-respuestas-desde-el-derecho-disciplina-en-justicia-y-seguridad.

– International Seminar 7: *Corruption and Transnational Organized Crime: Responses from Constitutional and Electoral Law*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-7-corrupcion-y-crimen-organizado-transnacional-respuestas-desde-el-derecho-constitucional-7-electoral.

– International Seminar 8: *Corruption and Transnational Organized Crime: Responses from Tax, Financial and Foreign Exchange Law*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-8-corrupcion-y-crimen-organizado-transnacional-respuestas-desde-el-derecho-tributario-fiinanciero-y-cambiario.

– International Seminar 9: *Definition, Manifestations, Causes and Consequences of Corruption and Transnational Organized Crime*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-9-definicion-manifestaciones-causas-y-consecuencias-de-la-corrupcion-asociada-al-crimen-organizado-transnacional.

– International Seminar 10: *Corruption and Transnational Organized Crime: Case Studies from Colombia and the Brazilian Amazon*: https://www.iberoamericaninstituteofthehague.org/training-and-research/research-network-answers-to-corruption-associated-with-transnational-organized-crime/international-seminar-10-corruption-and-transnational-organized-crime-case-studies-from-colombia-and-the-amazonia.

– International Seminar 11: *Corruption and Transnational Organized Crime: Responses from Private Law*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-11-corrupcion-y-crimen-organizado-transnacional-respuestas-desde-el-derecho-privado.

– International Seminar 12: *Corruption and Transnational Organized Crime: Responses from International Cooperation*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/

seminario-internacional-12-corrupcion-y-crimen-organizado-transnacional-respuestas-desde-la-cooperacion-internacional.
– International Seminar 13: *Corruption and Transnational Organized Crime: Responses from International Criminal Law*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-13-corrupcion-y-crimen-organizado-transnacional-respuestas-desde-el-derecho-internacional-penal.
– International Seminar 14: *Corruption and Transnational Organized Crime: Responses from Foreign Policy in Latin America*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-14-corrupcion-y-crimen-organizado-transnacional-respuestas-desde-la-politica-exterior-en-america-latina.
– International Seminar 15: *Corruption and Transnational Organized Crime: Responses from the US Foreign Policy*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-15-corruption-and-transnational-organized-crime-responses-from-the-us-foreign-policy.
– International Seminar 16: *Corruption and Transnational Organized Crime: Responses from Human Rights*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-16-corrupcion-y-crimen-organizado-transnacional-respuestas-desde-los-derechos-humanos.
– International Seminar 17: *Corruption and Transnational Organized Crime: Responses from the Law of Maritime Spaces*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-17-corrupcion-y-crimen-organizado-transnacional-respuestas-desde-el-derecho-internacional-de-los-espacios-maritimos.
– International Seminar 18: *Responses to Corruption Associated with Transnational Organized Crime: Results of Program 70593 and Projects 70817, 71848 and 71861*: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-18-respuestas-a-la-corrupcion-asociada-al-crimen-organizado-transnacional.
– International Seminar 19: *Results of Project 71848 - Responses from comparative public law to corruption associated with transnational organized crime*: https://www.iberoamericaninstituteofthehague.org/training-and-research/research-network-responses-to-corruption-associated-with-transnational-

The works of the Research Network are published after their evaluation by external peers in the Ibero-American Perspectives on Justice Book Collection, published by Tirant lo Blanch Publishing House (Spain), the IIH and the Joaquín Herrera Flores Institute (Brazil/Spain). All 30 volumes elaborated so far by the Research Network so far are available for free download at the following links:

– https://editorial.tirant.com/es/colecciones/perspectivas-iberoamericanas-sobre-la-justicia.

– https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia.

– https://repository.urosario.edu.co/collections/f4697391-fcb8-47d3-b77d-fde3aa51d6b0.

For more information about the Research Network, please visit the following link: https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado.

5. PUBLICATIONS

5.1. The Ibero-American Perspectives on Justice/Perspectivas Ibero-Americanas sobre la Justicia Book Collection

The Ibero-American Perspectives on Justice/Perspectivas Ibero-Americanas sobre la Justicia Book Collection is published by Tirant lo Blanch Publishing House (Spain), the IIH and the Joaquín Herre-

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organized-crime/international-seminar-19-results-of-project-71848-responses-from-comparative-public-law.

– International Seminar 20: Results of Project 71861 - *Approaching the behavior of maritime drug trafficking networks, including the corrupt practices associated with them, from an evolutionary perspective*. https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/red-de-investigacion-respuestas-a-la-corrupcion-asociada-al-crimen-transnacional-organizado/seminario-internacional-20-narcotrafico-maritimo-y-sistemas-sociales-resultados-del-proyecto-71861-minciencias.

ra Flores Institute (Brazil/Spain). The Collection was started in the second semester of 2018 and is academically directed by Profs. Héctor Olasolo (Spain/Colombia) and Carol Proner (Brazil). It includes books in Spanish, Portuguese and English. The bulk of the Collection is dedicated to the publication of the works of the aforementioned Research Networks after their evaluation by external peers. In the period 2018-2025, 50 volumes have been published. All volumes are available for free download at the following links:

- https://editorial.tirant.com/es/colecciones/perspectivas-iberoamericanas-sobre-la-justicia;
- https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia.
- https://repository.urosario.edu.co/collections/f4697391-fcb8-47d3-b77d-fde3aa51d6b0.

5.2. The International Law Clinic Reports/Informes de la Clínica Jurídica Internacional Bilingual Collection

The International Law Clinic Reports/Informes de la Clínica Jurídica Internacional is a bilingual Collection published in co-edition by the Universidad del Rosario (Bogotá, Colombia) and the IIH. It has the institutional support of the Office of Public Counsel for Victims of the International Criminal Court (OPCV) (The Netherlands). The Collection was started in the first semester of 2020, is academically directed by Prof. Héctor Olasolo (Spain/Colombia) and is edited by Prof. R.J. MacLean (Canada).

The Collection publishes in Spanish and English the works of the International Law Clinic, organized since 2011 by the Universidad del Rosario, the IIH and the OPCV, under the academic direction of Prof. Olasolo. In the period 2020-2024, 4 volumes have been published. Volume 5 is coming out in the second semester of 2025. All volumes are available for free download at the following links**:**

- https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/international-law-clinic-reports-informes-de-la-clinica-juridica-internacional.

– https://repository.urosario.edu.co/items/f41c5371-14b0-4b08-85c7-e1ce9330f24d.

5.3. The Ibero-American Yearbook of International Criminal Law/Anuario Iberoamericano de Derecho Internacional Penal (ANIDIP)

The Ibero-American Yearbook of International Criminal Law/Anuario Iberoamericano de Derecho Internacional Penal (ANIDIP) is an indexed legal journal published by the Universidad del Rosario Publishing House, the IIH and the Tirant lo Blanch Publishing House. ANIDIP was started in 2013, is academically directed by Prof. Héctor Olasolo (Spain/Colombia) and is edited by Prof. Mario Iván Urueña-Sánchez (Colombia).

ANIDIP is a peer-reviewed (double-blind evaluation) scientific legal journal that is indexed in the following international indexes: Ibero-American Network of Innovation and Scientific Knowledge (REDIB), DIALNET, SCILIT, Directory of Open Access Journals (DOAJ), JournalGuide, Information Matrix for Analysis of Journals (MIAR) and Emerging Sources Citation Index.

ANIDIP is currently made up of three sections: (a) research articles (Section I); (b) research essays selected from the aforementioned Blattmann, Odio Benito & Steiner Essay Contest on International Criminal Justice (CEBOS); and (c) the aforementioned Critical Studies on Justice Essay Contest (CECJ).

In the period 2013-2024 has published 12 volumes, with articles in Spanish, Portuguese and English. Volume 13 is coming out in the second semester of 2025. All volumes are available for free download at the following links:

– https://revistas.urosario.edu.co/index.php/anidip.

– https://editorial.tirant.com/es/colecciones/anuario-iberoamericano-de-derecho-internacional-penal

– https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/anidip-anuario-ibero-americano-sobre-derecho-internacional-penal.

6. PARTNERS

Since its foundation in 2011, the IIH has developed a broad network of partners that includes the following

6.1. Ibero-American Week of International Justice - including the Ibero-American Seminar on International Justice

It is organized annually with the institutional support of:

- International Criminal Court (ICC) (The Netherlands).
- The Hague University of Applied Sciences (HHS) (The Netherlands).

The XI Edition (2024) had also the institutional support of:

- Spanish Agency for International Cooperation and Development (AECID) (Spain).
- International Association of Criminal Law (AIDP).
- Grotious Center for International Studies at Leiden University (The Netherlands).
- Inter-American Commission on Human Rights (IACHR) (United States of America).
- Permanent Court of Arbitration (CPA) (The Netherlands).
- Tirant lo Blanch Publishing House (Spain).
- Embassy of Argentina in the Netherlands.
- Embassy of Bolivia in the Netherlands.
- Embassy of Chile in the Netherlands.
- Embassy of Colombia in the Netherlands.
- Embassy of Costa Rica in the Netherlands.
- Embassy of Ecuador in the Netherlands.
- Embassy of Spain in the Netherlands.
- Embassy of Mexico in the Netherlands.

- Embassy of Peru in the Netherlands.
- Embassy of Uruguay in the Netherlands.
- Cervantes Institute in Utrecht (The Netherlands).
- Joaquín Herrera Flores Institute (Brazil/Spain).
- International Law Students Association (ILSA), HHS Branch, (The Netherlands).
- Podcast: Let's talk about International Law (The Netherlands).
- Ibero-American General Secretariat/Secretaría General Iberoamericana (Spain).
- Universidad del Rosario (Colombia).
- United Nations University for Peace (Costa Rica).

In previous editions, the following institutions also supported the Ibero-American Week of International Justice:

- African Foundation for International Law (AFIL) (The Netherlands).
- Arbitras: Association of Law Students-HHS (The Netherlands).
- Center for International and Comparative Law of the Lomonosov State University of Moscow (Russia).
- Chinese Initiative on International Law (China).
- Coalition for the International Criminal Court (CICC) (The Netherlands).
- Colegio de Abogados de la Corte Penal Internacional (The Netherlands).
- Colombian Institute for Human Rights (Colombia).
- Equal Rights Coalition (United States of America).
- German Agency for International Cooperation (GiZ) (Germany).
- Human Rights Advocates (United States of America).
- Iranian Center for International Criminal Law (The Netherlands).

- Inter-American Academy of Human Rights of the Autonomous University of Cohuila (Mexico).
- International Commission for Missing Persons (The Netherlands).
- International Nuremberg Principles Academy (Germany).
- International Court of Justice (ICJ) (The Netherlands).
- International Criminal Court Bar Association (Netherlands).
- Invictus: Student Association, The Hague University for Applied Sciences (Netherlands).
- Kosovo Specialized Chambers (The Netherlands).
- Martinus Nijhoff Publishing House (The Netherlands).
- Ministry of Foreign Affairs of The Netherlands.
- Ministry of Science, Technology and Innovation of Colombia.
- Peace and Justice Programme of the City of The Hague (The Netherlands).
- Pontificia Universidad Javeriana (Colombia).
- The Hague Academic Coalition (The Netherlands).
- The Hague Academy of International Law (The Netherlands).
- TMC Asser Institute (The Netherlands).
- United Nations Office of the High Commissioner for Human Rights, Regional Office for Central America (Panama).
- United Nations Development Programme (UNDP), Bogotá Office (Colombia).
- Universidad San Pablo CEU (Spain).
- Utrecht University (The Netherlands).
- Victor Carlos Garcia Moreno Moot Court Competition on the International Criminal Court (Mexico).

6.2. The ICC Moot Court Competition (Spanish Version)

It is organized annually in partnership with the International Criminal Court (The Netherlands). It has the institutional support of The Hague University of Applied Sciences (The Netherlands) and the Grotius Center for International Studies at Leiden University (The Netherlands).

6.3. The Blattmann, Odio Benito & Steiner Essay Contest on International Criminal Justice (CEBOS)

It is organized annually with the institutional support of:

- International Criminal Court (The Netherlands).
- Ibero-American General Secretariat - Secretaría General Iberoamericana (Spain).
- Tirant lo Blanch Publishing House (Spain).
- Universidad del Rosario (Colombia).

6.4. The Critical Studies on Justice Essay Contest (CECJ)

It is organized annually with the institutional support of:

- Tirant lo Blanch Publishing House (Spain).
- Joaquín Herrera Flores Institute (Brazil/Spain).
- Universidad del Rosario (Colombia).

6.5. The Ibero-American Perspectives on Justice/Perspectivas Ibero-Americanas sobre la Justicia Book Collection

It is published in partnership with:

- Tirant lo Blanch Publishing House (Spain).
- Joaquín Herrera Flores Institute (Brasil/España).

6.6. The International Law Clinic Reports/Informes de la Clínica Jurídica Internacional Bilingual Collection

It is published in partnership with the Universidad del Rosario (Colombia). It also the institutional support of Office of Public Counsel for Victims of the International Criminal Court (OPCV) (The Netherlands).

6.7. The Ibero-American Yearbook of International Criminal Law/Anuario Iberoamericano de Derecho Internacional Penal (ANIDIP)

It is published in partnership with:

- Universidad del Rosario Publishing House (Colombia).
- Tirant lo Blanch Publishing House (Spain).

6.8. Dissemination of Publications

The publications of the IIH are disseminated through cooperation with the following partners:

- Consejo General de la Abogacía Española (Spain).
- Tirant lo Blanch Publishing House (Spain).
- Universidad del Rosario (Colombia).
- Dialnet Foundation (Spain).

6.9. International Internship Program

It is organized in partnership with The Hague University of Applied Sciences (The Netherlands).

6.10. Research Stay Program at the International Law Clinic

It is organized in partnership with the Universidad del Rosario (Colombia). It has the institutional support of the Office of the Public Defender of Victims of the International Criminal Court (OPCV)

(The Netherlands). Since the 2020 Covid-Pandemic, the Program has been discontinued.

6.11. Cooperation Agreements

The IIH has signed Cooperation Agreements with the following partners:

- Inter-American Commission on Human Rights (IACHR) (United States of America) (2019-2024).
- Universidad del Rosario (Colombia) (2019-2024).
- The Hague University of Applied Sciences (The Netherlands) (2024-2028).

More information on IIH partners can be found at the following link: https://www.iberoamericaninstituteofthehague.org/organization/partners.

7. FINAL REMARKS

In light of the aforementioned, it must be underscored the numerous partners and efforts that have made it possible for the IIH, and its various activities, research networks and publications, to consolidate and acquire the form and content that they present fifteen years after the IIH foundation.

Their constant commitment has made it possible for the IIH to play during the last fifteen years the role of Ibero-American platform in The Hague.

For all these reasons, we express our deepest gratitude to all those who, during the brief but intense journey of the IIH, have approached us to selflessly offer their contribution.

In The Hague (The Netherlands), on February 15th, 2025

HÉCTOR OLASOLO, KEES KOONINGS,
ROMINA CATERA & ISABEL DÜSTERHÖFT
Board of Directors, IIH

PART I
ANALYTICAL FRAMEWORK AND METHODOLOGY

Chapter 1
Understanding the Analytical Framework and Methodology of the Trilogy[*]

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1. INTRODUCTION

Although there were initial experiences with the International Military Tribunal (IMT or Nuremberg Tribunal) and the International Military Tribunal for the Far East (IMTFE or Tokyo Tribunal) at the end of World War II, it was in the 1990s that international criminal law (ICL) ceased being an essentially theoretical branch of international law (IL) (Ambos, 2013: 72). Thus, international criminal justice (ICJ) and ICL, as we know them today, were largely constructed in the period between 1990 and 2010, through the reaffirmation and development of pre-existing international norms and the strengthening of its various enforcement mechanisms (Olasolo & Galain, 2018: 51-61).

As a result, the regulation of genocide, crimes against humanity and war crimes has been reaffirmed, so that, in addition to developing their conventional norms (in particular, through the ICC Statute), the customary nature of their different elements has been consolidated, including: (a) the prohibition of States and individuals from engaging in such crimes; (b) the attribution to those who commit them of international criminal responsibility before international society as a whole (also referred to as international community); (c) the obligation of States to investigate and prosecute those responsible for the commission of said crimes in their territory or under their jurisdiction; and (d) the absence of a statute of limitations and the prohibition of amnesty laws in relation to them. Moreover, a number of the core elements of ICL have acquired the rank of imperative law or *ius cogens* (Olasolo, 2017: 154).

Regarding the strengthening of ICJ mechanisms for enforcing ICL, new international and hybrid criminal tribunals were established in the period 1990-2010 and the obligations of States to investigate, prosecute and punish international crimes committed on their territory or under their jurisdiction was reaffirmed. Moreover, in certain cases, said crimes were investigated and prosecuted under the principle of universal jurisdiction.

With the adoption of the Statute of the International Criminal Court (ICC) in 1998, and its entry into force in 2002, the institutionalization of these mechanisms took place, moving from temporary

ad hoc tribunals to a permanent international jurisdiction, created through an international treaty that is meant to have a universal reach (Ambos, 2013: 72; Olasolo, 2017: 50-51).

In this context, in order to fully understand the conditions that allow the creation and development of the ICC as an institution, it is necessary: (a) to analyze the ICC Statute and its complementary instruments; and (b) to engage in an ongoing dialogue with those other disciplines that explain certain aspects of its role (Bianchi, 2016: 11). However, the doctrine has been largely limited, until now, to studying the ICC from traditional analytical perspectives, such as positivism, legal realism or liberal theories of law and justice.

As Corten (2009) highlights, this type of international legal research is characterized by the fact that it starts from certain basic assumptions about the "being" of IL which are considered fully proven and cannot be questioned, including the following: (a) the essence of IL is state voluntarism, which means that States define the production of international legal norms, so that sub-state or social actors are not relevant (state-centrism); (b) the object of study of international legal research must be limited to normative (substantive), procedural and institutional interactions between actors in international society (to the exclusion of reflections on the obligations relating to their ethical-moral conduct); (c) the questions under investigation must be answered in an analytical manner by using the traditional concepts and categories of IL analysis, without being able to challenge the Westphalian structure of IL based upon the concepts of supremacy, hierarchy, obligation, interstate relations, sources and subjects; and (d) the study of contradictions in the behavior of actors in international society must be framed within clearly defined limits, which requires that they be addressed through the lens of the aforementioned concepts and categories of analysis (for example, by considering them as breaches of international treaties) (Olasolo, Urueña-Sánchez & Arévalo-Ramírez, 2023).

Consequently, the study of the ICC through lenses that depart from normative positivism to analyze IL, as well as from interdisciplinary approaches, is, in most cases, insufficient. Given this situation, the trilogy is based on the interest in understanding the ICC's role in a more comprehensive way, through a broader perspective than

that offered by the traditional approaches mentioned above. This interest arises from two main findings. First, the importance of considering the issues raised by ICJ and ICL, their aims, and particularly the ICC's role, not only from a normative perspective, but also from perspectives that deviate from legal positivism and that frequently (but not always) rely on theoretical references that renounce modernity and its subjectivities to construct alternative worlds. To this end, based on their own perceptions of international society and IL, they develop constructions with a strong ethical commitment to the possibility of change. Secondly, there is a close relationship between said issues and a number of dilemmas addressed by other disciplines (Armstrong, Farrell & Lambert, 2012), such as philosophy, theology and international relations (IR).

2. FIRST APPROACH TO THE DEFINITION AND SCOPE OF APPLICATION OF INTERNATIONAL CRIMINAL LAW

Since the ICC is a permanent international criminal tribunal established to apply the ICC Statute (a core ICL convention) and its complementary instruments, the question arises as to what ICL is. The analysis of its goals, principles and sources, as well as the content of the ICC's role, will depend on the answer to this question (Olasolo, 2017: 48).

Authors such as Bassiouni (2008) and Kress (2014) adopt a broad definition of ICL. Bassiouni includes up to twenty-five categories of international crimes, understanding them as being those that: (a) affect important international interests or constitute especially serious crimes that undermine the values shared by the members of international society; or (b) involve more than one State due to the different nationality of perpetrators and victims, the means used or because it is only possible to protect the affected values through IL. This broad definition of ICL includes everything from genocide, crimes against humanity and war crimes to drug trafficking, counterfeiting, damage to submarine cables and unlawful interference with the mail (2008: 129 et. seq.).

For Kress (2014: 1-14), ICL is comprised of four distinct groups of international norms: (a) those which determine the scope of national criminal jurisdictions; (b) those that establish the obligations of States in matters of extradition and judicial assistance; (c) those that form part of transnational criminal law (TCL), understood as the set of norms created by States through international treaties to regulate and prosecute those economic transactions that have an impact beyond national boundaries and are therefore of interest to more than one State; and (d) those norms that make up *stricto sensu* ICL and are characterized by the fact that they attribute to certain human conduct (international crimes) a series of legal consequences (penalties) traditionally contained in national penal norms, and which are directly applied by international, hybrid or national jurisdictional bodies.

The establishment of this fourth group of international legal norms implies a profound transformation of IL, because, as Werle and Jessberger (2014) emphasize, it implies the adoption of the principle of international criminal responsibility of individuals. Thus, although the main purpose of IL is to regulate state conduct under the warning that States run the risk of incurring international liability (of a non-criminal nature) in the event of non-compliance, the emergence of *stricto sensu* ICL, as a branch of IL, implies the regulation of human conduct under the threat that individuals will incur international criminal liability if they commit prohibited behaviors (Ambos, 2013: 54; Cassese, 2008: 11-14; Olasolo & Galain, 2018).

This means that international society has created a series of legal norms directed at individuals who, like States, are part of it, to prohibit them from carrying out conduct that undermines the central values on which international society has been built after World War II (international peace and security, preservation of human groups and civilian population, and protection of essential aspects of human dignity), under the threat of being subject to a punishment in case of non-compliance (May, 2005: 72-75, 82, 83; Van der Wilt, 2014: 30-31).

Consequently, what is distinctive about international crimes that make up *stricto sensu* ICL, is the dual individual and collective nature of the values protected. On the one hand, they protect individual values such as life, physical integrity, sexual autonomy or freedom. On

the other hand, as expressly stated in paragraph 3 of the preamble of the ICC Statute, they also protect collective values (Ambos, 2013: 55; Luban, 2011: 21; Orakhelashvili, 2006: 46-47; Satzger, 2012: 181; Werle, 2010: 82-83, 468-469).

The following five categories of international crimes are aimed at preserving international peace and security: (a) aggression, insofar as it criminalizes serious and manifest violations of the regulation of the use of force by IL; (b) genocide, since it aims at the protection of national, ethnic, racial and religious groups, whose total or substantial destruction endangers international peace and security; (c) crimes against humanity, since international peace and security are also endangered as a consequence of systematic or widespread violations of the basic human rights of civilian populations; (d) the crime of apartheid, since any institutionalized regime of systematic oppression and domination of one or more racial groups generates, by its very nature, a threat to international peace and security; and (e) war crimes, because they threaten international peace and security through the escalation of conflict caused by them (Olasolo, 2017: 53).

Apart from the crime of apartheid, the other international crimes that have been just mentioned were included in art. 6 of the London Agreement (1945), which established the IMT, comprised of the following three categories of crimes (which were also applied by the IMTFE): (a) war crimes; (b) crimes against humanity; and (c) crimes against peace. Subsequently, the crime of genocide attained its own autonomy and the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) (1993), the International Criminal Tribunal for Rwanda (ICTR) (1994), the ICC (1998) and the Special Court for Sierra Leone (2002) have also included it as an autonomous crime. In addition, the category of crimes against peace disappeared from these statutes, so that the international and hybrid criminal tribunals established since 1990 have not been able to exercise jurisdiction over them. Only the ICC Statute includes within its material jurisdiction crimes against peace, encapsulated in the crime of aggression, whose definition came into force on July 1st, 2018, but which has not yet been applied by ICC case law. The same is true of the crime of apartheid, which is only included in the ICC Statute as a type of crime against humanity.

Together with the protection of international peace and security, four of the five categories of crimes mentioned above are also aimed at protecting the preservation of human groups (a core collective value for international society) characterized by: (a) race (apartheid); (b) nationality, ethnicity, race or religion (genocide); or (c) the fact of being part of a civilian population (crimes against humanity and war crimes).

These international crimes differ from a second group of international crimes where the values protected are neither international peace and security, nor the preservation of human groups or the civilian population, but, as Vanegas (2011: 68-70) and Castro Cuenca (2007: 81 et. seq.) suggest, the protection of essential aspects of human dignity. We are referring to slavery, torture and forced disappearance, whose investigation and prosecution are not carried out through international, and hybrid criminal tribunals created by international society, but through national jurisdictions (including through the application of the principle of universal jurisdiction).

From the foregoing, it can be concluded that *stricto sensu* ICL is characterized by constituting a response by international society to conduct that most seriously undermines its fundamental values. For this purpose, ICL provides for criminal liability to individuals with international legal personality who commit such behaviors. As a result, authors such as Satzger (2012: 179), refer to *stricto sensu* ICL as the "criminal law of the international community".

ICJ has adopted for the application of s*tricto sensu* ICL the mechanisms of investigation and prosecution characteristic of domestic law, with its basic principles of legality, culpability and due process (Fichtelberg, 2008: 11 et. seq.; Robinson, 2008: 961-962; Sander, 2010: 105 et. seq.; Stahn, 2012: 259-260). Thus, individual international responsibility essentially constitutes a supranational responsibility (to international society), of a criminal nature, which can be implemented by: (a) jurisdictional bodies (such as international criminal tribunals, like the ICC) which international society has established for these purposes; (b) national jurisdictions applying the principles of territoriality and active nationality, or acting on behalf of the international society through the principle of universal jurisdiction; and (c) hybrid or mixed criminal tribunals (Cassese, 2008: 11-14).

Furthermore, as reflected in UN Security Council (UNSC) resolutions 1503 (2003) and 1534 (2004) in relation to the ICTY and the ICTR, art. 1 of the SCSL Statute and the criminal policy documents of the ICC Office of the Prosecutor (ICC OTP, 2003; 2007; 2010; 2013; 2016a; 2016b), this response is directed, in particular, against those leaders who instrumentalize the state and non-state power structures at their disposal to plan, instigate, order, facilitate and commit prohibited conduct, thereby receiving the qualification of "most responsible". This is intended to ensure that those who, from the levers of power, resort to the commission of international crimes, immediately leave their leadership positions and face their criminal responsibility before their own national society and international society (Olasolo, 2017: 51).

3. INTER- AND MULTI-DISCIPLINARITY

If one understands the concept of a "discipline" as a set of concepts and methods intended to resolve those problems that usually arise through its application (Taekema & Van Klink, 2011), international legal research can be classified as uni-, multi- and inter-disciplinary, depending upon the level of interaction of the concepts and methods of IL with those of other disciplines (Olasolo, Urueña-Sánchez & Arévalo-Ramírez, 2023).

Interdisciplinary research is characterized by the fact that some of the questions that form part of its subject matter can only be answered through the application of concepts and criteria specific to other disciplines. This triggers the need to resort to them. This is usually carried out by means of the articulation of teams whose members address the research questions by applying the concepts and methods of their respective disciplines. They then compare the results and identify, as far as possible, the main commonalities and differences (Olasolo, Urueña-Sánchez & Arévalo-Ramírez, 2023).

In contrast to the above, international legal research of a uni- or multi-disciplinary nature uses other disciplines to: (a) complete the interpretation of the context, the facts or the factual consequences of applying IL; (b) apply borrowed concepts (such as sovereignty or

governance from political science) that provide greater precision to the analysis of IL; or (c) present new arguments for its interpretation in accordance with IL (Taekema & Van Klink, 2011; Olasolo, Urueña-Sánchez & Arévalo-Ramírez, 2023).

Based on the foregoing, and in order to enrich the study of the ICC's role, this volume analyzes the ICC through the lenses of various analytical frameworks not only specific to IL, but also to philosophy, theology and IR; disciplines with which it has a special relationship.

Thus, philosophy is concerned with revealing the reason for each of the areas of knowledge, contributing to giving them life through its concern for understanding them. This is particularly observed in the enrichment of legal theory by using concepts such as justice that have their origin in philosophical approaches.

In turn, IR facilitates the understanding of the ICC's role as a manifestation of international justice (IJ) based upon the analysis of the dynamics of international society and the interests that move its main actors, and in particular States and international organizations (IOs). This allows us to understand how and why these dynamics and interests condition the scope of IJ, and significantly affect the content and fulfillment of the ICC's role; the latter being an international tribunal inevitably affected by international socio-political phenomena.

With this as a foundation, both philosophy and IR provide the conceptual framework within which law in general, and IL in particular, are developed. As a result, IL elaborates its own conceptual constructions based on the contributions formulated out of approaches that have their origin in philosophy and IR. This is the case of the search for justice and the constitution of international jurisdictional bodies to achieve it.

As for theology, it allows us to analyze the ICC's role on completely different plane, by providing solutions that do not run up against the same material limits faced by the other disciplines that are the object of our study. In this way, the transcendent perspective is the only one that allows us to address with some degree of solvency questions about the countless victims who are repeatedly trampled by injustice.

In this sense, it is worth remembering that, even though a permanent ICC has been established to combat the impunity of those most responsible for the most serious crimes for international concern, the truth is that most of them will never have to answer for their actions or omissions, much less face a criminal trial for them. As Olasolo and Galain (2018) emphasize, national and international proceedings for international crimes committed on a large scale or systematic manner only exceptionally reach more than 1% of those potentially responsible. Likewise, neither national jurisdictions nor IJ have the operational capacity (whether through judicial or extrajudicial mechanisms) to offer the vast majority of victims the truth about what happened or comprehensive and transformative reparation for the damages suffered (Olasolo, Buitrago, Bonilla & Canosa, 2018).

Faced with this disturbing reality, theology allows us to explore other possible responses to the problem of structural injustice that characterizes human societies and constitutes a central aspect of international society. In doing so, it offers us tools to try to overcome the shortcomings of philosophy, IR and IL to explain the situation of countless victims of serious human rights violations and international crimes who will never see their aspirations realized, nor their rights to truth, justice, reparation and guarantees of non-repetition satisfied.

4. ANALYTICAL APPROACHES

4.1. Analysis of the role of the International Criminal Court from analytical approaches that adopt modernity and its subjectivities

Once the four disciplines from which the trilogy is approached have been established, the next step is to determine the analytical perspectives from which the ICC's role will be studied. Towards this end, after completing the introductory Part 1 (which is the same for the three books of the trilogy), the trilogy has been divided into three volumes, so that, while volume 1 analyses the ICC's role from analytical perspectives that adopt modernity and its subjectivities (distinguishing between those that are built on the basis of legal positivism (part II of volume 1) and those that are developed on other theore-

tical references (part III), volumes 2 and 3 study the ICC's role from approaches that denounce modernity and its subjectivities.

Part II (chapters 2 and 3) of volume 1 begins with an analysis of the ICC's role from the perspective of legal positivism (chapter 2), according to which: (a) the ICC's main role is to combat impunity; (b) the fulfilment of this role promotes the achievement of a series of goals to which the ICC is also directed, including retribution, prevention, victim participation and reparation and the maintenance of international peace and security.

Chapter 3 then addresses the relationship between, on the one hand, obstacles to have access to archives and the systematic destruction of large collections of documents and, on the other hand, the consolidation of impunity. Hence, the relevance for the proper fulfillment of the ICC's role of the ICC implementation of recommendations and principles on the organization and access to archives is evident (they are key for safeguarding the rights of victims).

Part III of volume 1 (chapters 4 to 8) addresses the ICC's role from the perspective of theories of rational choice and global governance, justice and constitutionalism. These are four analytical perspectives that, although moving away from legal positivism, base their theoretical frameworks on modernity and its subjectivities. Furthermore, they have as a common element the understanding of international society as comprised of a plurality of actors that, in addition to States, includes IOs, transnational corporations, regional arrangements and human beings themselves.

While the analysis of the ICC's role from the perspective of the rational choice theory (chapter 4) shows how a phenomenon outside the market can be explained from the perspective of Economic Analysis of Law (EAL), the approach of global governance (chapter 5) looks for mechanisms of conciliation and harmonization amongst the interests of the numerous actors that operate in international society (Nowrot, 2004; Bianchi, 2016). This undoubtedly has an impact on the way of understanding IJ, ICJ and the role that the ICC is called to play.

As to the global justice theory, it proposes to approach IJ and ICJ from a perspective of institutional morality, which implies evaluating

the interests of the actors that have influence on the international order in light of the most basic moral principles, so that one can speak of truly fair international norms for people (Britos, 2016; Pogge, 2008; Pogge & Álvarez, 2010; Risse, 2012; Tan, 2017). Taking off from this basis, chapters 6 and 7 address IJ, ICJ and the ICC's role from a dual perspective: (a) the expansion of the object and scope of application of IJ, by developing a system of attribution of international criminal responsibility for the commission of atrocious crimes that affect humanity; and (b) the universality of economic rights.

Part III of volume 1 concludes with the perspective of global constitutionalism (chapter 8), which conceives international society as a political community that ought to be governed in accordance with a universal constitution (Bianchi, 2016). To this end, it seeks to regulate the exercise of political power at the international level by using resources and tools specific to domestic constitutional law, which have an impact on how to understand the application of IJ, ICJ and the role of the ICC.

4.2. Analysis of the role of the International Criminal Court from non-positivist analytical approaches that denounce modernity and its subjectivities

Volumes 2 and 3 of the trilogy address the ICC's role from non-positivist theoretical approaches that denounce modernity and its subjectivities, which generates the need to seek other theoretical frameworks for analysis. Volume 2 addresses the ICC's role from theoretical perspectives, which, although they are not transversal to the four disciplines aforementioned, are relevant for the object of our study since they illuminate with special clarity certain significant aspects of the role of the ICC. To facilitate their analysis, they have been grouped according to the discipline to which they belong: philosophical and theological perspectives (part II of volume 2) and IR and IL perspectives (part III of volume 2).

Volume 3 ends the trilogy by studying the ICC's role from two axes of analysis that are transversal to the four disciplines from which the research has been developed: critical studies (part II of volume 3)

and the non-hegemonic historical-contextual approaches (part III of volume 3). The selection of these two axes of analysis aims at facilitating the comparison between different conceptions of the ICC's role from approaches as diverse as the ones of the critical theory of the Frankfurt School, and post-structuralist, postmodern and postcolonial perspectives like Marxism and neo-Gramscism.

Each one of the perspectives from which the role of the ICC is addressed in volumes 2 and 3 poses different scenarios in which there is no uniform way of understanding and assessing IJ, ICJ, ICL and the ICC. It cannot, therefore, be ignored that, starting from different conceptual premises, this collective work is presented as showing the possibility of analyzing any actor in the international system through a multiplicity of diverse analytical perspectives.

Consequently, just as injustice is a multifaceted concept, which manifests itself in different manners, facing different actors and in different circumstances, in the same way IJ, ICJ, ICL and the ICC's role must be considered, as the object of multiple demands from different actors at different levels and in different scenarios.

Furthermore, it is always important to remember that the various dimensions of the ICC (structural, operational and financial) affect in any case the effectiveness of its role, regardless of the content that one may attribute to it.

4.2.1. Analytical approaches from philosophy and theology

Part II of volume 2 is comprised of three chapters devoted to the following philosophical and theological analytical perspectives: (a) the ethical, practical and symbolic horizons (chapter 2); (b) justice as memory (chapter 3); and (c) the theory of emotions (chapter 4). The first chapter analyses the role played by the ICC as an ICJ enforcement mechanism, when the particularities of States make the application of national justice impossible. Consequently, the ICC can, to a certain extent, be seen as a symbol of accountability towards the "lords of impunity" who avoid answering for their international crimes by virtue of the power they hold at the domestic level (top officials acting from within the State or in collusion with the State), or

as a consequence of the weakness and limited scope of national justice systems (senior leaders of non-state actors), which leads national jurisdictions to become largely ineffective (Borobio, 2000; Cassirer, 1975; Rahner, 1952).

The perspective of justice as memory addresses the ICC's role from the centrality of the recovery of the memory of those who have been systematically silenced throughout the history of humanity. It is concerned with giving voice to those who, having been subjugated and made invisible, have been suppressed in the narrative of the victors (Benjamin, 2005). Both philosophy and theology have developed this approach in the belief that the exposure of the injustices suffered by those who have suffered them is the first step towards achieving true justice (Reyes Mate, 2009). In this context, the main manifestations of justice as memory in ICJ goals are studied; on this basis, the question as to what extent this perspective is relevant to the role of the ICC is addressed.

Part II of volume 2 concludes with an approach to the theory of emotions, which studies the relevance of the concept of affective circulation to better understand the conduct of those involved in proceedings before the ICC and the other international criminal tribunals. A study oriented from this perspective shows how the identification of emotions in these processes (including how emotionality is instrumentalized in a conscious way for certain purposes) has a notable impact both on the goals and scope of ICJ and on the determination of the ICC's role.

4.2.2. Analytical approaches from international law and international relations

Part III of volume 2 is composed of four chapters that correspond to the following IL and IR analytical perspectives: (a) constructivism (chapter 5); (b) feminist theories in IL (chapter 6); (c) post-structuralism and queer theory (chapter 7); and (d) the special reparation needs of minors and elderly (chapter 8).

The first considers that international society is built upon a foundation of different social phenomena (facts), where the actors of the

international system have subjective and specific interests, as well as values, discourses and ideas, which determine their interpersonal relationships, and these, in turn, construct state and supra-state dynamics (Onuf, 1989). In this way, international structures are shaped through the recurrent practices of their actors and their interaction among themselves and with their values, discourses and ideas (Wendt, 1999).

In this context, it is social phenomena that truly determines the future of IR, and not objective and invariable concepts (Wendt, 1999; Onuf, 1989; Palan, 2004; Reus-Smit, 2005, Sánchez, 2012). This conception of international society also affects the way in which justice is understood and how IOs, such as the ICC, seek its application. This means that to study the ICC's role, it is necessary to examine, first of all, what the determining phenomena for its consolidation as an institution have been, and only from this understanding, to analyze, secondly, what role the ICC is called to play in international society.

Feminist perspectives identify the system of patriarchal oppression on which much of contemporary society and its institutional apparatus have been built (Sjoberg & Tickner, 2013). They also reveal how international society, far from being alien to these phenomena, has its foundations in concepts and ideologies that privilege men over women, which is why it is not possible to talk about institutions and IOs without denoting that they have been permeated by gender inequality (Smith, 2017). In this context, while liberal feminism denounces that exclusion and oppression deprive women of equal participation in the areas of creation and application of IL, radical feminist studies reveal the structural inequalities that have permeated the dynamics of IL and have rendered that power relations be conducted between men and for men (excluding women from decision-making and leaving their rights and problems far from the focus of attention, despite the growing discourse of inclusion) (Charlesworth & Chinkin, 2016).

In turn, post-structuralist and postmodern feminist analyses focus on the way in which the gender perspective, along with other categories, are discursively constructed to assign and normalize roles among the actors of the social body, opening a space for an intersectional perspective that ends the hierarchization of genders and

allows for the construction of an international society that is truly equitable and equal in terms of rights and duties. Lastly, third world feminist developments highlight oppressions that have their origin in imperialism and racism (as well as in the exploitation of Global South States) and analyze the role of ICJ in this regard.

The various feminist approaches mentioned offer possible solutions, the application of which by the ICC would allow the exercise of its role from a gender perspective, making ICJ an ally in breaking down the barriers of gender inequality.

Post-structuralist and queer perspectives study the injustices intrinsic to the construction of social systems based on binary hegemonic structures, and, in particular, on the hetero-patriarchal one based on gender binarism, which favors all heterosexual and cisgender actors who comply with traditionally conceived gender stereotypes (Sedgwick, 1998). These binary structures have been extrapolated to international society, which has assumed an ideological framework that actively discriminates against anyone who challenges it.

Based upon this premise, queer theory vindicates different sexual and gender identities, and seeks to put an end to the historical marginalization of the LGBTIQ+ population in international society, as a result of: (a) having challenged the gender roles imposed by the male-female binomial; and (b) having shown having a different sexual orientation or gender identity (Fone, 2008; Foucault, 2002; MacKinnon, 1982; Merry, 2009; Ortner, 1974; Rich, 1996; Rubin, 1989; West, 2000). In this context, post-structuralist and queer perspectives study the impact of their assumptions on IJ and ICJ enforcement mechanisms and, particularly, on the ICC's role.

Finally, age as an essential factor of vulnerability is particularly relevant in relation to minors and the elderly (although their protection is widely recognized internationally, it continues to be insufficiently implemented in practice). Moreover, although the ICC Statute has established a robust framework for reparations, it does not expressly provide for measures that take into account the special vulnerability of minors and the elderly.

The situation is especially complex in relation to the elderly. This is 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 actions of the TFV manifest the absence of specific reparation measures aimed at addressing the special needs of these people.

As a result, from the perspective of considering civil society as no longer as an object, but an agent of ICJ, the role played so far by the ICC and the role that it could eventually play, is addressed.

4.2.3. Transversal axes of analysis

Through the two axes of analysis selected, volume 3 seeks to study the ICC's role from perspectives that share central elements in their shaping, while emphasizing differentiated aspects because of the specific concepts and methods of the respective disciplines from which they have been developed. This undoubtedly has an impact on the way in which they perceive the ICC's role.

The first axis of analysis is that of critical studies (chapters 2-6), which seeks to overcome the reductionism characteristic of classic disciplinary conceptions when defining their object of study (in our case, the ICC's role). Through this, they aim to promote the analysis of new currents of thought and expand the horizon of knowledge through the exploration of new paradigms, which stimulates true intellectual freedom in human beings (Bohman, 2019). Critical studies do not, therefore, constitute a unique perspective, but, on the contrary, are comprised of a plurality of approaches (of which the utopian horizon, the mercy-liberation principle, Marxism, the Helsinki School and social idealism are addressed) which share the same goal: to break with an epistemological model based on the exclusivity of a few historically privileged perspectives, so as to create space for others that are no less relevant (Bronner, 2011).

The second axis of analysis (chapters 7-11) is made up of the following non-hegemonic historical-contextual perspectives: biblical historical-contextual hermeneutics, emancipatory legal pluralism, the perspective of postcolonialism and the Global South, the so-called third world theories (TWAIL) and the perspective of African States. The first has as its epicenter the meaning of the concept of

justice contained in the texts of the Old and New Testaments based on the experience of God of the People of Israel and the rural society of Galilee.

The second perspective identifies the existence of different normative regimes that do not emanate from the State, but which are interrelated with the state legal system, and construct from these interrelations what we call "law" (Checkel, 2017). In its emancipatory variant, legal pluralism affirms the existence of democratic and participatory social practices aimed at reordering public space through community policies based on an "ethics of otherness" (recognizing oneself in the other) that seeks the construction and application of an emancipatory rationality.

These types of practices, undertaken by subaltern groups within a certain historical, social and economic context to satisfy their fundamental basic needs, have legitimacy despite their non-state nature (Wolkmer, 2001). From an international perspective, this implies that there is an array of new collective actors, practices and conventions outside the state sphere that, together with the practice of States, influence the development of IL (Bianchi, 2016) and ICL. This, in turn, influences the determination of ICJ goals and the role that the ICC must play.

The next two perspectives are characterized by identifying in traditional studies a categorization of States and societies, which favors those who are considered part of the Global North (also known as "developed countries") and relegates to the background the States and societies framed as part of the Global South (also called "underdeveloped" or "developing countries") (Adetula, Benabdallah & Murillo-Zamora, 2017). These approaches explain how the term "North" is used as a synonym for civilization, progress, stability, development and moral, political, economic and social superiority, while the expression "South" is equated with what is considered underdeveloped, unstable, uncivilized and inferior (Paz, 2006).

Through this dichotomy, it is also possible to see how those States, societies and leaders belonging to the Global North have privileged their interests and have dominated that which they have considered less developed (Adetula, Benabdallah & Murillo-Zamora, 2017). The-

se dynamics go back to centuries of oppression and domination of some peoples over others (a central element as well in the experiences of the People of Israel and the society of Galilee), which have prevented the existence of true equality within international society and within contemporary human societies (Bianchi, 2016). It is from this standpoint that the perspectives of postcolonialism and the Global South and TWAIL approach the ICC's role.

Finally, given that all investigations and prosecutions undertaking by the ICC from 2002 to 2016 were focused on international crimes committed in African countries by African state and non-state leaders, the perspective on the ICC's role by the States of that continent is particularly relevant. Unlike the views of the perspectives of postcolonialism and Global South and TWAIL, the initial perception of most African States was that the ICC could play a transformative role in: (a) reducing disparities between the Global North and the Global South; and (b) ending the impunity of neocolonial States. As a result, 34 African States become parties to the ICC Statute, representing more than a quarter of all ICC States Parties.

Nevertheless, as predicted by said perspectives, African countries soon left behind this perception. This disillusionment with the ICC was reflected in the confrontation between the African Union (AU) and the ICC between 2009 and 2016 as a result of: (a) the controversy over the immunities of the highest state representatives following the ICC cases against the then Heads of State of Sudan (Al-Bashir), Libya (Qadhafi) and Kenya (Kenyatta); (b) the perception of neocolonialism in the referral of situations (Sudan and Libya) by the UNSC; (c) the perception of lack of transparency and discrimination by the ICC OTP in applying the criteria for selecting situations for investigation; and (d) the obstacles created by ICC proceedings to peace processes in Africa.

This led to the AU proposals for a collective withdrawal of its members from the ICC Statute and the creation of an alternative regional mechanism for ICJ, which was formally established in 2014 through the adoption of the Malabo Protocol (2014). Moreover, Burundi, Gambia and South Africa filed with the UN Secretary General their notices of withdrawal from the ICC Statute in October 2016. However, Gambia and South Africa halted the withdrawal process in early

2017 and the tensions between the AU and the ICC appear to have progressively decreased after the end of the Kenyatta case in 2015. As a result, no collective withdrawal of African States from the ICC Statute has taken place and the Malabo Protocol has only been ratified by Angola in mid-2024. Nevertheless, several of the underlying causes of tension between the AU and the ICC have not disappeared, and a new confrontation could emerge at any time in the coming years.

5. METHODOLOGY AND STRUCTURE

With respect to methodological considerations, the first point to be stressed is that, apart from chapters 2 and 3 of volume 1 (which address in an introductory manner the ICC's role from the perspective of positive IL and the principles of information management and archival policy), the remaining chapters adopt, as an epistemological proposal, the distancing from (and even rejection of) the different forms of positivism, whether understood: (a) from the social sciences perspective as a presupposition of classical empiricism (Hume); or (b) from the legal discipline as methodological positivism (Kelsen) or analytical positivism (Hart).

This supposes, therefore, moving away from the normative-monistic vision based on the supremacy of IL over domestic law, in order thereby to have a unique and uniform legal system in which the normative hierarchy renders the domestic norm subordinate to the universal (fundamental) norm (Kelsen, 1982). It also means distancing oneself from the limited recognition that nuanced universalism of Hart grants to particular cultural norms as aids in legal construction, which leaves IL as a set of primary rules of obligation that are not linked by any basic rule or fundamental norm of recognition (as is the case in domestic law) (Hart, 1994).

There are four main reasons put forward by non-positivist approaches to justify their position. In the first place, conceiving the international legal system as a set of norms transforms it into an instrument for political-legal elites and limits its analysis to a summation of isolated arrangements of structures and processes (Campderrich Bravo, 2009: 26).

Secondly, ignoring the process of normative construction (or deconstruction) undermines the dynamic nature of IL. It causes it to be static, while promoting adherence to a conservative ideology of the *status quo*. It becomes anachronistic in dealing with the growing challenges posed by international society (Urueña-Sánchez, 2017).

Thirdly, positivism consists of a theoretical approach whose epistemology prioritizes the analysis of IL from "top to bottom", underestimating the role assumed by particular cultural norms and by domestic interactions in the production, reproduction and revaluation of norms. By doing this, positivism fosters a totalizing Westernism that tries to generalize and impose its values on the rest of international society (O'Meara, 2010).

Finally, continuing to consider the State (and its legal and political elites) as the exclusive unit of analysis because it is the only one capable of imposing sanctions (war and retaliation in the case of Kelsen, 1982) or creating rules of obligation (Hart, 1994) significantly reduces the heterogeneity inherent in the contemporary international legal system (Urueña-Sánchez, 2017). In this way, as Shaw (2008: 56) highlights, positivist visions of IL add to their lack of dynamism their complete disarticulation from the specific needs and values of the different societies that they seek to regulate.

The decision to distance oneself from positivism elicits the need to seek other theoretical references. What most of the theoretical approaches from which the ICC's role is analyzed in this trilogy have in common is the denunciation of modernity and the subjectivities produced by it (important exceptions to this general rule are the perspectives of the theories of rational choice and of global governance, justice, and constitutionalism, which are addressed in chapters 4 to 8 of volume 1). This makes the predominant epistemological orientation that guides the research carried out in most of the chapters of the trilogy the interpretivist one. In contrast to traditional orientations, interpretivism distances itself from the different modalities of ontological materialism (reality is not, therefore, determined by the material conditions of existence) and epistemological foundationalism (presuppositions cannot be assumed without problematizing them) (Olasolo, Urueña-Sánchez & Arévalo-Ramírez, 2023).

For those who adopt interpretivism, social phenomena can only exist through belief systems and modes of acquiring knowledge. Ontology and epistemology are therefore co-constitutive, which is reflected in the formulation of open questions that seek to examine a range of observable elements and processes that contribute to shaping an outcome. Consequently, interpretivism promotes research questions that seek to analyze the way in which social actors represent "the world" through their intersubjective interpretations, which allows for the exploration of norms, perceptions, acts of language and texts as figurative practices from which reality is socially constructed (O'Meara, 2010: 47). Therefore, the question regarding the ICC's role in the contemporary international system opens up a whole series of approaches regarding the actors in the system, IJ, ICJ, ICL, and ultimately, regarding the underlying dynamics that shape international reality.

Interpretivism regards ontology and epistemology as two sides of the same coin, in which facts and values (or subject and object of research) are inseparable. The renunciation of any pretense of value asepsis leads this epistemological orientation to favor Weberian *verstehen* as a supposition of observation directed by the interpretation of social facts. In accordance with this, the primary method used is the qualitative-interpretative method. This method is concerned with the context of events and focuses its inquiry on those areas in which human beings are involved and interested, and thus they evaluate and experience directly (Rodríguez Martínez, 2011: 12).

The qualitative-interpretative method seeks to interpret social reality by observing the social world as a dynamic order of intersubjective meanings (Rodríguez Martínez, 2011: 10). In the specific case of the ICC, its role cannot be assessed strictly from a formal perspective limited to the powers granted to it by the ICC Statute but must be viewed through multiple prisms to obtain a holistic view of its reality. This choice of method does not exclude, however, reserving a space for analysis based on quantifiable measurement instruments.

A more complex discussion in comparing the four disciplines involved in the research has to do with the research techniques and especially with the types of sources utilized. Although the research techniques lean towards documentary analysis rather than to living

sources, the handling of each of the chapters has the possibility of varying both by the disciplinary approach and by the analytical perspective chosen by the authors. The documentary techniques used combine, *inter alia*, legal hermeneutics, historical genealogy, structural content analysis, textual interpretation and critical discourse analysis.

As the distinction made by each discipline between primary and secondary sources runs the risk of becoming immeasurable, instead of referring to one or the other category, three main categories of sources are presented. First, the theoretical and methodological sources specific to each analytical perspective, which offer a deductive panorama from which to analyze the social reality under study. Second, phenomenological texts, which account for the nature of the ICC, its functioning, its agency in the different situations and cases in which it has intervened and the critical positions on this agency. Third, texts related to the international legal framework (conventional and customary), as well as the most relevant case law and doctrine for the application of the different analytical perspectives of the ICC's role.

Finally, as regards the structure of each chapter, it begins with the exposition of the central elements of the analytical perspective from which it is approached and its conception of justice. On this basis, the treatment of IJ is examined, including, where appropriate, the goals of ICJ and ICL. Finally, an analysis of the role that the ICC has been playing, and is called upon to play, from the corresponding theoretical approach is provided.

REFERENCES

Doctrine

Adetula, V., Benandallah, L. & Murillo-Zamora, C. (2017). Global South Perspectives. In: McGlinchey, S., Scheinpflug, C. & Walters, R. (Eds.). International Relations Theory. Bristol (United Kingdom): Internacional Relations Publishing. Pp. 125-130.

Ambos, K. (2013). Treatise on International Criminal Law. Oxford (United Kingdom): Oxford University Press.

Armstrong, D., Farrell, T. & Lambert, H. (2012). International Law and International Relations. Cambridge (United Kingdom): Cambridge University Press.

Bassiouni, M.C. (Ed.) (2008). International Criminal Law: Sources Subjects and Contents. Leiden (The Netherlands): Martinus Nijhoff Publishers.

Benjamin, W. (2005). *Tesis sobre la historia y otros fragmentos*. Ciudad de México: Contrahistoria.

Bianchi, A. (2016). International Law Theories. Oxford (United Kingdom): Oxford University Press.

Bohman, J. (2019). Critical Theory. In: Zalta, E.N. (Ed.). The Stanford Encyclopedia of Philosophy. https://plato.stanford.edu/archives/win2019/entries/critical-theory/.

Borobio, D. (2000). *Sacramentos y etapas de la vida*. Salamanca (Spain): Sígueme.

Botero, J. L. (2012). *Justicia restitutiva, retributiva y estructural en el contexto de la profecía bíblica. Reflexiones Teológicas*. Vol. 10. Pp. 53-72.

Britos, P. (2016). *¿Qué significa 'justicia global'?. Justicia*. Vol. 29. Pp. 86-98.

Bronner, S. (2011). Critical Theory: A Very Short Introduction. Oxford (United Kingdom): Oxford University Press.

Campderrich Bravo, R. (2009). *¿Derecho internacional o guerra imperial? Hans Kelsen y Carl Schmitt ante la pacificación de las relaciones interestatales por medio del derecho. Anales de la Cátedra Francisco Suárez*. Vol. 43. Pp. 19-38.

Cassirer, E. (1975). *Esencia y efecto del concepto de símbolo. Ciudad de México: Fondo de Cultura Económica.*

Cassese, A. (2008). International Criminal Law. Oxford (United Kingdom): Oxford University Press.

Castro Cuenca, C. G. (2007). *Algunos lineamientos sobre la legitimidad del injusto en los bienes jurídicos supraindividuales*. In: Balmaceda Hoyos, G. (Ed.). *Problemas actuales del derecho penal* (pp. 81-115). Santiago de Chile: Jurídicas de Santiago.

Checkel, J. T. (2013). Theoretical Pluralism. In: Carlsnaes, W., Risse, T. & Simmons, B.A. (Eds.). Handbook of International Relations. London, Los Angeles, New Delhi, Singapur & Washington DC.: Sage. Pp. 220-240.

Corten, O. (2009). *Méthodologie du droit international public*. Brussels (Belgium): Université de Bruxelles.

Debergé, P. (1998). *La justicia en el Nuevo Testamento*. Estella (Spain): Verbo Divino.

Fichtelberg, A. (2008). Liberal Values in International Criminal Law. A Critique of Erdemovic. Journal of International Criminal Justice. Vol. 6. Pp. 3-19.

Fone, B. (2008). *Homofobia: una historia*. Ciudad de México: Ed. Océano.

Foucault, M. (2002). *Historia de la sexualidad. La voluntad del saber*. Ciudad de México: Siglo XXI Editores.

Hart, H. (1994). The Concept of Law. Oxford (United Kingdom): Clarendon Press.

Kelsen, H. (1982). *Teoría pura del derecho*. Ciudad de México: UNAM.

Kress, C. (2010). On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: some Reflections on the March 2010 ICC Kenya Decision. *Leiden Journal of International Law*. Vol. *23*. Pp. 855-873.

Kress, C. (2014). International Criminal Law. In: Wolfrum, R. (Ed.). Max Planck Encyclopedia of Public International Law.

López, F. (2001). *Amós y Miqueas: dos profetas campesinos*. Estella (Spain): Verbo Divino.

Luban, D. (2011). *Una teoría de los crímenes contra la humanidad*. Bogotá (Colombia): Temis.

MacKinnon, C. (1979). Sexual Harassment of Working Women: A Case of Sex Discrimination. New Haven (USA): Yale University Press.

Massimo, G. (2011). *Comentario al Evangelio de Mateo*. Madrid (Spain): Verbo Divino.

May, L. (2005). Crimes against Humanity: A Normative Account. Oxford (United Kingdom): Oxford University Press.

Meier, H. (1998). *Un judío marginal. Nueva visión del Jesús histórico*. Estella (Spain): Verbo Divino.

Merry, S. (2009). Gender Violence: A Cultural Perspective. New Jersey (USA): Wiley-Blackwell.

Nava Bedolla, J. (2009). *La orientación epistemológica de la investigación educativa*. Ponencia presentada en el X Congreso Nacional de Investigación Educativa. http://www.comie.org.mx/congreso/memoriaelectronica/v10/pdf/carteles/1613-F.pdf.

Nowrot, K. (2004). Global Gobernance and International Law. Halle (Germany): Martin Luther Universitat Halle-Wittenberg. https://peacepalacelibrary.nl/ebooks/files/Heft33.pdf.

Olasolo, H. (2017). *Derecho internacional penal, justicia transicional y delitos transnacionales: dilemas políticos y normativos*. Valencia (Spain): Tirant lo Blanch & Instituto Ibero-Americano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional.

Olasolo, H., Buitrago Rey, N.E., Bonilla Tovar, V. & Canosa Cantor, J. (Eds.) (2018). *Alcance y limitaciones de la justicia internacional*. Perspectivas Iberoamericanas sobre la Justicia Book Collection. Vol. 4. Valencia (Spain): Tirant lo Blanch, Instituto Ibero-Americano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional e Instituto Joaquín Herrera Flores. https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-4-coleccion-alcance-y-limitaciones-de-la-justicia-internacional.

Olasolo, H. & Galain Palermo, P. (2018). *Los desafíos del derecho internacional penal: atención especial a los casos de Argentina, Colombia, España, México y Uruguay*. Perspectivas Iberoamericanas sobre la Justicia Book Collection. Vol. 1. Valencia (Spain): Tirant lo Blanch, Instituto Ibero-Americano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional e Instituto Joaquín Herrera Flores. https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-4-coleccion-alcance-y-limitaciones-de-la-justicia-internacional.

Olasolo, H., Urueña-Sánchez, M.I. & Arévalo-Ramírez, W. (2023). Theoretical Foundations and Techniques for Conducting International Law Research from Critical Approaches. *Díkaion*. Vol. 32. No. 1. Pp. 1-35.

O'Meara, D. (2010). *Le constructivisme*. In: MacLeod, A. & O'Meara, D. (Eds.). *Théories des relations internationales: contestations et résistences*. Montreal (Canada): Athéna Editions. Pp. 244-268.

O'Meara, D. (2010). *La méthodologie*. In MacLeod, A. & O'Meara, D. (Eds.). *Théories des relations internationales: contestations et résistences*. Montreal (Canada): Athéna Editions. Pp. 37-62.

Onuf, N. (1989). *The World of Our Making: Rules and Rule in Social Theory and International Relations*. Columbia (USA): University of South Carolina Press.

Orakhelashvili, A. (2006). *Peremptory Norms in International Law*. Oxford (United Kingdom): Oxford University Press.

Ortner, S. (1974). Is Female to Male as Nature is to Culture. In Rosaldo, M. & Lamphere, L. (Eds.). *Women Culture and Society*. Redwood City (USA): Stanford University Press.

Palan, R. (2004). Constructivism and Globalisation: From Units to Encounter in International Affairs. Cambridge Journal in International Relations. Vol. 17. No. 1. Pp. 11-23.

Paz, G. D. L. (2006). *La división norte-sur y los estudios internacionales. CONfines de Relaciones Internacionales y Ciencia Política*. Vol. 2. No. 4. Pp. 111-114.

Pogge, T. (2008). *¿Qué es la justicia global?. Revista de Economía Institucional*. Vol. 10. No. 19. Pp. 99-114.

Pogge, T. & Álvarez, D. (2010). *Justicia global: dos enfoques. Isegoría Revista de Filosofía Moral y Política*. Vol. 43. Pp. 573-588.

Pongutá, S. (2008). *Por medio de los profetas*. Bogotá (Colombia): Ediciones Salesianas.

Rahner, K. (1962). *Escritos de teología*. Vol. IV. Madrid (Spain): Taurus.

Reus-Smit, C. (2005). Constructivism. In: Burchill, S., Devetak, R., Donnelly, J., Linklater, A., Patterson, M., Reus-Smit, C. & True, J. (Eds.). Theories of International Relations. New York (USA): Palgrave McMillan. Pp. 188-212.

Reyes Mate, M. (2011). *Tratado de la injusticia*. Barcelona (Spain): Anthropos Editorial.

Rich, A. (1996). *Heterosexualidad obligatoria y existencia lesbiana. DUODA Revista d'Estudis Feministes*. Vol. 10.

Risse, M. (2012). On Global Justice. New Jersey (USA): Princeton University Press.

Robinson, D. (2008). The Identity Crisis of International Criminal Law. Leiden Journal of International Law. Vol. 21. Pp. 925-963.

Rodríguez Martínez, J. (2011). *Métodos de investigación cualitativa. Silogismo*. Vol. 8. Pp. 1-34.

Rubin, G. (1989). *Reflexionando sobre el sexo: notas para una teoría radical de la sexualidad*. In: Vance, C. (Ed.). *Placer y peligro: explorando la sexualidad femenina*. Madrid (Spain): Revolución. Pp. 113-190.

Sánchez, L. E. (2012). *¿De qué se habla cuando se habla de constructivismo?. Revista de Relaciones Internacionales de la UNAM*. Vol. 114. Pp. 107-129.

Sander, B. (2010). Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence. Leiden Journal of International Law. Vol. 23. Pp. 105-135.

Satzger, H. (2012). International and European Criminal Law. Munich (Germany): Hart/Beck.

Sedgwick, E. (1998). *La epistemología del armario*. Barcelona (Spain): Ediciones de la Tempestad.

Sicre, J. L. (1992). *El profetismo en Israel*. Estella (Spain): Verbo Divino.

Sjoberg, L. & Tickner, J. A. (2013). Feminist Perspectives on International Relations. In: Carlsnaes, W., Risse, T. & Simmons, B.A. (Eds.). Handbook on International Relations. London, Los Angeles, New Delhi, Singapur & Washington DC: Sage. Pp. 174-190.

Smith, S. (2017). Feminism. In: McGlinchey, S., Scheinpflug, C. & Walters, R. (Eds.). International Relations Theory. Bristol (United Kingdom): International Relations Publishing. Pp. 62-68.

Stahn, C. (2012). Between Faith and Facts: By What Standards Should We Assess International Criminal Justice?. Leiden Journal of International Law. Vol. 25. Pp. 251-282.

Taekema, S. & Van Klink, B. (2011). On the Border: Limits and Possibilities of Interdisciplinary Research. In Taekema, S. & Van Klink, B. (Eds.). Law and Method. Interdisciplinary Research into Law. Tubinga (Germany): Mohr Siebeck.

Tan, K. (2017). What Is This Thing Called Global Justice? London (United Kingdom): Routledge.

Urueña-Sánchez, M. I. (2017). *El positivismo de Kelsen y Hart en el derecho internacional contemporáneo: una mirada crítica. International Law: Revista Colombiana de Derecho Internacional*. Vol. 15. No. 31. Pp. 193-219.

Van der Wilt, H. (2014). "Crimes against Humanity: A Category Hors Concours in (International) Criminal Law?". In: Van Beers, B., Corrias, L. & Werner, W.G. (Eds.). Humanity across International Law and Biolaw. Cambridge (United Kingdom): Cambridge University Press. Pp. 25-41.

Vanegas, M. (2011). *De los delitos de lesa humanidad y de los delitos contra las personas y bienes protegidos por el derecho internacional humanitario*. In: Castro Cuenca, C.G. (Ed.). *Manual de derecho penal: parte especial*. Vol. I. Bogotá (Colombia): Universidad del Rosario & Ed. Temis. Pp. 68 et. seq.

Wendt, A. (1999). Social Theory of International Politics. Cambridge (United Kingdom): Cambridge University Press.

Werle, G. (2010). *Tratado de derecho penal internacional*. Valencia (Spain): Tirant lo Blanch.

West, R. (2000). *Género y teoría del derecho*. Bogotá (Colombia): Ediciones Uniandes, Instituto Pensar & Siglo del Hombre Editores.

Wolkmer, A.C. (2001). *Pluralismo jurídico: fundamentos de uma nova cultura*. São Paulo (Brazil): Alfa Omega.

Resolutions, Reports and Other Documents

International Criminal Court. Office of the Prosecutor. (2003). Paper on Some Policy Issues before the Office of the Prosecutor. https://www.legal-tools.org/en/doc/f53870/.

International Criminal Court. Office of the Prosecutor. (2007). Policy Paper on the Interests of Justice. https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf.

International Criminal Court. Office of the Prosecutor. (2010). Draft Policy Paper on Preliminary Examinations. https://www.icc-cpi.int/NR/

rdonlyres/9FF1EAA1-41C4-4A30-A202- 174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf.

International Criminal Court. Office of the Prosecutor. (2013). Policy Paper on Preliminary Examinations. https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf.

International Criminal Court. Office of the Prosecutor. (2016a). Draft Policy Paper on Case Selection and Prioritisation. https://www.icc-cpi.int//Pages/item.aspx?name=Draft-Policy-Paper-on-Case-Selection-and-Prioritisation.

International Criminal Court. Office of the Prosecutor. (2016b). Policy Paper on Case Selection and Prioritisation. https://www.icc-cpi.int//Pages/item.aspx?name=policy-paper-on-case-selection-and-prioritisation.

United Nations. Security Council. (2003). Resolution 1503. International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda.

United Nations. Security Council. (2004). Resolution 1534. International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda.

PART II
FIRST APPROACH TO THE ROLE OF THE INTERNATIONAL CRIMINAL COURT: POSITIVIST APPROACHES

Chapter 2
The Perspective of Positive International Criminal Law[*]

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1. INTRODUCTION: POSITIVE LAW AS AN ANALYTICAL PERSPECTIVE

The International Criminal Court (ICC) aims of retribution and prevention are explicitly set out in the ICC Statute, but the ICC's role goes much further. The perspective of positive law can illuminate the way for us to elucidate what the true role of this complex jurisdictional body is. However, as has been propounded in chapter 1, the analysis of the role of the ICC must be carried out without falling into the reductionism incurred when starting out from positivism, legal realism or liberalism (Hart, 1983: 271; Cortés, 1997: 59-87; Campos, 2010: 191-220). Thus, we intend to address in this chapter the ICC's role from the perspective of positive ICL, based on a kind of positivism such as that of Campbell (2002: 307), which looks beyond the separation of law and morality. Moreover, in carrying out our analysis, we will examine the ICC Statute and the ICC case law, keeping always in mind the role that victims occupy in positive law (Campbell, 2002: 3).

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When the ICC's role is examined from the perspective of positive international criminal law (ICL), it is not limited to ending impunity and providing retributive punishment, but it also includes the adoption of measures to: (a) foster a universal legal awareness by reaffirming the values protected by ICL (positive general prevention); (b) deter the commission of atrocious crimes (negative general prevention-deterrence); and (c) provide reparative and restorative justice (Olasolo, 2012: 73).

Moreover, crimes falling under the jurisdiction of the ICC protect legal values of a dual nature: individual and collective. On the one hand, they protect life, physical integrity, sexual autonomy and the freedom of the victims. On the other hand, they also guarantee collective legal values (Ambos, 2013: 55), such as the preservation of international peace and security (Werle, 2010: 82-83, 468-469). For this reason, this chapter will also analyze the treatment by the ICC of war crimes and aggression.

Finally, the question arises as to whether, according to positive ICL, the ICC's role also includes the implementation of positive complementarity strategies with the intention of strengthening the capacities of national judicial institutions, helping them to rebuild and strengthen domestic justice systems, and providing aid and technical support in a proactive manner. This is to incentivize States Parties to put an end to impunity for international crimes through complying with their obligations to investigate and prosecute.

2. RETRIBUTION, PREVENTION AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY AS ELEMENTS OF THE ROLE OF THE INTERNATIONAL CRIMINAL COURT

2.1. The International Criminal Court and its role in ending impunity

Under the ICC Statute, retribution and punishment of the convicted persons remain a necessary end. Thus, in the fourth paragraph of the preamble of the ICC Statute it is stated that the most serious crimes of international concern must not go unpunished. ICC case law also reflects the retributive function of punishment (ICC, Ntaganda, 07/08/2019: 11).

Likewise, according to paragraphs 4, 6 and 10 of the preamble of the ICC Statute, ending the impunity of the perpetrators of such crime is a primary purpose of the ICC. In this sense, Broomhall (2003: 54) points out that international criminal tribunals, such as the ICC, punish the most serious crimes of international concern (referred to by Scheffer as "atrocity crimes"), bringing to trial state and non-state leaders allegedly responsible for them (Scheffer, 2012: 429).

Originally, retribution was interpreted as the right of society to impose criminal punishment as payment on those who violated its essential values in accordance with the theory of social contract. Retribution is therefore based on the philosophical premise of replacing the individual revenge of the law of retaliation with the state obligation to provide civil justice and punish the perpetrator.

Retribution also means that any individual who disrupts public order must be punished for his actions (Bassiouni, 2003: 693). Consequently, punishment is justified to penalize acts that disrupt international public order (Slye & Van Schaack, 2009: 297). In this sense, the International Criminal Tribunal for Rwanda (ICTR) has pointed out that retribution is the expression of social disapproval attributed to the perpetrators of crimes, which demands the punishment of the latter for what they have done. Retribution satisfies the need for justice and contributes to calming the anger caused by crimes committed against victims and society at large (ICTR, Rutaganira, 03/14/2005:108). In this way, criminal punishment provides victims with a feeling of satisfaction when they see their attackers reprimanded (Slye & Van Schaack, 2009: 297).

Retribution does not mean revenge (Ntaganda, 07/08/2019). However, it is reasonable to question whether the ICC has a merely retributive function when it is charged with punishing such serious crimes. In this regard, since the negotiations of the ICC Statute, questions have been raised about the purpose of criminal punishment and whether the sentences imposed faithfully reflect what the convicted persons deserve (Bassiouni in Olasolo, 2010: 5-6).

For De Guzmán (2015: 932-933), the first sentences of the ICC in the Lubanga (2012) and Katanga (2014) cases lack a substantial

involvement with the purposes of punishment, since the judges were reluctant to explain in detail how the sentences imposed served such purposes.

In turn, doctrine has put forward different approaches to the purposes of punishment in the ICC, including more utilitarian ones that justify punishment according to the social benefits it produces in the prevention of crimes (De Guzmán, 2014: 938).

Cesare Beccaria, an enlightened 18th century thinker, in his famous work On Crimes and Punishments (1764), had already written that punishment should be proportional to the crime committed, being more effective in preventing crime, as it left a more lasting impression on the minds of men (Beccaria, 2014). Sumano Rodríguez (2020) agrees that punishment should not exceed its benefits. De Guzmán (2014: 938) shares this position by stating that the benefits of punishment must maintain a utilitarian proportion: it must be sufficiently severe, but not beyond what is necessary in order to prevent future crimes.

On the other hand, Olasolo (2012: 73) states that the ICC's role should not be limited to the jurisdictional and punitive spheres, but must also have a restorative and reparative nature, taking victims into consideration. Maculan and Gil Gil (2020) share this approach. However, without denying victims right to justice, these authors consider that their satisfaction must be part of a larger universe conformed of different elements, such as retribution, reconciliation, reconstruction of the social fabric and confrontation of the past with a view to deterring future perpetrators. As a result, the ICC's role should be fulfilled within the framework of transitional and restorative justice, with the objective of maintaining social order as a protected legal value.

Rodríguez-Villasante (2012: 73) has a more conservative view and tells us that restorative procedures would change the nature of the ICC somewhat. Claudia Jiménez (2012: 73) agrees when she says that the primary ICC's role is punitive, not reparative. Magdalena Martín (2012: 73) disagrees, however, and recalls that the ICC has, as its basic objective, the fight against impunity, which includes a preventive deterrent function. Olasolo (2010) agrees with this last position be-

cause for him there is a clear connection between the concept of responsibility to protect and the mandate of the ICC in that both focus on preventing future situations of atrocious crimes.

In light of the above noted, and based on the preamble of the ICC Statute, it can be stated that the ICC, unlike the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR, has a broader mandate, which is clothed in a preventive approach, making it clear that the ICC's role goes beyond punishment.

2.2. The obligation of the International Criminal Court to prevent the commission of new crimes of international concern

The response to international crimes resulting from breaches of *ius cogens* norms of ICL, such as the prohibition of genocide, crimes against humanity and war crimes, is essentially retributive with a view to deterrence and the prevention of new crimes. This is due to their devastating effects on numerous victims and the disruption of national order and international peace (Bassiouni, 2003: 697). As a result, as stated in the preamble of the ICC Statute, one of the main purposes of punishment is general prevention, with its dual positive dimension (creation of a universal legal conscience through the reaffirmation of the values protected by the ICC Statute) and negative dimension (deterrence of state and non-state leaders in light of the high cost that the commission of international crimes has had for other convicted leaders) (Olasolo, 2016: 117).

There is great skepticism about the effectiveness of general negative prevention due to: (a) the small number of potential defendants who can be brought to trial before the ICC (Osiel, 2000; Maculan & Gil Gil, 2020); (b) the vulnerability of international criminal tribunals, their dependence on States to carry out its investigations *in situ* and the attempts by the most influential States in international society to instrumentalize them (Olasolo, 2016: 126); and (c) the institutional weaknesses of the ICC and its limited resources and personnel (Quesada Alcalá, 2019).

This calls into question the capacity of the ICC to end impunity and thus to contribute to the prevention of new crimes. Moreover, as

Cryer, Friman, Robinson and Wilmshurst (2010: 26) have noted, there is an underestimation of the rational calculations of high-ranking leaders who are not blinded by other considerations. Indeed, as Farer has stated, many of the leaders who commit international crimes do not believe that they will be reached by international justice (Farer in Olasolo, 2016: 120).

Apart from some national jurisdictions which have been able to prosecute senior leaders for the commission of international crimes, such as Argentina and Chile (Olasolo & Galain, 2018), and with a few exceptions —such as the case of Charles Taylor, sentenced for war crimes by the Special Court for Sierra Leone (SCSL) (2012)— it is clear that those leaders most responsible feel confident that the chances of being prosecuted are very limited.

When one thinks of Joseph Kony, leader of the Lord's Resistance Army (a Ugandan rebel group), who has been the subject of an ICC arrest warrant for crimes against humanity and war crimes almost 20 years ago (ICC, Joseph Kony, 27/09/2005) and remains a fugitive and is unlikely to ever be transferred to The Hague for prosecution, the criticism of general negative prevention seems well-founded. The same applies to former president of Sudan, Omar Al Bashir, who in his capacity as Head of State of Sudan has officially visited numerous States (some of them States Parties to the ICC Statute) between 2009 and 2019 with no fear of being arrested and transferred to the ICC. Even, after the coup that removed him from power and led to his arrest in 2019, he has not been transferred to the ICC by the Sudanese government after more than five years.

The problem demonstrated by the Al Bashir case (in which there are two arrest warrants issued by the ICC in 2009 and 2010) is not only legal, but political. Until the 2019 coup, the ICC faced the disagreement of numerous African States, including Nigeria, Chad, Malawi and South Africa, regarding compliance with their obligations of cooperation under the ICC Statute. This allowed Al Bashir to visit all these States with impunity without being arrested (Soto Cremades, 2018). An example of this situation is the visit of Al Bashir to the African Union (AU) Summit held in 2015 in South Africa. On that occasion, the South African government, with the support of the AU (which opposed the arrest of Al Bashir), not only allowed him to

enter the country, but also facilitated his exit from the country, even in contravention of the arrest warrant that a South African judge had issued in order for South Africa to comply with its obligations with the ICC.

Political challenges, such as those made by the South African government, highlight the challenges facing the ICC and raise serious doubts about its ability to bring those "most responsible" to justice. This opens the debate on the effectiveness of the system of cooperation provided for in the ICC Statute (Meschoulam, 2015).

Furthermore, there are also signs that weaken the credibility of the ICC in terms of the determination of the length of the sentences. It is true that in the Ntaganda case, the ICC has stressed that: (a) the totality of the sentence must be proportionate and reflect the guilt of the person sentenced, and the penalties must be adjusted according to the gravity of the crime (ICC, Ntaganda, 8/07/2019: 11); and (b) with regard to prevention, the sentence must be sufficient to discourage the convicted person from reoffending (individual prevention), as well as to deter those who may consider committing similar crimes (general prevention) (ICC, Ntaganda, 8/07/2019: 10).

Nevertheless, if effective deterrence requires a credible threat of criminal punishment (Slye & Van Schaack, 2009: 299), it must be asked what an adequate sentence means in order to deter those potential perpetrators who intend to commit the gravest crimes of international concern. Moreover, the 9, 12 and 14 years of imprisonment imposed respectively on Al Mahdi, Lubanga and Katanga for crimes against humanity and/or war crimes do not seem sufficiently harsh sentences —the same can be said regarding the less than 2 years imprisonment imposed on Jean-Pierre Bemba and several members of his defense team for crimes of obstruction of justice.

In light of the foregoing, it sometimes appears that the sentences imposed by the ICC and other international criminal tribunals are not sanctions proportional to the threshold of gravity of the crimes committed. Indeed, they can be perceived as lenient by comparison to the gravity of the international crimes committed. Furthermore, it does not appear that the ICC has sufficiently taken into account the harm suffered by the victims when determining sentences. This

strengthens the position of those who claim that negative general prevention cannot be effective if the judicial practice of the ICC ultimately shows this kind of leniency.

Skepticism is higher if the message sent by the ICC is one of weakness and if potential perpetrators consider that punishment is low or that it is likely to escape justice because only a small fraction of those responsible for atrocious crimes are tried by the ICC. This situation is aggravated if, as Slye and Van Schaack (2009: 301) point out, ICC prosecution and criminal punishment is episodic and highly selective. Indeed, as Cryer, Friman, Robinson and Wilmshurst (2010: 28) argue, this has nothing to do with the wish of the drafters of the ICC Statute to create a culture of accountability in which those who commit international crimes are regularly prosecuted.

2.3. The International Criminal Court and the provision of justice for victims

In accordance with the positions that maintain that the ICC's role should not be limited to the jurisdictional and punitive spheres, but should also include a restorative dimension, a deeper examination of the ICC reparative mandate is necessary.

Victims thus have a very relevant role at various moments of the process before the ICC, even though they are not parties to the proceedings *stricto sensu*. Indeed, victims are at the center of the ICC Statute, and guaranteeing justice to victims forms part of the role of the ICC (Olasolo, 2016: 100). This is shown by the importance of: (a) providing adequate reparation to victims; and (b) giving due weight to views of the victims in the historical narrative put forward by the ICC in its decisions. As a result, the ICC must listen to victims conscientiously and ensure their participation in the proceedings.

Art. 75 of the ICC Statute enshrines, for the first time in ICL, the right to reparation, based upon the restorative role that justice must play (Jara Bustos, 2013: 115). This right is effectively complemented by the existence of a Trust Fund to support victim reparation when they cannot be completely satisfied by the measures imposed against the convicted person (art. 79).

Nevertheless, as the ICC Statute does not establish normative standards in relation to victim reparation, the case law of the ICC is of particular importance, as it interprets and explores new avenues based on the positive law contained in the ICC Statute, the ICC Rules of Procedure and Evidence (ICC RPE) and treaties, principles and customary rules of international law (IL) and international human rights law (IHRL) (art. 21(1)(b) and (3) of the ICC Statute) (López, 2013: 215-216).

Regrettably, the ICC case law provides little clarification in relation to reparation for victims, given the serious difficulties faced by the ICC in establishing forms of reparation that effectively satisfies them. These difficulties were already revealed in the first ICC decision on this matter (ICC, Lubanga, 7/08/2012), which established a series of guidelines applicable to victim reparation that have been deeply debated (Jara Bustos, 2013: 113-125). In this sense, special attention has been paid to the following principles: (a) all victims must be treated equally; (b) reparation must not be limited to victims who participated at trial and requested them; and (c) reparation must ensure, to the extent possible, reconciliation between the convicted person and the persons and communities affected by the crimes (ICC, Lubanga, 7/08/2012: 193). These principles are not mandatory, however, nor do they constitute, in principle, positive law on the matter, although they do draw on conventional norms and general principles of IL. As Martínez Ventura has pointed out, the success of the ICC is, to a certain extent, dependent on the success of its reparation system (2014: 347).

Although it is noteworthy that, while the ICC attributes individual reparations to victims, other international bodies that rule on state responsibility provide for reparation measures that have a more restrictive scope (Bruno, 2013: 55), it is also important to highlight that the Trial Chamber (TC) in the Lubanga case, in addition to establishing the aforementioned principles and guidelines for reparation, gave priority to collective over individual reparation, and delegated to the Trust Fund for Victims the preparation and execution of a collective reparation plan (ICC, Lubanga, 07/08/2012). As Martínez Ventura (2014: 345-346) notes, this decision is highly complex to implement, which significantly affects its effectiveness.

The fact that, in the face of enormous practical difficulties and the avalanche of requests for reparation, the ICC opted in the Lubanga case for a system of collective reparations, may be considered by some to contradict the idea that the axis of the effectiveness of the ICC lies in the reparation to victims (Galván, 2019: 429-430). In this way, by leaving the determination of the type of reparation in the hands of the ICC case law, much flexibility has been given to the ICC in this matter. This has fostered strong criticism from the perspective of the principle of legality and the satisfaction of the rights of the victims[1].

The beneficiaries of reparations have also been the subject of controversy. According to rule 85 of the ICC RPE, reparations may be granted to direct and indirect victims, including the families of direct victims, those who have tried to prevent the crimes, and, in general, anyone who has suffered personal harm resulting from the crimes (this is regardless of their participation in ICC proceedings (ICC, Lubanga, 7/08/2012: 194)). Moreover, the concepts of "indirect victim" and "family" are complex, since the former requires a close personal relationship with the direct victim, and the latter is endowed with cultural connotations that make it more flexible (ICC, Lubanga, 7/08/2012: 194).

Furthermore, ICC decisions on reparation have, in the end, created a hierarchy among victims. Thus, in the Katanga case, concerning the massacre that occurred in Bogoro (Democratic Republic of the Congo (DRC)) on 23 February 2003, victims of crimes committed before or after that date were not admitted into the procee-

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[1] In the Lubanga case, the Trial Chamber found that reparations based on a community approach would be more beneficial and useful than individual reparations, since funds were limited and costly verification procedures were not required (ICC, Lubanga, 7/08/2012, para. 274). Thus, the decision was made: (a) to build community centres; (b) to establish a programme to reduce the stigma of child soldiers; and (c) to select activities involving physical and psychological rehabilitation and training to generate other activities. In contrast, in the Katanga case, 250 US dollars were granted to each victim of the massacre. Likewise, in the Al-Mahdi case, a monetary amount was granted to each victim. In these last two cases, collective and symbolic reparation measures were also granted.

dings. The same occurred in the Al-Mahdi case, which focused on the destruction of cultural property in Timbuktu (Mali). This selectivity regarding victims is improper considering that one element of the ICC's role is to ensure their rights and provide justice to victimized communities.

Furthermore, as the reparation decision issued on 7 August 2012 in the Lubanga case shows, the sluggishness of the procedure must be noted, since the Appellate Chamber (AC) only partially confirmed such decision several years afterwards (18 July 2019), setting an amount of 10 million dollars for reparation (ICC, Lubanga, 18/07/2019).

This amount is far larger than the million dollars demanded from the Congolese leader Germain Katanga for victim compensation (ICC, Katanga, 24/03/2017) and the 3.18 million dollars demanded from Al-Mahdi (ICC, Al-Mahdi, 8/03/2018). Given the insolvency of the convicted persons and the limited amount of funds in the Trust Fund, the money allocated to victims is clearly insufficient (Moffet, 2019). Moreover, in the Lubanga case, TC I focused on cases of child soldiers, while victims of other types of crimes felt dissatisfied. It is noteworthy that in all three cases, violence has continued, while there are continuing tensions between the communities involved.

Consequently, the positive law contained in the ICC Statute and in the ICC RPE has not proved to be very useful, due to its interpretative flexibility and the discretionary criteria that guide the decisions of the ICC chambers[2]. Furthermore, the ICC case law, which has bet on collective reparation and has established hierarchies among groups of victims, is being strongly criticized, as it cannot be forgotten that the ICC must do justice by and for all victims. Therefore, to ignore the central role that they play is to forget the reasons for the existence of the ICC and the purposes for which it was created. In this regard, it can be highlighted that, from the analysis of the ICC´ case law, it is possible to draw the conclusion that, although an effort is required from the ICC in relation to the consideration of victims as the main recipients of its justice, this effort has, so far, been insufficient.

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2 Idem.

2.4. The International Criminal Court and its role in maintaining international peace and security

2.4.1. First approach

As has already been mentioned, the maintenance of international peace and security (the main purpose of the UN according to art. 1(1) of the UN Charter) is also one of the elements implicit in the role of the ICC. Thus, although the ICC's role is not directly aimed at maintaining international peace and security, the truth is that its role in fighting impunity in contexts linked to situations of armed conflict has an impact on it. In this sense, Cardona (2003: 103) has underlined that the mere existence of the ICC is a political factor of great significance for the existence of an international system to maintain international peace and security. For this author, the origin of the ICC, its role and the use of its powers are closely linked to this (Cardona, 2003:102).

Leaving aside the origin of the ICC and focusing on its role and the exercise of its jurisdiction, one notes that the first element that must be taken into consideration to assess the contribution of the ICC to the maintenance of international peace and security is that related to the crimes included in the ICC Statute (many of which have been previously regulated by conventional and customary IL). In this regard, Escobar (2003) states that, through each of the crimes incorporated in the Statute, fundamental rights, that constitute the axiological foundation of peace, are being preserved (Escobar, 2003: 8). Furthermore, as Escobar underlines, this element, although present in all crimes contained in the ICC Statute, acquires a special profile in war crimes and aggression.

2.4.2. Genocide and crimes against humanity

According to the ICC Statute, as well as pre-existing ICL, the gravest crimes of international concern must not go unpunished (ICC, Situation in Kenya, 31/03/2010: 17). The inclusion of genocide among these crimes was not problematic because it is provided for in the 1948 Genocide Convention and is part of international custo-

mary law[3]. However, genocide has its own problems as it is a crime with tight legal contours. Thus, its absolute prohibition exclusively protects groups identified by reasons of "national, ethnic, racial or religious affiliation as such".

Since 2002, the ICC has only had one case of genocide, in which the accused person has remained at large for fifteen years. In this case, Pre-Trial Chamber (PTC) I considered that there were reasonable grounds to believe that, under the orders of the then President of Sudan, Omar Al Bashir, or at least under his command, the Sudanese armed forces, the Janjaweed militias, the Sudanese police forces, the National Intelligence and Security Service and the Humanitarian Aid Commission committed genocide against the Fur, Masalit and Zaghawa ethnic groups through a counterinsurgency campaign launched in 2003 in Darfur. For the PTC I, these groups were targeted due to their ethnic composition with the intention of bringing about their physical destruction (ICC, Al Bashir, 12/07/2010).

The link between genocide and international peace and security is clear in this kind of situation due to its impact on the societies in which it takes place. It even affects entire regions, as occurred with the Great Lakes region after the Rwandan genocide.

Regarding crimes against humanity (CAH), their inclusion in the material jurisdiction of the ICC is justified by the existence of various international instruments that reflect the customary nature of CAH. The ICC Statute has been heir to this development linked to situations of breach of international peace and security. Accordingly, the ICC Statute contains a comprehensive list of CAH, generally accepted as part of international customary law (Escobar, 2000: 504-507, 505), which makes the ICC Statute the first multilateral convention of general scope that includes in a detailed and exhaustive manner this category of international crimes (Condorelli, 1999: 9-10; Donat-Cattin, 1998: 49-52).

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[3] In its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of Genocide (1951), the International Court of Justice affirmed that the prohibition of genocide was applicable even to States that had not ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (ICtJ, 28/05/1951: 23).

2.4.3. War crimes

The role of the ICC in contributing to international peace and security is most clearly manifested in its jurisdiction over war crimes and aggression. Concerning war crimes, the ICC Statute reflects the existing customary law on the subject[4], although in some cases it goes further. Moreover, the approach of the ICC Statute fits with the evolution of international society with respect to considering that internal armed conflicts can also threaten international peace and security[5]. The fact that serious violations of IHL committed in internal armed conflicts are recognized by the ICC Statute as war crimes implies their incorporation into conventional law, thus avoiding criticism regarding possible violations of the principle of legality.

Likewise, as Escobar (2003: 9-10) has underlined, there has been an expansion of the operational scope of war crimes, since not only are violations of the Geneva Conventions (GCs) included in the ICC Statute, but also of the Hague Conventions and of rules of customary law that regulate the protection owed to victims and the conduct of hostilities. New violations of IHL also appear in the ICC Statute, including some of special relevance for the international practice in the maintenance of international peace and security (such as attacks against forces or installations belonging to a peacekeeping or humanitarian assistance mission conformed under the UN Charter)[6].

As a criticism, it is worth mentioning that for these violations of IHL to be considered war crimes, UN forces must be entitled to the

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4 The International Court of Justice has stated on numerous occasions that IHL forms part of international customary law (ICtJ, Nicaragua v. United States of America, 27/06/1986: 215, 218, 220).

5 Art. 8(2)(c) of the ICC Statute incorporates violations of common art. 3 of the 1949 Geneva Conventions with certain qualifications. Furthermore, one of the major achievements of the ICC Statute has been the extension of the ICC jurisdiction to other serious violations of the laws and customs applicable in non-international armed conflicts. See: art. 8(2)(e) of the ICC Statute.

6 Such attacks are considered war crimes if these forces or installations are entitled to the protection afforded to civilians or civilian objects under IHL. See: art. 8(2)(b)(iii) del ICC Statute.

protection granted to civilian persons and property. Therefore, peace enforcement missions authorized by the UNSC are excluded, as well as UN peacekeeping operations when they resort to force beyond self-defense (Gutiérrez Espada, 2000: 580). It would have been desirable to adapt the ICC Statute to UN practice in peacekeeping operations to achieve greater coherence in the protection of all operations deployed under the auspices of this organization.

In relation to one of the attacks perpetrated in 2007 against members of a peacekeeping operation (Haskanita (Sudan)) belonging to the AU, the ICC Office of the Prosecutor (ICC OTP) was unable to present sufficient evidence that the indicted commander of the Sudanese Liberation Army (SLA) (Abu Garda) participated directly or indirectly in the attack that caused ten casualties among the members of the mission. As a result, the charges were not confirmed. The same did not happen, however, with the other two defendants in the attack (both commanders of the Justice and Equity Movement, Abdallah Banda and Saleh Jerbo), whose charges were confirmed by PTC I, although it has not been possible to start the trial because Banda remains a fugitive and Jerbo has died.

The ICC Statute also includes as war crimes, both in internal and international armed conflicts, rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and any other form of sexual violence. All of them clearly reflect the incorporation of the gender perspective into the maintenance of international peace and security (ICC OTP, 2014). In this regard, it should be remembered that the UNSC, in its resolutions 1820 (2008) and 1888 (2009), reaffirms that sexual violence, when used as a war tactic to attack civilians, can exacerbate situations of armed conflict and prevent the restoration of international peace and security.

In practice, however, prosecuting sexual crimes that incorporate a gender dimension has proven to be a difficult task. This is shown, *inter alia*, by the ICC first judgment in the Lubanga case, in which the TC rejected the allegation of the ICC OTP that sexual violence could comprise an integral part of other ICC crimes, such as the recruitment of child soldiers.

2.4.4. The crime of aggression as a corollary to the role of the International Criminal Court in maintaining international peace and security

The crime included in the ICC Statute that is most closely related to international peace and security is the crime of aggression. The principle of legality required that it be defined, but there was no positive law apart from UNGA resolution 3314 (XXIV), the content of which is largely of a customary nature. Due to the lack of consensus at the Rome Conference, both the definition and other issues relating to the integration of the crime of aggression in the ICC system were postponed to a future Review Conference.

The greatest difficulty has always been the prior conditions that must be met for the ICC to be able to exercise its jurisdiction over the crime of aggression (Escobar, 2002: 248). Its complexity is due to the need to ensure the compatibility of the ICC Statute with the UN Charter, given the primary responsibility of the UNSC for maintaining international peace and security. Coherence between the two texts was essential to combat impunity for state leaders who plan, prepare, initiate, or carry out acts of aggression that manifestly violate the UN Charter.

After several years of work by the Princeton Preparatory Group[7], all the outstanding issues were resolved at the 2010 Kampala Review Conference, which led to the inclusion of articles 8 bis, 15 bis, 15ter and 25(3) bis in the ICC Statute. The definition of the crime of aggression adopted has three main aspects: the conduct of the State (the act of aggression), the individual conduct (the crime *stricto sensu*) and the conditions of admissibility (the relationship between the ICC and the UNSC for the purposes of determining the act and the crime of aggression). Although we focus on the state

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7 At the Princeton Group meetings, two main positions emerged: (a) those who advocated an exclusive role for the UNSC in determining the crime of aggression (in which case the role of the ICC would be to cooperate with the UNSC in maintaining international peace and security); and (b) those who advocated a non-exclusive role for said body. See: von Hebel & Robinson (1999: 85).

conduct because it is the issue most closely linked to international peace and security, we cannot ignore that the crime of aggression is a crime committed by state leaders, which entails a close link with the UNSC.

Concerning the link between the crime of aggression and the commission of an act of aggression, the definition of the latter largely corresponds to that established in resolution 3314 (XXIX) of the UNGA (art. 8 bis (2) of the ICC Statute). However, the identification with resolution 3314 cannot be absolute because otherwise it would allow for a restrictive line of interpretation that, according to Rodríguez Villasante (2011: 775), would foster impunity in respect to modern forms of aggression, such as cyber warfare, naval military maneuvers, the delegation of military flights, or the use of unmanned combat aircraft for information purposes, among others. However, as Kreb (2010: 1190-1191) has pointed out, the ICC margin of interpretation is not discretionary, but it is based on international human rights standards, as provided for arts. 21(3) and 67(1)(i) of the ICC Statute. As a result, the relationship in the ICC Statute between international peace and security and human rights is certainly clear.

The adoption in Kampala of a definition was finally achieved thanks to the approval of a series of understandings, based on a proposal introduced by the US delegation on 7 June 2010, which emphasized that aggression is the most serious and dangerous form of the unlawful use of force. Accordingly, the analysis of whether an act of aggression has been committed requires an examination of all the circumstances relating to the case, including its gravity. Similarly, when determining whether an act of aggression constitutes a manifest violation of the UN Charter, its characteristics, gravity, and scale must be examined. In this way, coherence between the ICC Statute and the UN Charter is ensured.

Nevertheless, such coherence is not absolute. As Remiro Brotons (2012: 1117-1118) has highlighted, the idea of the threshold is redundant, insofar as the relevance and gravity of the aggression is implicit in art. 39 of the UN Charter itself, in which a gradation is established according to which the UNSC determines the existence of a threat to peace, breach of peace or act of aggression. Furthermore, one must

bear in mind that the ICC itself only has jurisdiction over the most serious crimes of international concern[8].

With respect to the conditions for the exercise of the ICC jurisdiction over the crime of aggression and the role of the UNSC, it was essential to harmonize these conditions with the relevant provisions of arts. 1(1), 10, 11, 12, 14, 24, 39 and 103 of the UN Charter (Escobar Hernández, 2002: 243-264; Stein, 2005: 1-36; Blokker, 2007: 867-894). Accordingly, the proposal finally approved seeks to achieve as much harmonization as possible, and the result cannot be considered negative for the fight against impunity. In fact, the main problem arises when proceedings are originated on the initiative of States Parties or the ICC OTP. In these cases, the first obligation of the latter is to verify whether the UNSC has ascertained the existence of an act of aggression by the relevant State. If so, the ICC OTP can act. If this is not the case, and if six months have passed without the UNSC having made a pronouncement, the ICC OTP may proceed with the case if it obtains the authorization of the Pre-Trial Division[9].

The ICC power to proceed with the investigation and prosecution of a crime of aggression without the prior determination of the UNSC[10], came at the price of postponing the date of commencement of the ICC jurisdiction *ratione temporis*. As a result, the ICC material jurisdiction over the crime of aggression was only activated on 17 July 2018. Furthermore, as of November 2023, the Kampala amendments on the crime of aggression have only 46 ratifications. This is, in principle, a small number if we consider that fifteen years have passed since its adoption, but it can also be seen as a high number given the above-mentioned problems. Therefore, the agreement on a definition of aggression and the progress made on the number of ratifications of the Kampala amendments should be seen as an important achievement.

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8 This threshold is intended to exclude the uses of force authorised by the UN Charter, and therefore seeks to foster coherence between the ICC and the UNSC with regard to international peace and security.

9 Art. 15 bis (2) and (3) of ICC Statute.

10 Idem.

3. POSITIVE COMPLEMENTARITY: AN EFFECTIVE STRATEGY FOR THE INTERNATIONAL CRIMINAL COURT TO FULFIL ITS ROLE OF ENDING IMPUNITY AND PREVENTING NEW INTERNATIONAL CRIMES?

According to art. 1 of the ICC Statute, the ICC has a complementary character with respect to national criminal jurisdictions. This means that the ICC only exercises its jurisdiction when the concerned States do not act, or if they do act, they do not have the necessary willingness or capacity to genuinely carry out their investigations and prosecutions (Olasolo, 2010: 4; Daza González, 2015: 94; Fuentes, 2011: 11). Consequently, the ICC, which in no case replaces national jurisdictions to end impunity, is shaped as a jurisdiction of last resort that can only be activated and exercised in the face of inaction, unwillingness, or inability of national jurisdictions (Olasolo, 2014: 50-5). Thus, the formal primacy for the purposes of promoting the investigation and prosecution of those most responsible for the crimes provided for in the ICC Statute lies with national jurisdictions. This is also reflected in the obligations of the States Parties to investigate and prosecute under art. 86 of the ICC Statute.

A first interpretation of the principle of complementarity adopted the carrot-and-stick approach, according to which it is considered that the threat of intervention by the ICC can motivate States Parties to carry out their own investigations and prosecutions. The power that arts. 13(c) and 15 (1) of the ICC Statute give to the ICC OTP to initiate a preliminary examination *ex officio*, and without the need to consult with other interested parties (Olasolo, 2010: 8), makes credible this threat of intervention.

However, a second approach, known as positive complementarity, subsequently emerged. This is a strategy of the ICC OTP aimed at rebuilding and strengthening national jurisdictions to enable them to fulfil their obligations to investigate and prosecute those most responsible for the crimes under the ICC Statute (Marshall, 2010).

This new approach to the principle of complementarity was the result of analyzing the close relationship between the ICC preventive mandate and the principle of responsibility to protect, which was de-

veloped after the failures of UN peacekeeping missions in the armed conflicts in the former Yugoslavia (1991-1995) and Rwanda (1994)[11]. Both the Brahimi Report (2000) and the 2005 World Summit on the responsibility to protect populations facing genocide, war crimes, ethnic cleansing and crimes against humanity expressed the need to implement, jointly with States, positive actions at the domestic level in order to promote human rights and good governance (UN, 2005). To this end, they defined three pillars of action of equal importance: (a) the responsibility of each State to protect its populations (first pillar); (b) the responsibility of the international community to assist States to protect their populations (second pillar); and (c) the responsibility of the international community to act directly to protect the populations of a State when it is evident that it has not managed to do so through the first and second pillars (third pillar).

The adoption in 2005 of the principle of responsibility to protect constituted a firm commitment by the international community, which awakened great expectations for a future free of atrocious crimes. It also served to promote the understanding of: (a) the complementarity between the ICC and national jurisdictions from the perspective of positive complementarity; and (b) the possibilities of proactive action by the ICC OTP.

On this basis, Luis Moreno Ocampo, the first ICC Prosecutor, stressed the importance of deepening this understanding of complementarity by stating that the ICC is not efficient because many cases reach the Court, when the absence of trials before the ICC should be understood as meaning a degree of progress in the functioning of national jurisdictions (Marshall, 2010: 23).

It was in the ICC OTP Strategic Plan for the period 2009-2012 where the central elements of the positive complementarity strategy were defined. It was understood as a collaborative effort between the ICC OTP and national jurisdictions, based on recognizing the formal primacy of the latter in preventing and punishing atrocious crimes

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[11] The origins of this principle can, however, be found in the work of Groccio, *De Jure Belli ac Pacis*, which speaks of the responsibility to protect in order to preserve and rebuild peace and prevent human societies from falling victim to armed conflict and atrocities.

committed in their territories. According to the Strategic Plan, its implementation was designed to be carried out in two phases.

The first phase consists of the evaluation by the ICC OTP of the processes and institutions of national jurisdictions, while the second involves the exceptional and proactive intervention of the ICC OTP to cooperate with States parties to strengthen their national judicial system (Olasolo, 2010).

This intervention, which is not strictly judicial (Daza González, 2015), may consist of the adoption of numerous measures such as: (a) training of national legal actors in the investigation and prosecution of atrocious crimes; (b) assistance in the establishment of protection programs for victims and witnesses or in the administration and management of information; and (c) monitoring the development of national proceedings (providing advisory opinions, guidelines and directives on how to develop them, and involving other ICC bodies to make the measures adopted more efficient).

According to the ICC OTP Strategic Plan for the period 2016-2018, the strategy of positive complementarity has generated certain progress with respect to: (a) the opening of new investigations; (b) the steps forward taken in the existing investigations thanks to the information provided by the ICC OTP to national jurisdictions; (c) the increase in requests for assistance by States Parties to the ICC OTP; and (d) better coordination between national jurisdictions and the ICC OTP.

Positive complementarity has been, however, the subject of ongoing debate because, in addition to not being expressly contemplated in the ICC Statute, authors, such as Daza González (2015), understand that it is possible to consider it as a renunciation of the investigative mandate of the ICC OTP and as a lack of will on the part of States Parties to address the crimes under the ICC jurisdiction committed in their territory or by their nationals. For this author, one of the strongest criticisms refers to the preliminary examination in the situation in Colombia (2004-2021). Although this situation is frequently invoked as a successful example of positive complementarity, in reality, for Daza González (2015: 99) the effects of the preliminary examination were minimal and in complete opposition to

impact that could have been generated by the decision to open an investigation into the international crimes committed in Colombia, in light of: (a) the gravity of the crimes; and (b) the lack of willingness and/or capacity of the Colombia national jurisdiction to investigate and prosecute those most responsible for such crimes.

Olasolo (2014), on the contrary, considers that the strategy of positive complementarity in the Colombian case has reported progress by having systematically resorted to multiple sources of information, field visits, diplomatic channels and the media to alert international society about the crimes committed and the impunity of their alleged perpetrators. This has encouraged national authorities to comply with their obligations of criminal prosecution, independently, impartially and within a reasonable time. Furthermore, the detailed monitoring carried out by the ICC OTP of the Colombian situation placed the ICC OTP in a good position to decide three years ago, in light of the progress of national proceedings, that it was not necessary to open an investigation or to keep the preliminary examination open.

Both the preliminary examination as well as the analysis of the functioning of the principle of complementarity (including the assessment of the effectiveness of the positive complementarity strategy) are specific to each situation. Therefore, it is not possible to generalize as to specific time-periods in which they should be carried out. This conclusion is reinforced by several factors, among which the following stand out: (a) the modest size and limited resources with which the ICC OTP operates; and (b) the difficulties with which the ICC OTP carries out its activities due to several factors, including the geostrategic relevance of the States not party to the ICC Statute, the resistance and the change in the political agendas of the States Parties (although the ICC OTP acts with complete independence and impartiality, it always operates amid political resistance), and the withdrawal of some States Parties from the ICC Statute in recent years (largely motivated, as shown by the cases of Burundi and the Philippines, by the opening of preliminary examinations and/or investigations with respect to such States).

All these factors have resulted in new tensions and challenges to the fulfillment of the role of the ICC. Moreover, as this situation does not seem likely to improve in the short term, it is very likely that

the ICC OTP will have no option other than to reinforce its strategy of positive complementarity, so that, in the midst of a situation of strong tensions and serious budgetary limitations, progress can be made through cooperation with national jurisdictions in achieving the ultimate goal of the ICC: ending impunity for those most responsible for atrocious crimes.

4. CONCLUSIONS

The starting point of the chapter has been the view of Campbell on ethical or soft positivism, according to which not only is it necessary to create good norms, but it is also required that those who are involved in the administration of the system adapt their methods and conduct (Campbell, 2002: 328). Accordingly, without international criminal tribunals committed to the ideals of ethical positivism, the benefits that positive law can offer cannot be achieved. Thus, if the ICC does not demonstrate commitment to the creation, consolidation and application of norms that contribute to the fight against impunity, it will not be possible to affirm that the main role of the ICC can be fulfilled.

Although the ICC's main role is to investigate and prosecute atrocious crimes of international concern (fight against impunity), according to the ICC Statute, its complementary instruments and pre-existing positive ICL, the ICC's role also consists of other elements. First, positive general prevention, which is understood as the fostering of a universal legal awareness of the relevance of the values protected by the crimes under the ICC jurisdiction. Second, general negative prevention, which seeks to deter potential perpetrators from committing this kind of atrocious crimes in the future. Third, the promotion victim participation in ICC proceedings and the implementation of effective reparation programs. Fourth, the maintenance of international peace and security, which must be carried out in a manner compatible with the action of the UNSC in the exercise of its powers under the UN Charter.

Moreover, the implementation of certain strategies, such as positive complementarity, fosters the fulfillment of the multilevel ICC's role.

Nevertheless, there is much skepticism about the capacity of the ICC to effectively fulfill its role. That said, this perception of fragility does not seem entirely accurate if one takes into account that the ICC has strategies, such as positive complementarity, which can be effective tools to: (a) promote, from the preliminary examination phase of a situation (and therefore prior to the opening of an investigation), the reconstruction and strengthening of national justice systems and their institutions, by offering technical assistance and support in a proactive manner; and (b) foster national proceedings against those most responsible for the crimes provided for in the ICC Statute.

REFERENCES

Case law

Inter-American Court of Human Rights

IACtHR [26 September 2006]. Case Almonacid Arellano et. al. vs. Chile. *Preliminary Objections, Merits, Reparations and Costs.*

International Court of Justice

ICtJ [27 June 1986]. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America). *Merits, Judgment.*

ICtJ [28 May 1951]. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. *Advisory Opinion.*

International Criminal Court

Darfur, Sudán

ICC [Pre-Trial Chamber I]. The Prosecutor v. Omar Hassan Ahmad Al Bashir. Case. No. ICC-02/05-01/09. *Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir ("Omar Al Bashir").* 12 July 2010.

Centroafrican Repúblic I

ICC [Trial Chamber III]. The Prosecutor v. Jean-Pierre Bemba Gombo. Case No. ICC-01/05-01/08. *Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims.* (2012). 22 February 2012.

ICC [Trial Chamber III]. The Prosecutor v. Jean-Pierre Bemba Gombo. Case No. ICC-01/05-01/08. *Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concems of victims*. 22 February 2012.

ICC [Trial Chamber III]. The Prosecutor v. Jean Pierre Bemba Gombo. Case No. ICC-01/05-01/08. *Judgment Pursuant 74 of the Statute*. 21 March 2016.

Democratic Republic of the Congo

ICC [Appeals Chamber]. The Prosecutor v. Thomas Lubanga Dyilo. Case No. ICC-01/04-01/06. *Appeals Judgement*. 8 December 2009.

ICC [Appeals Chamber]. The Prosecutor v. Thomas Lubanga Dyilo. No. ICC-01/04-01/06. *Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2*. Case. 3 March 2015.

ICC [Appeals Chamber]. The Prosecutor v. Thomas Lubanga Dyilo. Case No. ICC-01/04-01/06. *Judgment on the appeals against Trial Chamber II's Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable*. 18 July 2019.

ICC [Pre-Trial Chamber I]. The Prosecutor v. Thomas Lubanga Dyilo. Case No. ICC-01/04-01/06. *Decision on the Confirmation of Charges*. 14 May 2007.

ICC [Trial Chamber I]. The Prosecutor v. Thomas Lubanga Dyilo. Case No. ICC-01/04-01/06.*Decision establishing the principles and procedures to be applied to reparation*. 7 August 2012.

ICC [Appeals Chamber]. The Prosecutor v. German Katanga. Case No. ICC-01/04-01/07. *Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial"*. 16 July 2010.

ICC [Trial Chamber II]. The Prosecutor v. German Katanga. *Ordonnance de réparation en vertu de l'article 75 du Statut*. Case No. ICC-01/04-01/07. 24 March 2017.

ICC [Trial Chamber VI]. The Prosecutor v. Bosco Ntaganda. Case No. ICC-01/04-02/06. *Verdict*. 8 July 2019.

ICC [Trial Chamber VI]. The Prosecutor v. Bosco Ntaganda. Case No. ICC-01/04-02/06. *Sentencing Judgment*. 7 November 2019.

Republic of Kenya

ICC [Pre-Trial Chamber II]. Situation in the Republic of Kenya. Situation No. ICC-01/09. *Décision relative à la demande d'autorisation d'ouvrir une en-*

quête dans le cadre de la situation en République du Kenya rendue en application de l'article 15 du Statut de Rome. 31 March 2010.

Republic of Mali

ICC [Appeals Chamber]. The Prosecutor v. Ahmad Al Faqui Al Mahdi. Case No. ICC-01/12-01/15. *Public Redacted Judgment on the appeal of the victims against the "Reparations Order"*. March 2018.

Republic of Uganda

ICC [Pre-Trial Chamber II]. The Prosecutor v. Joseph Kony. Case No. ICC-02/04-01/05. *Request to the Democratic Republic of Congo for Arrest and Surrender of Joseph Kony*. 27 September 2005.

International Criminal Tribunal for Rwanda

ICTR [Trial Chamber III]. The Prosecutor v. Vincent Rutaganira. Case No. ICTR-95-1C-T. *Judgment and Sentence*. 14 March 2005.

International Criminal Tribunal for the former Yugoslavia

ICTY [Appeals Chamber]. The Prosecutor v. Tihomir Blaškić. Case No. IT-95-14-A. *Judgment*. 29 July 2004.

Doctrine

Ambos, K. (2013). *Treatise on International Criminal Law*. Oxford (United Kingdom): Oxford University Press.

Bassiouni, M.C. (1999). *International Criminal Law*. New York (USA): Transnational Publishers.

Bassiouni, M.C. (2003). *Introduction to International Criminal Law*. New York (USA): Transnational Publishers.

Beccaria, C. (2014). *De los delitos y de las penas*. México: Editorial Porrúa.

Blokker, N. (2007). "The Crime of Aggression and the United Nations Security Council". *Leiden Journal of International Law*. Vol. 20. No. 4. Pp. 867-894.

Broomhall, B. (2004). *International Justice & The International Criminal Court*. Oxford (United Kingdom): Oxford University Press.

Campbell, T. (2002). "El sentido del positivismo jurídico". *DOXA*. Vol. 25. Pp. 303-321.

Campos Zamora, F.J. (2010). "Nociones fundamentales del realismo jurídico". *Revista de Ciencias Jurídicas*. Vol. 1. No. 22. Pp. 191-220.

Cardona Llorens, J. (2003). "La Corte Penal Internacional y el mantenimiento de la paz y seguridad internacionales". In: Cardona Llorens, J., Gómez Colomer, J.L. & González Cussac, J.L. (Eds.). *La Corte Penal Internacional (un estudio interdisciplinar)*. Valencia (Spain): Tirant lo Blanch. Pp. 61-103.

Carsten, S. (2007). "Jus ad bellum, jus in bello … jus post bellum? Rethinking the Conception of the Law of Armed Force. *The European Journal of International Law*. Vol. 17. No. 5. Pp. 921-943.

Cassese, A. (1998). "Reflections on International Criminal Justice". *The Modern Law Review*. Vol. 61. No. 1. Pp. 1-10.

Condorelli, L. (1999). "La Cour pénale internationale: un pas de géant (pourvu qu'il soit accompli…)". *Revue Générale de Droit International Public*. Vol. 103. No. 1. Pp. 7-21.

Cortés Rodas, F. (1997). "La filosofía política del liberalismo. Hobbes, Locke y Rawls". *Estudios Políticos*. Vol. 10. Pp. 59-87.

Cryer, R., Friman, H., Robinson, D. & Wilmshurst, E. (2010). *An Introduction to International Criminal Law Procedure*. Cambridge (United Kingdom): Cambridge University Press.

Daza González, A. (2015). *El principio de complementariedad en el derecho penal internacional. Jus Penal* Book Collection. Bogotá (Colombia): Universidad Católica de Colombia.

De Brower, A.M. (2015). "The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purpose". *Cornell International Law Journal*. Vol 48. No. 3.

De Guzmán, M.M. (2015). "Proportionate Sentencing at the ICC". In: Carsten, S. (Ed.). *The Law and Practice of the International Criminal Court*. Oxford (United Kingdom): Oxford University Press. Pp. 932-962.

Donat-Cattin, D. (1998). "Crimes Against Humanity". In: Lattanzi, F. (Ed.). *The International Criminal Court. Comments on the Draft Statute*. Napoles (Italy): Editoriale Scientifica & University of Teramo. Pp. 49-52.

Escobar Hernández, C. (2000). "El Estatuto de Roma de la Corte Penal Internacional". In: Abogacía del Estado & Ministerio de Justicia de España (Eds.). *Hacia una justicia internacional (XXI Jornadas de Estudio, 9 al 11 de junio de 1999)*. Madrid (Spain): Abogacía General del Estado & Ministerio de Justicia.

Escobar Hernández, C. (2002). "Corte Penal Internacional, Consejo de Seguridad y crimen de agresión: un equilibrio difícil e inestable". In: Mariño Menéndez, F. (Ed.). *El derecho internacional en los albores del siglo XXI. Homenaje al profesor Juan Manuel Castro-Rial Canosa*. Madrid (Spain): Trotta. Pp. 243-264.

Escobar Hernández, C. (2003). "La Corte Penal Internacional: un instrumento al servicio de la paz". *Revista Internacional de Filosofía Política*. Vol. 21. Pp. 1-31.

Fuentes Torrijo, X. (2011). "El principio de complementariedad en la práctica de la Corte Penal Internacional". *Estudios Internacionales*. Vol. 169. Pp. 119-140.

Galván, E.R. (2019). "La reparación de las víctimas en la jurisprudencia de la Corte Penal Internacional". *Derechos en Acción*. No. 13. Pp. 345 et. seq.

Gutiérrez Espada, C. (2000). "Valoración crítica de las críticas y temores suscitados por el Tribunal Penal Internacional". In: Abogacía General del Estado & Ministerio de Justicia (Eds.) *Hacia una justicia internacional (XXI Jornadas de Estudio, 9 al 11 de junio de 1999)*. Madrid (Spain): Abogacía General del Estado & Ministerio de Justicia. Pp. 580 et. seq.

Harhoff, F. (2008). "Sense and Sensibility in Sentencing - Taking Stock of International Criminal Punishment". In: Engdahl, O. & Wrange, P. (Eds.). *Law at War: The Law as It Was and the Law as It Should Be*. Leiden (The Netherlands): Martinus Nijhoff Publishers. Pp. 121-140.

Hart, H.L.A., & Lyonel A. (1983). "Ihering's Heaven of Concepts and Modern Analytical Jurisprudence". In: Hart, H.L.A. *Essays in Jurisprudence and Philosophy*. Oxford (United Kingdom): Oxford Clarendon Paperbacks. Pp. 271 et. seq.

Jiménez de Aréchaga, E. (1979). "La costumbre como fuente del derecho internacional". In: *Estudios de derecho internacional. Homenaje al profesor Miaja de la Muela*. Vol. 1. Madrid (Spain). Editorial Tecnos. Pp. 625 et. seq.

Kreb, C. & Von Holtzendorff, L. (2010). "The Kampala Compromise on the Crime of Aggression". *Journal of International Criminal Justice*. Vol. 8. No. 5. Pp. 1179-1217.

Knoops, G.J. (2003). *An Introduction to the Law of International Criminal Tribunals*: Transnational Publishers.

Lattanzi, F. (1999). "The Rome Statute and State Sovereignty. ICC Competence, Jurisdictional Links, Trigger Mechanism". In: Lattanzi, F. & Schabas, W. (Eds.). *Essays on the Rome Statute of the International Criminal Court*. Ripa di Fagnano Alto (Italy): Editrice il Sirente.

Laucci, C. (1999). "Compétence et complémentarité dans le statut de la future Cour Pénale Internationale". *L' Observateur des Nations Unies*. Vol. 7. Pp. 131-176.

López Martín, A.G. (2013). "Primera sentencia de la Corte Penal Internacional sobre reparación a las víctimas: caso The Prosecutor v. Thomas Lubanga Dyilo, 7 de agosto de 2012". *Revista Española de Derecho Internacional*. Vol. LXV. No. 2. Pp. 209-226.

Maculan, E., & Gil Gil, A. (2020). "The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts". *Oxford Journal of Legal Studies*. Vol. 40. No. 1. Pp. 132–157.

Marshall K.A. (2010). "Prevention and Complementarity in the International Criminal Court: A Positive Approach". *Human Rights Brief*. Vol. 17. No. 2. Pp. 21-26.

Moffett, L. (2019). *Reparations at the ICC: Can It Really Serve as a Model?* https://www.justiceinfo.net/en/41949-reparations-at-the-icc-can-it-really-serve-as-a-model.html.

Olasolo, H. (2010). "The Role of Victims in Criminal Proceedings before the International Criminal Court". *Revue Internationale de Droit Penal*. Vol. 81. Pp. 125-163.

Olasolo, H. (2010). *La función de la Corte Penal Internacional en la prevención de delitos atroces mediante su intervención oportuna: de la Doctrine de la intervención humanitaria y de las instituciones judiciales ex post facto al concepto de responsabilidad para proteger y la función preventiva de la Corte Penal Internacional. Oratie*. University of Utrecht (The Netherlands). https://publicaciones.fder.edu.uy/index.php/idp/article/view/97.

Olasolo, H. (2012). "El principio de complementariedad y las estrategias de actuación de la Corte Penal Internacional en la fase de examen preliminar: ¿porqué la Corte Penal Internacional mantiene su examen preliminar, pero no abre una investigación, sobre la situación en Colombia?". *Revista Electrónica de Relaciones Internacionales*. Vol. 24. Pp. 3-45.

Olasolo, H. (2014). "Los exámenes preliminares de la Corte Penal Internacional en América Latina: el caso colombiano y su impacto sobre futuras negociaciones de paz en la región". *Anuario de Derechos Humanos*. Vol. 10. Pp. 35-56.

Olasolo, H. (2016). "Los fines del derecho internacional penal". *International Law: Revista Colombiana de Derecho Internacional*. Vol. 14. No. 29. Pp. 93-146.

Olasolo, H. & Galain Palerno, P. (2018). *Los desafíos del derecho internacional penal: atención especial a los casos de Argentina, Colombia, España, México y Uruguay*. Perspectivas Iberoamericanas sobre la Justicia Book Collection. Vol. 1. Valencia (Spain): Tirant Lo Blanch, Instituto Ibero-Americano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional & Instituto Joaquín Herrera Flores. https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-1-coleccion-desafios-derecho-internacional-penal.

Orrego, C. (1997). *H.L.A. Hart. Abogado del positivismo jurídico*. Pamplona: EUNSA.

Osiel M. J. (2000). "Why to Prosecute? Critics of Punishment for Mass Atrocity". *Human Rights Quarterly*. Vol. 22. No. 1. Pp. 118-147.

Quesada Alcalá, C. (2012). "La agresión: un crimen 'cierto' de futuro 'incierto'". In: Cardona Llorens, J., Pueyo Losa, A., Rodríguez-Villasante y Prieto, J.L., Sobrino Heredia, J.M. & Aznar Gómez, M.J. (Eds.). *Estudios de derecho internacional y de derecho europeo en homenaje al profesor Manuel Pérez González*. Valencia (Spain): Tirant Lo Blanch. Pp. 1069-1092.

Quesada Alcalá, C. (2013). "El crimen de agresión como amenaza a la seguridad global". *Cuadernos de Estrategia*. Vol. 160. Pp. 77-116.

Quesada Alcalá, C. (2019). "Levantando el velo de la lucha contra la impunidad". In: Rocha Herrera, M., Quesada Alcalá, C. & Urueña-Sánchez, M.I. (Eds.). *Actores contemporáneos internacionales. Normatividad y poder en las relaciones internacionales*. Perspectivas Iberoamericanas sobre la Justicia Book Collection. Vol. 7. Valencia (Spain): Tirant Lo Blanch, Instituto Ibero-Americano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional & Instituto Joaquín Herrera Flores. Pp. 225-256. https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-7-actores-internacionales-contemporaneos.

Remiro Brotons, A. (2005). "Agresión, crimen de agresión, crimen sin castigo". *Documento de Trabajo*. Vol. 10. Pp. 18 et. seq.

Remiro Brotons, A. (2012). "El crimen de agresión en el Estatuto de la CPI revisado: Nascetur ridiculus mus". In: Cardona Llorens, J., Pueyo Losa, A., Rodríguez-Villasante y Prieto, J.L., Sobrino Heredia, J.M. & Aznar Gómez, M.J. (Eds.). *Estudios de derecho internacional y de derecho europeo en homenaje al profesor Manuel Pérez González*. Valencia (Spain): Tirant Lo Blanch. Pp. 1115-1129.

Rodríguez-Villasante y Prieto, J.L. (2010). *Nota sobre la conferencia de revisión del Estatuto de Roma de la Corte Penal Internacional, Kampala (Uganda)*. Cruz Roja Española. https://www.cruzroja.es/principal/documents/1750782/1840691/Notas+Conferencia+de+revision+de+Kampala.pdf/6bdb6706-e5ab-49f2-9fd5-487544a3cf19.

Rodríguez-Villasante y Prieto, J.L. (2011). La Corte Penal Internacional, de Roma a Kampala pasando por La Haya. "Consenso" sobre el crimen de agresión en la conferencia de revisión del Estatuto. *Revista General de Marina*. Vol. 260. Pp. 769-779.

Scheffer, D. (2012). *All the Missing Souls, A personal History of the War Crime Tribunals*. Princeton (USA): Princeton University Press.

Slye, C.R. & Van Schaack, B. (2009). *Essentials International Criminal Law*. New York (USA): Wolters Kluwer Law & Business.

Soto Cremades, M. (2018). "La incidencia del debate paz-justicia en los retos que afronta la CPI". *Revista de Paz y Conflíctos*. Vol. 11. No. 2. Pp. 237-253.

Stein, M. (2005). "The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?". *Indiana International and Comparative Law Review*. Vol. 16. No. 1. Pp. 1-36

Von Hebel, H. & Robinson, D. (1999). "Crimes Within the Jurisdiction of the Court". In: Lee, R.S. (Ed.). *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*. The Hague (The Netherlands): Kluwer Law International.

Werle, G. (2010). *Tratado de derecho penal internacional*. Valencia (Spain): Tirant lo Blanch.

Resolutions, Reports and Other Documents

Institut Catalá Internacional per la Pau. (2012). *El futuro de la Corte Penal Internacional. Hacia el X aniversario de la entrada en vigor del Estatuto de Roma*. In: *Relatoría del seminario*. Barcelona. *9-10 de enero de 2012*.

International Criminal Court. Assembly of States Parties. (2010). Amendments to the Rome Statute of the International Criminal Court on the crime of aggression. Resolution RC/Res.6. 11 June 2010.

International Criminal Court. Office of Public Counsel for Victims. (2013). *Representación de Víctimas ante la Corte Penal Internacional. Manual para los Representantes legales*. Doc. No. ICC-OPCV-MLR-001/13_Spa. https://www.icc-cpi.int/iccdocs/opcv/OPCVManualSpa.pdf.

International Criminal Court. Office of the Prosecutor. (2005). Informal Meeting of Legal Advisors of Ministries of Foreign Affairs. 24 October 2005. https://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A%20CEA8B6799E37/143836/LMO_20051024_English.pdf.

International Criminal Court. Office of the Prosecutor. (2010). Prosecutorial Strategy 2009-2012. https://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62 D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf.

International Criminal Court. Office of the Prosecutor. (2012a). Joint letter to the Chief Prosecutor of the International Criminal Court.

International Criminal Court. Office of the Prosecutor. (2012b). The Prosecutor v. Thomas Lubanga Dyilo. Case No. ICC-01/04-01/06. Prosecution's Submissions on the principles and procedures to be applied in reparations. 18 April 2012.

International Criminal Court. Office of the Prosecutor. (2014). Policy Paper on Sexual and Gender-Based Crimes. https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes–june-2014.pdf.

International Criminal Court. Office of the Prosecutor. (2015). Strategic Plan 2016-2018. https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf.

International Criminal Court. Office of the Prosecutor. (2019). Strategic Plan 2019-2021. https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf.

International Criminal Court. Office of Public Information. (2018). Case Information Sheet: Omar Hassan Ahmad Al Bashir. https://www.icc-cpi.int/CaseInformationSheets/albashirEng.pdf.

International Criminal Court. Registry. (2012). The Prosecutor v. Thomas Lubanga Dyilo. Case. No. ICC-01/04-01/06. First Report to the Trial Chamber on applications for reparations. Annex EX PARTE. 8 March 2012.

International Criminal Court. Registry. (2012). The Prosecutor v. Thomas Lubanga Dyilo. Case. No. ICC-01/04-01/06. Second Report of the Registry on Reparations. 19 March 2012.

Meschoulam, M. (2015). *¿Funciona la Corte Penal Internacional? El caso Al Bashir y su último escape*. In: *El Universal. Ciudad de México*. 17 June 2015.

Sumano Rodríguez, J. A. (2020). *Detener la hemorragia es posible. Parte II/II*. In: *Nexos. Ciudad de México (México)*. 27 January 2020. https://seguridad.nexos.com.mx/?p=1897.

United Nations. General Assembly. (2005). 2005 World Summit Outcome. Doc. No. A/RES/60/1. 24 October 2005. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf.

United Nations. Security Council. (2008). Resolution 1820. Doc. No. S/RES/1820 (2008). 19 June 2008. https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf.

United Nations. Security Council. (2009). Resolution 1888. Doc. No. S/RES/1888 (2009). 30 September 2009. https://www.un.org/shestandsforpeace/sites/www.un.org.shestandsforpeace/files/unscr_1888_2009.pdf.

Chapter 3
The Perspective of the Principles Governing Information Management and Archival Policy: Special Attention to the Relationship Between Archives, Human Rights and International Justice[*]

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In memory of Louis Joinet (1934-2019)

1. INTRODUCTION

In October 2020, Fabián Salvioli, Special Rapporteur of the United Nations (UN) for the promotion of Truth, Justice, Reparation

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[*] For the institutional ascription of this chapter, see the initial Note of the book.

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and Guarantees of Non-Repetition, presented his report on the processes of memorialization in the context of serious violations of human rights and international humanitarian law (IHL). Along with the right to truth, the right to justice, the right to reparation and the guarantees of non-repetition, such memorialization processes have been incorporated into the notion of transitional justice as its fifth pillar. They do not replace the other four pillars nor do they represent an excuse for legal impunity (Salvioli, A/HR/45/45, 2020: para. 102).

Salvioli argues that the protection of the archives of state agencies and civil society organizations (especially human rights organizations) is crucial to carrying out effective memorialization processes. Archives must be accessible according to established norms and governments must remove obstacles to such access (Salvioli, A/HR/45/45, 2020: para. 113).

In addition, the Special Rapporteur made a final, far-reaching, recommendation in saying that the UN must establish procedures to share its own archives, which are important to clarifying the pasts of many societies and to contribute to the fulfillment of the right to truth. Specifically, the UN must create a methodology that can be easily accessed to allow societies to learn more about their own history (Salvioli, A/HR/45/45, 2020: para. 114)[1].

The report of the Special Rapporteur marks an end to a time characterized rendering Record management and the work of archivists irrelevant. Rather, it places them in the front line of the fight against impunity. It is not possible to understand today the dimensions that the right to truth involve without paying attention to the centrality that archives occupy in the design and implementation of policies guided by and for international justice (IJ).

From being the great unknowns and an important obstacle to the right to know, we have come a long way in placing archives on the political agenda of international law (IL) and IJ. It is unquestionable that archives constitute a strong asset as guarantors of human rights,

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[1] See also section D on access to files (Salvioli, A/HR/45/45, 2020: paras. 70, 71, 72).

even though doctrine has rarely addressed them in relation to IL. Far from being part of the problem, they are an integral part of the solution. However, there remains much to be done as proposed in this text, which examines the role played –or, better said, that should be played– by archives and, more specifically, by archivists in a field dominated in the main by jurists.

Looking back, the starting point of this journey stretches back to the 1990's. Since then, there has been a coincidence of a sort of double process of mutual feedback over which there has been very limited reflection.

First, the establishment by the UN Security Council (UNSC) of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, together with the approval, and entering into force, of the ICC Statute, implied –in the words of González Quintana (2009) – the reinforcement of the close relation between archives and human rights and of its international dimension, incorporating the notion of universal justice. And what is more relevant is that, from those initiatives, arose the unprecedented challenge for the new international criminal tribunals of managing and preserving an enormous mass of documents, having very diverse origins and natures.

Secondly, during the 1990s and the first decade of the 21st century, the UN Human Rights Commission Special Rapporteurs, Louis Joinet (E/CN.4/Sub.2/1997/20/Rev.1, 1997) and Diana Orentlicher (E/CN.4/2005/102/Add.1, 2005), established a set of principles for the protection and promotion of human rights through the fight against impunity. These were texts in which, for the first time, archives were placed at the center of IJ, through five principles inserted into the right to truth. They would later serve as a basis for numerous resolutions, recommendations and reports prepared by the UN Educational, Scientific and Cultural Organization (UNESCO), the UN Office of the High Commissioner for Human Rights (OHCHR) and the International Council on Archives (ICA).

Thus, in the last three decades progress has been made as never before in this mutual recognition of the complementary and interrelated nature of archives, human rights and IJ (Boel, Canavaggio &

González Quintana, 2021). Of course, there is still a long way to go from theory to practice in the implementation of professional record management processes in international criminal justice (ICJ), but the doctrinal bases have been settled.

To examine all these historical novelties at the doctrinal and practical levels, as well as to determine the role that the ICC can play for the establishment of a global archive against impunity, this chapter has been divided into four main sections. In the first place, there is a review of the "leap forward" concerning the right to truth as a result of the aforementioned initiatives by the UN Human Rights Commission and Council. Second, a case study based upon the archival system created as a result of the establishment of the ICTY and the ICTR is presented. It is the first example of using a global archive against impunity. To do this, we focus on the archives of the International Residual Mechanism for International Tribunals (IRMCT). Third, an analysis of the ICC's role in relation to record management and archiving policy is undertaken, so as to ask ourselves about its strengths and weaknesses from an archival perspective. The chapter closes with a set of conclusions, in the form of pending questions and possible solutions within a scenario that, despite what has been discussed, cannot be described as optimistic.

2. THE EMERGENCE OF THE RIGHT TO TRUTH: ARCHIVES AS GUARANTORS OF HUMAN RIGHTS

2.1. The leap forward in the period 2005-2020

Despite the criticism experienced in the last two decades by international criminal law (ICL), international human rights law (IHRL) and IHL (Cassese, 2008; Risse, 2012; Olasolo, 2017; Tan, 2017), since 2005 the right to the truth has been strengthened in IL. As González Quintana (2016) has underlined, this reinforcement has led to the recognition in the field of IJ of the role of archives and the work of archivists.

Several steps have been taken that can be followed, in detail, in the 2006 study on the right to the truth by the UN Commission on Human

Rights (OHCHR, E/CN.4/2006/91)[2]. In this report, the increased relevance of legislation on access to information, and particularly the regulation of the right to *habeas data*, is underlined. Likewise, it affirmed that the right to the truth: (a) is an autonomous and inalienable right, linked to the obligation and duty of States to protect and guarantee human rights; (b) cannot be suspended; and (c) must not be subject to restrictions (OHCHR, E/CN.4/2006/9: 2).

Three years later, in a report dedicated to the study of the best practices for the effective exercise of the right to truth (OHCHR, A/HRC/12/19), the OHCHR noted that the recognition that archives and archivists play a critical role in supporting human rights has increased over the last decade (2009: para. 5). Likewise, it showed its concern for ensuring the future of the archives of the international criminal tribunals (OHCHR, A/HRC/12/19: para. 28). This is a concern that came from afar, as evidenced by Resolution 2003/72 of the Human Rights Commission of April 25, 2003 (Human Rights Commission, 2003).

In this same sense, the UNSC, in its 2009 and 2011 reports, demonstrated the priority that the correct location and financing of the archives of the ICTY, the ICTR and the SCSL had for the UN. Moreover, in a document on the rule of law and transitional justice in societies that suffer or have suffered conflicts (ONU, 2011: paras. 29-32), the way in which these tribunals had opened the archives to the public was congratulated by UNSC (UNSC, S/2009/258; S/2011/634: 29-32; Peterson, 2006; Trujillo Sánchez, 2010).

Civil Society also addressed this matter in the Global Principles on National Security and the Right to Information (VV. AA., 2013), known as the Tshwane Principles. In particular, Principle 10 specifically addresses the categories of information about which there is a strong presumption or an overriding interest in favor of disclosure.

All of this laid the foundations for the adoption in 2010 and 2013 of: (a) Resolution 14/7 of the Human Rights Council on the Proclamation of March 24 as the International Day of the Right to the Truth in relation to Serious Violations of Human Rights and the Dignity

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[2] See also: Human Rights Council (27/09/2012). Resolution 21/7 on the right to the truth. 27 September 2012.

of Victims (UNGA, A/RES/65/196; HRC, A/HRC/RES/14/7; UN, n.d.(a)); and (b) Resolution 68/165 of the UN General Assembly (UNGA) on the right to the truth (UNGA, A/RES/68/165). Both resolutions consolidated the leap forward as to the role granted in IL to archives and document management[3].

This last resolution recognizes, in point 1, the importance of respecting and guaranteeing the right to the truth as a contribution to ending impunity and promoting and protecting human rights (UNGA, A/RES/68/165). Furthermore, in points 10 and 11, it encourages those States that have not yet done so: (a) to establish a national archival policy that guarantees the preservation and protection of all archives in their possession relating to human rights; (b) to promulgate legislation which declares that the nation's documentary legacy must be conserved and preserved; and (c) to establish a framework for the management of state documents from their creation forward.

Furthermore, the UNGA requested the OHCHR to provide information on good practices for the establishment, preservation and access to national archives on human rights, and to put the information received at the disposition of the public through an online database (UNGA, A/RES/68/165).

This recognition of the central role of document management, archives and archivists in the defense of human rights and in the application of IJ, continues to the present day. As a result, on September 15, 2019, the UNGA approved Resolution 74/5 on the proclamation of September 28 as the international day for universal access to information (UNGA, A/RES/74/5).

2.2. The work of the UN Special Rapporteurs Louis Joinet and Diane Orentlicher between 1997 and 2005 as the premise for the leap forward made from 2005 onwards

The leap forward taken from 2005 onwards would not have been possible without the work of the UN Special Rapporteurs Louis Joi-

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3 See also: Human rights Council (01/10/2009). Resolution 12/12 on "The Right to the Truth" (HCR, A/HRC/RES/12/12) and Bernales Rojas (2016).

net and Diane Orentlicher who, between 1997 and 2005, established and developed a valuable set of principles against impunity. Through these principles, the archives acquired major relevance[4].

Joinet and Orentlicher addressed, *inter alia*, the following three fundamental matters: (a) a complete review of the principles to fight against impunity in which, for the first time in a UN document, archives and archivists appeared expressly as guarantors of the right to know; (b) the consideration of the archives themselves as a guarantee for the defense of human rights in cases of serious crimes under IL; and (c) the provision, also for the first time, of a series of recommendations to States on the preservation and consultation of the archives and their cooperation with international tribunals and extrajudicial commissions of investigation.

"The issue of impunity for perpetrators of human rights violations (civil and political)" (Joinet, E/CN.4/Sub.2/1997/20/Rev.1, 1997) was the title of the report presented by Joinet in 1997. The French jurist drew four stages on the origins of the fight against impunity. It began in the 1970's with the experience of the struggles for democracy in Latin America (without mentioning the Spanish or Portuguese cases) and concluded with a set of initiatives culminating in the Vienna Declaration and Action Program, of which the Joinet Report is its main result.

Joinet structured the set of principles for the protection and promotion of human rights through the fight against impunity in four large blocks: (a) the right to know; (b) the right to justice; (c) the right to reparation; and (d) the right to non-repetition. Shortly thereafter, they were updated by Orentlicher (E/CN.4/2005/102/Add.1, 2005).

From the 1997 report, it is useful to refer to its definition of the right to know, which proposes that it be read in terms of both individual and collective rights and where it is made clear that there is a safeguarding role to be played by the States. Thus, according to Joinet (E/CN.4/Sub.2/1997/20/Rev.1, 1997: 4), it is not just about

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4 Bassiouni (2008); Klinkner & Davis (2020). Concerning the role of victims in ICL, see: Vega (2006).

the individual right that every victim, or their relatives or friends, has to know what happened, which comprises the right to the truth. The right to know is also a collective right that aims to prevent violations from recurring in the future. On the other hand, it includes, under state responsibility, the duty of memory to protect against the deformations of history that are called revisionism and denialism; in effect, knowledge, for a people, of the history of their oppression belongs to its heritage and as such must be preserved. Such are the main purposes of the right to know as a collective right.

There are four general principles established within the right to know: (a) the inalienable right to the truth (Principle 2); (b) the duty to remember (Principle 3); (c) the victims' right to know (Principle 4); and (d) the guarantees to make the right to know effective (Principle 5) (Orentlicher, E/CN.4/2005/102/Add.1, 2005: 7-8). In Principles 3 and 5 there is an express recognition of the work of the archives in the fight against impunity.

As regards the novelties of the Orentlicher Report, there is an expansion of Joinet's initial definitions ("impunity", "serious crimes under international law" and "processes with a view towards reestablishing democracy and/or peace or transition towards them") to also include the definitions of truth commissions and archives. As Orentlicher explains, the word "archives" refers to collections of documents relating to violations of IHRL and IHL from sources that include: (a) national governmental agencies, in particular those that have played an important role in relation to human rights violations; (b) local institutions that have been involved in human rights violations, such as police stations; (c) public institutions involved in the protection of human rights, including Prosecutor's Offices and the judiciary; and (d) materials collected by truth commissions and other investigative bodies (Orentlicher, E/CN.4/2005/102/Add.1, 2005: 6).

But what was truly new was that within the right to know a section (c) was included which entitled the "preservation and consultation of archives in order to determine violations". Under this, documentary management took on a relevance never previously granted in the fight against impunity. It specified five main principles: (a) measures for the preservation of archives (Principle 14); (b) measures to

facilitate consultation of archives (Principle 15); (c) cooperation of archival services with tribunals and extrajudicial investigatory commissions (Principle 16); (d) specific measures related to personal files (Principle 17); and (e) specific measures related to the processes of reestablishing democracy and/or peace or of transition towards them (Principle 18) (Orentlicher, E/CN.4/2005/102/Add.1, 2005).

These principles support the right to the truth based on professional record management policy. In particular, as provided for in Principle 16, the tribunals and the extrajudicial commissions of investigation, as well as the investigators working under their responsibility, must be able to freely consult the archives. This principle is to be applied in such a way as to respect the relevant requirements for the protection of privacy, including assurances of confidentiality provided to victims and other witnesses as a precondition for their testimony. Access to archives may not be denied for reasons of national security unless, in exceptional circumstances: (a) the restriction has been prescribed by law; (b) the Government has demonstrated that the restriction is necessary in a democratic society; and (c) the denial has been subject to an independent judicial review (Orentlicher, E/CN.4/2005/102/Add.1, 2005).

In this way, the urgent need for collaboration between States and justice is made clear. It renders the former politically and legally responsible for the proper functioning of the national archival system based upon the foundation of the obligations described. Furthermore, the interrelation of these obligations with Principles 15 and 17 offers a global vision about the relevance of the right of access to documentation as a fundamental requisite in the fight against impunity.

3. THE INTERNATIONAL CRIMINAL TRIBUNALS AND THEIR RESIDUAL MECHANISM AS THE SOURCE OF ARCHIVES *EX-NOVO*

Although there have been previous experiences with international criminal tribunals such as those of Nuremberg (1945-1946) and Tokyo (1946-1948), as well as with other transitional justice institutions, such as truth commissions, in many of these cases the safeguarding

of their record has not been taken into account. An endless number of these archives have either been lost or have ended up in countries far removed from the place in which they were generated, due to the lack of an authority having the capacity to decide on the long-term conservation and preservation of these archive collections[5].

To avoid this, the UN has adopted a set of measures, beginning in the first decade of the 21st century, to ensure the permanent conservation of documentation related to international criminal tribunals[6]. These initiatives were led by the UNSC and the UN Secretary General, Ban Ki-moon, between 2009 and 2011 (UNSC, S/2009/258; S/2011/634: 29-32). They have generated a large set of files *ex-novo*. These initiatives constitute a historical milestone, which has perhaps not been sufficiently valued. Moreover, they have had important consequences for the archives of the subsidiary bodies of the UNSC, such as the ICTY, the ICTR and the IRMCT.

As a result, the following issues will be analyzed in the coming sections: How are these archives organized? How do they work? What type of archival treatment do they receive? Are there examples of similar archives? What are its main strengths and limitations?

3.1. The archives of the Residual Mechanism of International Criminal Tribunals

The IRMCT is the organization responsible for all documents managed by the international criminal tribunals (in particular, by the ICTY and the ICTR), which have been transferred to its custody (IRMCT, n.d.(a)). This means managing, preserving and providing access to a massive quantity of physical and electronic documents (more than 3 petabytes of electronic documents), as well as maps, photographs, audio and video recordings, databases, web pages and

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5 This is the case, for example, of the Truth Commission of El Salvador, whose documentation has been deposited in a private entity located in the United States paid for by volunteers.

6 See also the UN archival system: Biraud (2013); ONU (n.d.(c)); ONU (n.d.(d)).

all kinds of records located in its branches in Arusha (Tanzania) and The Hague (Netherlands).

Any data or information preserved by the IRMCT, the ICTY or the ICTR is considered evidence of its management and the result of its activities (IRMCT, 2019: art. 1). Most records are the result of investigations and legal proceedings (including those related to the detention of accused persons, the protection of witnesses and the enforcement of sentences). Moreover, there are records about the administration of the tribunals as UN organs.

The records of international criminal tribunals have a unique character. They include those that have been generated by the Chambers, the Prosecutor's Office and the Registry, as well as those that come from the Defense and third parties. They are composed of accusations, motions, orders, decisions and sentences, as well as evidence admitted by the Chambers, transcripts and audiovisual recordings of the proceedings. Moreover, there are non-judicial documents, which are all those records that are handled by the IRMCT, but which are not a direct consequence of judicial activity.

In 2016, the Access Policy for the Records of the IRMCT was published, which constitutes the basis of the organization's security and access to information regime (IRMCT, 2016). The Policy, which was revised in 2019, conceived access as both the right and the means of finding, using and retrieving information and records from the IRMCT (IRMCT, 2019: art. 1)[7]. It complied with the IRMCT's obligation of openness and transparency, while showing its commitment to the principles enshrined in the ICA's universal declaration on archives (2010). It also complied with the UN rules and standards on access policy (SGNU, 2012).

According to the Policy, there are three types of records, depending on the need to protect the information contained in them: (a) strictly confidential; (b) those that, without being strictly confidential, have been assigned a security classification level of confidential; and (c) records not classified as confidential (whose unauthorized

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7 The form for this process is available at: https://www.irmct.org/en/records-enquiry.

disclosure would not harm the work of the IRMCT). There is also the possibility of ordering: (a) the declassification of confidential records to make previously restricted content permanently accessible; or (b) the disclosure of confidential records to make restricted materials accessible only for a specific purpose. It is also possible to prepare copies of the records in which their sensitive or classified information is redacted. All this is managed through the Access Coordination Unit, which also implements any judicial decision on the redaction of records or change in their classification level[8].

As provided for in the Policy, records which, in principle, cannot be disclosed include the following three types of documents:

1. Any record received or issued having a confidential nature or having the possibility of a confidential classification, or whose disclosure could compromise the security or protection of any person, violate his/her rights or invade his/her privacy —including records and information related to the protection of witnesses, victims or other vulnerable persons, as long as they are related to the evidence or proceedings of the ICTY, the ICTR or the IRMCT (they are records containing information that, if accessed without proper authorization, would reveal the identity and location of the aforementioned persons, including personal information concerning the detainees and their relatives).

2. Any record: (a) whose publication could compromise the security of UN member states or harm any UN operation; (b) that enjoy any legal privilege; (c) that are related to internal investigations, including judicial records classified as confidential, or as strictly confidential, by any judicial order or decision; or (d) that comes from the Prosecutor's Office and which, if disclosed without the proper authorization, could jeopardize an investigation or process.

3. Any record: (a) that moves between different units of the tribunals, including drafts, if their disclosure could undermine the IRMCT's free and independent decision-making process; (b) of a commercial nature, if its disclosure could harm the financial interests of the IRMCT or of other parties involved; or (c) that, because

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8 These Access Coordination Centres are in the Registry.

of its content or the circumstances of its creation or communication, must be considered confidential.

Moreover, restrictions also apply to documents that: (a) originate from a third party and cannot be disclosed without the express consent of the original source; or (b) are related to witnesses or evidence subject to protective measures (access to which cannot be granted without a court order).

When information has been classified as "confidential" by a judicial authority, access is only possible through: (a) a judicial order for its permanent declassification or for its disclosure for a specific purpose; or (b) redactions that eliminate the confidential information from a copy of the record. For this, it is necessary to make an application to the IRMCT Registry, which is the organ responsible for implementing procedures to transfer requests for access to classified judicial records to the president of designated Chamber (such requests are considered to be court records). The Registry will implement any decision adopted by the competent Chamber. The fact that access to a classified document has been granted does not necessarily mean a definitive change in its level of confidentiality.

Likewise, an organ of the IRMTC (such as, for example, the Prosecutor's Office) may, because of an access request transmitted by the Registry, take the decision to; (a) declassify records that it has previously classified as confidential; (b) authorize the disclosure of the information for a specific purpose; or (c) authorize access to redacted copies of records once the sensitive information has been removed.

Regarding non-judicial classified records, access can be requested to the Access Coordination Unit, who can reject such a request for, among other grounds, the following reasons: (a) the language used in the request is inappropriate, vexatious, trivial or frivolous; (b) the requested information is already, or soon will be, publicly available; (c) the requested information is not specific or is too broad; (d) the requested information does not exist, is not in the custody of the IRMCT, or, despite reasonable efforts to locate it, cannot be found; (e) the requested information cannot be supplied without an overly arduous investigation.

When access to non-judicial records is denied, the applicant will be given the reason for such a decision, and he/she may submit a request for review through the Access Coordination Unit. The latter will subsequently send the request to the president of the organ that has created or received the relevant record. Its decision will be definitive.

While copies of classified records with sensitive information removed are kept as separate records from classified records, declassified records are labeled as such and are considered authorized versions of the records. Furthermore, they can be reproduced as long as the original source is quoted, and the information is not distorted. If they contain material copyrighted by a third party, the applicant may not reproduce or publish this material without obtaining the permission of the copyright holder. In this sense, the granting of an access request by the IRMCT should not be interpreted as eliminating the intellectual property rights of the author.

Consequently, the IRMCT, which is governed by the principle of openness and transparency, is responsible for ensuring that sufficient measures are taken to guarantee proper management, custody, integrity, classification, effective treatment and authorized access to the files and other records that are in its possession or have been generated by the ICTR, the ICTY or the IRMCT. Furthermore, the IRMCT has the power to grant, deny or restrict said access, not in an arbitrary way, but through the instruments enabled for this process (IRMCT, 2019; SGNU, 2012).

3.2. Access to public judicial records of international criminal tribunals and the IMRCT through digital databases

In addition to what has just been described, there is a second method available to any person to access public judicial records through various virtual databases: the UCR (IRMCT, n.d.(b)) and the JRAD (IRMCT, n.d. (c)) for public judicial records of the IRMCT and the ICTR; and the ICR (ICR, 2009) for public court records of the ICTY. These databases offer access for consultation and downloading of public records which have been uploaded from 1994 to the

present, through a simple registration process in which no personal data is requested (only email addresses are saved), and without the need for providing any justification. Records are uploaded within 24 hours after being archived by the Registry. There is even the possibility through the web, and by telephone, to request access to archived records that very same day.

These databases allow anyone to browse, download and copy documentation, information and material, always for personal, non-commercial use, and without any right to resell, redistribute, compile or create works from that information. The research can be carried out through different search modalities: (a) a free text search; (b) by date; (c) by situation; (d) by case name; (e) by the type of record[9]; (f) by the type of decision; (g) by the source of the record[10]; (h) by language; and (i) by the phase of the case[11].

Moreover, it is necessary to clarify that the records are shown without any guarantee as to their accuracy and integrity (if what is needed is a certified copy, it must be requested from the Access Coordination Unit). Therefore, the information is only shown for informative purposes.

Periodically, records on the web are added, modified, improved or updated, but there is no responsibility for any failure, error, omission, interruption or delay. Likewise, the IRMCT has the exclusive right (and at its sole discretion) to alter, limit or suspend the web or any record in any aspect, without being obliged to consider users'

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9 Briefs, Confirmation of Indictment, Correspondence, Decisions and Orders, Arraignments, Judgments, Motions, Notices, Responses, Transcripts/Videos, Orders and Subpoenas and Witness Materials.

10 *Amicus curiae*, Appeals Chamber, Defence, Defence of several persons, Court-appointed attorney, Legal representative of victims, Office of Public Counsel for the Defence, Office of Public Counsel for Victims, Office of the Prosecutor, other participants, Pre-Trial Chambers I to III, Trial Chambers I to X, Presidency, Presidency of the Trial Division, Registry, State Representatives and Trust Fund.

11 Appeal, Review of sentence, Compensation to an arrested or convicted person, Enforcement of arrest sentences, Preliminary trial, Review of the Presidency, Reparation/Compensation, Trial.

needs, who may be denied access to the web or any part of it without prior notice.

The IRMCT assumes no responsibility for the use that users make of these documents or for any damage that may be caused. Moreover, any conclusions that appear in the records are the result of the opinions of the staff and not of the organization itself. Finally, the records may contain links and references to third-party websites (which are not under the control or responsibility of the IRMCT), which does not imply any type of support for them.

4. THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN RELATION TO INFORMATION MANAGEMENT AND ARCHIVING POLICY

The right to the truth is not explicitly found in the ICC Statute or in its complementary instruments, such as the ICC RPE (ICC, 2004)[12]. However, as Vera Sánchez (2018: 108) points out, even if there is no express mention of the right to the truth in the ICC Statute, some of its norms may be a manifestation of said right, such as art. 54 (ICC OTP's duty to seek the truth) and article 69 (3) (presentation of evidence to determine the veracity of the facts).

However, the immense bibliography[13] on the work and role of the ICC (both at theoretical and practical levels) has systematically ignored the role of records management despite its relevance. One possible reason can be found in the absence of traditional channels of communication between jurists, archivists and ICC authorities. Furthermore, the usual inabilities of the archivists themselves should be pointed to when it comes to raising awareness and convincing the directors of national and international organizations, such as the ICC, of the value of their work, as well as the potential of incorporating their perspective into the organization's mission.

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12 See: Olasolo (2016).

13 See: Alberch i Fugueras (2008).

Nevertheless, despite the above the ICC, being the first permanent international criminal tribunal, is, to a large extent, a pioneer in records management.

Following the ICA's archival terminology, the ICC's archives can be defined as both the institution responsible for the preservation and distribution of its records (including, all records produced and received by the ICC in fulfilling its role), and the specific site in which said records can be found (ICA & InterPARES, n.d.; Ministry of Culture of Spain, 1995). The fact that the ICC is made up of four bodies (Presidency, Chambers, Prosecutor's Office and Registry), two semi-autonomous offices (the Office of Public Counsel for Victims and the Office of Public Counsel for the Defence) and the Trust Fund for Victims, and that some of them operate in countries as diverse as the Netherlands, the United States and the countries in which the ICC is conducting investigations, presents no obstacle to being the guarantor of their corresponding files.

4.1. The main features of the archives of the International Criminal Court

The first group of records that must be conserved in the ICC archives are those that one could call essential, since they are the ones related to the performance of the ICC's role: the investigation and prosecution of persons accused of committing genocide, crimes against humanity, war crimes or aggression (as well as the internal management that an organization of this type entails). Most of the records belonging to this group are available in electronic version, have historical value and are permanently preserved.

The first group of essential records are the so-called "foundational records" of the ICC. The need for their proper management is mentioned as a fundamental task of the ICC to be able to properly carry out its mission. Furthermore, the ICC Statute contains numerous references to the treatment of records related to the judicial functions of the Court and to detention processes, including art. 8(a) on the ICC's duty to protect the confidential nature of records and information, art. 72 on the disclosure of records and information that may

affect national security, art. 73 on how to deal with the information or records of third parties, art. 87(6) on the ICC's requests for information and records to intergovernmental organizations and art. 93(1)(i) on the transmission of records and documents (including, official ones) by State parties. Likewise, art. 7 of the ICC Agreement on Privileges and Immunities (UN, 2002) refers to the inviolability of files and records.

The second group of essential records are those resulting from collecting information, records, testimonies, and various types of materials relating to the investigative and judicial activities of the Court.

The third group is comprised of all those records related to the ICC's internal management, including, *inter alia,* accounting records, financial records, property management records, personnel records and representation records.

To manage all these records, the ICC approved on 18 March 2015 an Administrative Instruction on Records Retention and Disposal Policy. It established a records preservation policy, that revealed an awareness of the need for good records management, both to be able to function as an institution and, above all, to carry out its role properly (ICC, AI/2015/002). It also underlined the differences between the original form of the records (that follows their authors' intention) and the form in which the records have survived[14]. Moreover, it highlighted the distinction between original records, backup copies and digitally born records: the first to be considered authentic are electronic records (as long as they were created with the necessary guarantees). Finally, it required the digitalization of non-digital records that were not yet in electronic format and that were in the conservation period (non-digital records that had already been digitalized were to be destroyed)[15].

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14 See: *Comisión Internacional de Diplomática* (2005).

15 There are records in which only their non-digital form is authorized, such as evidence that is not a live statement, or agreements with third parties signed in a non-electronic format or authenticated in any other non-digital way by the parties.

The Administrative Instruction considers that the following files and documents are part of the ICC's archives: all records (no matter their format), photographs, maps or any material readable through a machine, including computer memories. Although books should be excluded from the traditional definition of archive records because, in principle, they do not have probative value, all other categories of records would be included, as long as there is a proper way of certifying its authenticity.

According to the Administrative Instruction, the treatment to be given to a record depends upon its initial labeling of the record considering its function and nature, thereby applying a proper approach to record management. This means that the record is taken into account from the moment it is generated and not only, as usually happens, at the time it is filed definitively.

The Administrative Instruction provides for the following categories of records: (a) "legacy records", which include judicial records (including evidence), investigative records, agreements with third parties, public communications of special significance or any other record as determined by the Registry; (b) "operational records", which involve all ICC's functions, programs, processes, transactions and services, such as accounting, financial and asset documentation; and (c) "transitory records", which are those that are needed for a limited time to complete a routine task or for the preparation of a legacy or operational record. "Working records" and other supporting materials are not considered as ICC records.

In this way, all ICC records are categorized and labeled as legacy, operational or transitory records. This classification is based on their value and determines their retention schedule: (a) legacy records have a historical value because they can maintain their potential value in the future, either from a legal point of view or from the perspective of reconstruction of the history of the institution, and, therefore, are considered for permanent conservation; (b) operational records have operational value, which defines the usefulness of the records within the ICC's processes (they may have administrative, fiscal, legal, historical or informational value and all these values must be assessed separately to determine their retention period); and (c)

transitory records have a temporary value, since they have no administrative or probative value.

The conservation of records encompasses different activities: (a) expungement (namely the controlled disposal of documents); (b) transfer of records (the act of transferring ICC's records to an external organization for the purpose of archiving or returning them to their home institution); and (c) creation of backup copies (both in electronic and physical format). Their overall purpose is to guarantee that records are retained for the necessary time based on their administrative, fiscal, legal, historical or informative value.

The retention period refers to the minimum time that a records is kept before its elimination and is applied through the retention schedule. The legacy records are kept permanently, while the operational records have a retention period of ten years, and the transitory records of two years (once said periods have expired, both types of records are disposed). The term is calculated from the date on which the record has last been modified, or, in the case of records with an expiration, termination or closing date, from that specific date.

The records produced by the ICC are subject to conservation reviews and categorization according to certain standards. Firstly, they are normally retained in their electronic version, with the exception of physical records that cannot be completely and adequately converted to an electronic format without compromising their value and usefulness due to their inherent characteristics (for example, fingerprints). Secondly, in the event of a conflict between the established retention schedule and other specific preservation time periods defined with respect to certain categories of records, the longer retention term prevails. Thirdly, in cases where only the original form is considered authentic, the original records are kept permanently (they will be also digitized, and the paper and electronic formats will be linked).

An example of the application of these criteria is the treatment of the victims' requests for participation in the proceedings and for reparations, and their attached records, which remain accessible for consultation in their original version during the applicable conserva-

tion period. After that period expires, the physical documents can be eliminated, retaining only the electronic version for consultation[16].

Finally, regarding the organizational chart of the ICC's archives, the responsibilities for records management fall to a specific unit: the Records Management and Archives Focal Point, whose staff must provide to the organizational units (organs, divisions, offices, sections and teams, as defined in the structure of the ICC) advice on preservation, transfers and disposal of records[17].

The heads of each organizational unit are responsible for defining the relevant criteria for the categorization of records within the Unit and for ensuring their application by their subordinates. In the same way, each staff member is responsible for making the initial decision on the new records or material that they produce, acquire, deliver or receive, and for their subsequent categorization as legacy, operational or transitory records. While categorization as transitory records is not subject to review, categorization as operational records is reviewed by the Archives and Records Management Coordination Unit on a random basis or at the request of the staff member who initiated the categorization. Furthermore, the Coordination Center always verifies the proposal to classify a document or other material as a legacy document.

This initial categorization activates an automatic deletion of the records according to the corresponding retention schedule. Each month, operational records and transitory records that have reached their expiration date in the retention schedule are deleted, unless a staff member of the organizational unit has specifically requested that they continue to be retained. In this case, the Coordination Center reviews them and decides whether they will continue to be kept for an additional period of two or ten years, or perhaps even be recategorized as "legacy records".

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16 To avoid duplicates, created and categorized records are circulated internally using hyperlinks to where they are recorded rather than by attaching them.

17 See: art. 1(13) of the Administrative Instruction on Records Retention and Disposal Policy (ICC, ICC/AI/2015/002).

In this regard, it is important to underline that all records produced, acquired, delivered or received by ICC's staff members as part of their duties are the property of the ICC, so that if they are altered, destroyed, replaced, transferred or rendered useless without following the procedure established above disciplinary action may be adopted. To avoid this, the Coordination Center is responsible for certifying the correct conversion of the paper format into electronic format and, when appropriate, the proper destruction of the paper versions.

Finally, once a year the Records Management and Archives Focal Point publishes a summary report on the disposal of records and the categorization of records as legacy records. This report is distributed among the heads of all ICC's organizational units.

4.2. Reflections on the role of the International Criminal Court in relation to information management and archival policy

The ICC is the first permanent international criminal tribunal that has the capacity to investigate and prosecute those most responsible for committing genocide, crimes against humanity, war crimes and aggression. As with any other tribunal, it is impossible to carry out this mission without proper records management. For an institution whose decisions have such decisive consequences, it is essential to not leave open for interpretation any core aspect of records management. In fact, this constitutes its main guarantee to legitimize the activities of the ICC.

The casuistry is inexhaustible. For instance, something as simple as not having jurisdiction to judge minors under 18 years of age requires a record that attests to that. Likewise, the very fact of determining who is a victim may sometimes constitute a process that is established through records whose chain of custody must not be broken.

The records management system contemplated by the ICC has several strengths, including the understanding that records management must be implemented from the generation of the records, which facilitates the decision-making process regarding it throug-

hout its life cycle. Moreover, the system establishes several categories of records. Nevertheless, it lacks the so-called "record series"[18], which should be an element common to the archives of the ICC, the ICTR, the ICTY and the IRMCT. Rectifying this should not be complicated, since the bulk of what is processed are judicial files and the documents they contain have very similar characteristics.

Concerning the regulation of access to the records in the ICC's archives, it is noteworthy that it is not as clear and broad the regulation to access the IRMCT's archives. Both regulations are based upon a principle of transparency and public access subject to appropriate and easily understandable restrictions, such as the proper development of cases or the protection of witnesses. Nevertheless, the free and open availability of the databases where the judicial records of the ICTY, the ICTR and the IRMCT are collected seems to foster transparency (although their lack of commitment on the veracity of the content reduces guarantees). In this sense, it is important to remember that the function carried out by judges is essential to preventing human rights violations, as is the publicity given by civil society and academic, journalistic and other kinds of investigations.

The regulation of the disposal of records is a way of preserving those which are essential, although this is less clear in the cases of transfers to external organizations. Moreover, if they are private, what will happen if the relevant companies go bankrupt? What guarantees are there for the recovery of the records? To avoid these problems, the ICC should have its own archives that covers all phases of the life cycle of records.

Traditionally, the judicial environment is resistant to technological innovations, probably because it is a profession practiced since ancient times and, therefore, conservative in its own forms of operation. These technological innovations may replace written records as an essential element in the exercise of judicial functions, as long as the records comply with certain requirements that guarantee their

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[18] By records series, it is understood the set of records generated by the same actor in the development of the same administrative activity and regulated by the same procedural standard. See: *Ministerio de Cultura de España* (1995).

authenticity. Nevertheless, on occasions, it seems that technological innovations do not offer these guarantees, even though, in operational terms, the opposite happens.

In this sense, the ICC has been courageous in placing its bets on the authenticity of electronic records, although it is not clear if the assignment of the necessary metadata for their correct recovery has taken place (which would make some processes automatic and guarantee their authenticity and integrity). This criticism has important consequences in archival terms, specifically, in relation to the recovery and permanent conservation of documentation of historical value.

In any case, the ICC has shown its concern with a proper management of the ICC's records by publishing an administrative instruction to deal with it. Even more so: it has created a specific unit to ensure its correct application. Without archivists who can dictate and oversee the instructions and know the value of the records, it is difficult for each organizational unit (especially in organizations of the size of the ICC) to become aware of the importance of the proper processing and safekeeping of the records they receive or produce. The function of archivists, therefore, is as important as that of jurists, since without one, the other cannot be properly carried out.

As has happened in the past with such crimes as the Holocaust or the Armenian genocide, a perverse tool that puts us at risk of the repetition of these crimes is the denial of their existence, which is to perpetuate them against the victims. In this sense, even Adolf Hitler himself enunciated the very telling phrase: "who remembers the Armenian genocide?". He did so to highlight how the extermination of Armenians had gone unpunished and how this type of atrocious crimes continued going unpunished in his time. A response to this situation is, undoubtedly, to guarantee the exercise of the right to know by going to the archives to find out what happened and request, where appropriate, reparation. Moreover, the publicity given to the records, sometimes even through exhibitions in the case of the IRMCT, is a way for society to become aware, and thereby promote guarantees of non-repetition as a form of reparation of serious human rights violations.

5. CONCLUSIONS

ICJ is a civilizational advance that, despite having been inaugurated (and celebrated) at the end of the 20th century, is in grave danger of backsliding in the face of the vetoes and omissions of the great powers. However, this same "principle of reality" forces us to reflect on the historical force of Impunity –in capital letters– associated with repressive and dictatorial regimes and the numerous violations of IHRL and IHL committed throughout history. Impunity has led to preventing access to archives and to the intentional and systematic destruction of extensive documentary collections.

A good example of this is the so-called "Spanish Model of Impunity" (Equipo Nizkor, 2004). In 2014, a report issued by the Working Group on Enforced or Involuntary Disappearances of the Human Rights Council (HRC, A/HRC/27/49/Add.1) warned of the very serious situation of the thousands of disappeared spread over hundreds of mass graves, which were the result of judicial and extrajudicial executions during the Spanish Civil War and the Franco dictatorship (it is a unique case in the European context). Moreover the, until recently, considered "model" Spanish transition led to: (a) the non-dismantling of the repressive apparatus of Francoism (armed forces, intelligence forces and judicial and administrative powers); (b) few, partial and incomplete policies of reparation and public memory until the recent adoption of Law 20/2022 on Democratic Memory (October 19, 2022); and (c) the maintenance of the legal effects of the decisions issued by the repressive bodies of Franco dictatorship until the entry into force of Law 20/2022[19].

At the end of the 20th century and during the first decade of the current one –coinciding in time with the start of the ICC– Spain was one of the pioneering nations in the application of the principle of universal jurisdiction. There were cases of Chile, Argentina and Guatemala, to note just a few examples (Jimena Quesada, 2008; Ollé Sesé, 2008; Nieva-Fenoll, 2013). It was a strange contradiction that was soon closed with the reforms of Article 23(4) of the Organic Law of the Judiciary in 2009 and 2014. These regulatory changes ended the

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[19] See: art. 3 the Spanish Law 52/2007 on Historical Memory.

fight against impunity by the Spanish national jurisdiction through its use of the principle of universal jurisdiction (Organic Law 1/2014; Saéz Valcárcel, 2014; Fernández-Riera Fernández, 2018).

At the same time, the so-called "Historical Memory Recovery Process" led by civil society was born and consolidated. The new correlation of forces that emerged forced the then Socialist Executive (2004-2008), headed by José Luis Rodríguez Zapatero, to approve the well-known Law 52/2007 on Historical Memory. It was legislation that at no time questioned the Amnesty Law of October 1977 (Law 46/1977) –the true cornerstone of the "Spanish Model of Impunity" – and which was characterized by its tepidity in each of its sections. For example, in the case of archives, hardly any progress was made, and it was on the verge of going backwards in a very serious way if it had not been for the associations of professional archivists (González Quintana, 2007). Finally, only a small legal loophole was left for victims to access their personal files. Over the next decade, the issue of access to archives was obstructed in numerous legal and other ways (Gálvez Biesca, 2020).

Thirteen years later, another socialist government, on this occasion, in coalition with *Unidos Podemos* (United We Can)- a left-wing force- presented in September 2020 a draft of what is now called the "Democratic Memory Law". Its Explanatory Memorandum stated that archives and documentation are the true written memory of States, and that access to public and private fonds and archives should be regulated considering the criteria of archival policies in defense of human rights prepared by UNESCO and the ICA (Government of Spain, 2020). Two years afterwards, Law 20/2022 on Democratic Memory, which contains significant improvements in the regulation of this matter, was passed.

What does all this say? First, that no progress is guaranteed and, further, that any progress must be defended day by day, as is the case with ICJ. Second, that even a government such as the Spanish government, so resistant to any kind of innovation and progress in opening its archives, has been unable to ignore the broad and consolidated body of doctrine on archives and human rights.

For all these reasons, and as expounded upon in this chapter, it is imperative to consolidate and reinforce the recommendations and principles on archives as guarantors of human rights from an ICJ perspective.

Moreover, it is necessary to extend these same principles to domestic law in order to strengthen national and transitional justice processes.

Probably, the greatest virtue of this type of contribution lies in the fact that it enables the construction of channels of communication, dialogue and debate between jurists and archivists, who have lived back-to-back for a long time, despite sharing a common goal. Providing an X-ray into how this complex relationship has evolved would in all liklihood reveal many unknowns about the advances and setbacks of ICJ. Moreover, this could lead to the pending sharing of experiences, as well as to an updated report on the contribution of archives in fighting Impunity at the global level.

The old Spanish trade union leader, Marcelino Camacho, stated that "rights are conquered and then defended". This is also applicable to the right to the truth because the steps forward given the sins of the 1990s are today called into question. To confront this situation, the IRMCT's archives is a very important first step: the first great global archives against Impunity. Why not shield what has been achieved by considering the IRMCT as a documentary heritage of humanity?[20].

Finally, in relation to the ICC, it is important to highlight that, as the first permanent international criminal tribunal, it needs to carry out proper records management, because without that it is impossible for it to effectively perform its role of investigating and prosecuting most responsible for genocide, crimes against humanity, war crimes and aggression. As a result, it is essential not to leave open for interpretation any of the main aspects of records management. Hence, it is a very good sign the concern shown by the ICC for this matter as reflected in the publication of an Administrative Instruction to regulate and in the establishment of a specific unit to ensure its correct application.

One should never forget that one of the best guarantees to curb negationism and hate speech, and to limit the danger represented by historical revisionism, resides in the shielding, permanent preservation of, and access to archives that testify to the brutality and lack of humanity that has characterized a wide range of regimes in the 20th and 21st centuries (Salvioli, A/HR/45/45, 2020: 53).

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[20] See: UNESCO (n.d.).

REFERENCES

Doctrine

Alberch i Fugueras, R. (2008). *Archivos y derechos humanos*. Gijón (Spain): Trea.

Bassiouni, M.C. (Ed.). (2008). *International Criminal Law: Sources Subjects and Contents*. Leiden (The Netherlands): Martinus Nijhoff Publishers.

Bernales Rojas, G. (2016). *El Derecho a la Verdad. Estudios Constitucionales*. Vol. 14. Pp. 263-304.

Boel, J. Canavaggio, P., González Quintana, A. (Eds.). (2021). Archives and Human Rights. London/New York: Routledge.

Cassese, A. (2008). International Criminal Law. Oxford (United Kingdom): Oxford University Press.

Fernández-Riera Fernández, C. (2018). *Justicia Universal en España. La limitación de un principio del Derecho Internacional. Diálogos Jurídicos. Anuario de la Facultad de Derecho de la universidad de Oviedo*. Vol. 3. Pp. 199-222.

Gálvez Biesca, S. (2020). *La encuesta sobre el Acceso a los Archivos en España: Informe de resultados. Historia Actual Online*. No. 52. Pp. 171-198.

González Quintana, A. (2007). *La política archivística del Gobierno español y la ausencia de gestión del pasado desde el comienzo de la transición. Hispania Nova. Revista de Historia Contemporánea*. Vol. 7. Pp. 5-26. http://hispanianova.rediris.es/7/dossier/07d008.pdf.

González Quintana, A. (2016). *Del Derecho a Saber al Derecho a la Verdad: el papel de los archiveros en la defensa de los Derechos Humanos. Tria*. Vol. 20. Pp. 257-270.

Jimena Quesada, L. (2008). *Dignidad humana y justicia universal en España*. Pamplona (Spain): Thomson Aranzadi.

Joinet, L. (1989). *L'amnistie. Le droit à la mémoire: entre pardon et oubli. Communications*. Vol. 49. Pp. 213-214.

Klinkner, M. & Davis, H. (2020). The Right to the Truth in International Lwa. Victim's Rights in Human Rights and International Criminal Law. New York (USA): Routedge.

Ministerio de Cultura de España. (1995). *Diccionario de terminología archivística*. Madrid (Spain): Ministerio de Cultura.

Nieva-Fenoll, J. (2013). *El principio de Justicia Universal. Revista Española de Derecho Internacional*. Vol. LXV/I. Pp. 131-149.

Olasolo, H. (2016). *Los fines del Derecho Internacional Penal. International Law: Revista Colombiana de Derecho Internacional*. Vol. 14. No. 29. Pp. 93-146.

Olasolo, H. (2017). *Derecho internacional penal, justicia transicional y delitos transnacionales: dilemas políticos y normativos*. Valencia (Spain): Tirant lo Blanch & *Instituto Ibero-Americano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional*.

Ollé Sesé, M. (2008). *Justicia Universal para Crímenes Internacionales*. Madrid (Spain): La Ley & Wolters Kluwer.

Orentlicher, D. (2016). Some King of Justice: The ICTY's Impact in Bosnia and Serbia (2016). Oxford (United Kingdom): Oxford University Press.

Risse, M. (2012). On Global Justice. New Jersey (USA): Princeton University Press.

Tan, K. (2017). What is this Thing Called Global Justice? London (United Kingdom): Routledge.

Trujillo Sánchez, A. (2010). *La Corte Penal Internacional. Una experiencia de Justicia Internacional* (Ph.D. Dissertation). Madrid (Spain): UNED.

Vera Sánchez, J.S. (2018). *¿Por qué es importante que la Corte Penal Internacional condene más allá de toda duda razonable?. Anuario Colombiano de Derecho Internacional*. Vol. 11. Pp. 101-130.

Vega, P. (2006). *El papel de las víctimas en los procedimientos ante la Corte Penal Internacional: sus derechos y las primeras decisiones. Sur-Revista Internacional de Derechos Humanos*. Vol. 5. Pp. 18-41.

Resolutions, Reports and Other Documents

Biraud, G. (2013). Records and archives management in the united nations. Gineva (Switzerland). Doc. No.: JIU/REP/2013/2). https://undocs.org/es/JIU/REP/2013/2.

Cardozo Law Institute in Holocaust and Human Rights. (2018). The Uses of Truth: Truth Commission Archives, Justice and the Search for the Disappeared in El Salvador. https://derechoshumanos.udp.cl/cms/wp-content/uploads/2020/12/Relatoria_Va_Uses_of_Truth_El_Salvador_TC_archives_access_ENG.pdf.

Comisión Internacional de Diplomática. (2005). *Terminologie der Diplomatik*. Munich (Germany): Ludwig Maximilians University. http://www.cei.lmu.de/VID/.

Huskamp Peterson, T. (2006). Temporary Courts, Permanent Records. United States Institute of Space. Report 170. https://www.usip.org/sites/default/files/resources/sr170.pdf.

International Committee of the Blue Shield. (n.d.). About Us. https://theblueshield.org/about-us/history/international-committee-of-the-blue-shield-icbs/.

International Council on Archives. (n.d.). Multilingual Archival Terminology. https://www.ica.org/resource/multilingual-archival-terminology-mat/.

International Criminal Court. (2004). Regulations of the Court. https://www.icc-cpi.int/sites/default/files/RegulationsCourt_2018Eng.pdf.

International Criminal Court. (2013). Rules of Procedure and Evidence. https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceEng.pdf.

International Criminal Court. (2015). Administrative Instruction on Records, Retention and Disposal Policy. Doc. No.: ICC/AI/2015/002. https://www.icc-cpi.int/resource-library/Vademecum/RECORDS%20RETENTION%20AND%20DISPOSAL%20POLICY.pdf.

International Criminal Tribunal for the former Yugoslavia. (2009). ICTY Court Records. http://icr.icty.org/.

International Residual Mechanism for Criminal Tribunals. (2016). Access Policy for the records held by the International Residual Mechanism for Criminal Tribunals. Doc. No.: IRMCT/17. https://www.irmct.org/sites/default/files/documents/pd-mict-17-160812-en.pdf.

International Residual Mechanism for Criminal Tribunals. (2019). Access Policy for the records held by the International Residual Mechanism for Criminal Tribunals. Doc. No.: IRMCT/17/Rev.1. https://www.irmct.org/sites/default/files/documents/190104-acces-policy-records-irmct.pdf.

International Residual Mechanism for Criminal Tribunals. (n.d.(a)). Archives. https://www.irmct.org/en/archives.

International Residual Mechanism for Criminal Tribunals. (n.d.(b)). Unified Court Records. https://ucr.irmct.org/.

International Residual Mechanism for Criminal Tribunals. (n.d.(c)). Judicial Records and Archives Database. https://jrad.irmct.org/.

Joinet, L. (1997). Question of the impunity of perpetrators of human rights violations (civil and political) Final report prepared by Mr. Joinet pursuant to Syb-Commission decisión 1996/119. Doc. No.: E/CN.4/Sub.2/1997/20/Rev.1. https://undocs.org/pdf?symbol=es/E/CN.4/Sub.2/1997/20/Rev.

Open Society Foundation. (2013). The Global Principles on National Security and the Right to Information (The Tshwane Principles). New York: Open Society Foundation. https://www.justiceinitiative.org/uploads/eecb593a-d6f8-4dfa-b3cd-0d3f671a626c/tshwane-espanol-10302014%20(1).pdf.

Orentlicher, D. (2005). Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher. Addendum Updated Set of principles for the protection and promotion of human rights

through action to combat impunity * The report was submitted after the deadline in order to take into account replies of all respondents as well as the results of the expert workshop held in November 2004. *GE.05-10900 (E) 210205*. Doc. No.: E/CN.4/2005/102/Add.1. https://undocs.org/es/E/CN.4/2005/102/Add.1.

Salvioli, F. (2020). Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition. Doc. No.: A/HR/45/45.

Spain. *Ley 46/1977 de Amnistía*. 15 October 1977. https://www.boe.es/buscar/doc.php?id=BOE-A-1977-24937.

Spain. *Ley 52/2007. Por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura*. 27 December 2007. https://www.boe.es/buscar/doc.php?id=BOE-A-2007-22296#:~:text=Ley%2052%2F2007%2C%20de%2026,%C2%AB%20BOE%20%C2%BB%20n%C3%BAm.

Spain. *Ley Orgánica 1/2014 de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal*. 14 March 2014. https://www.boe.es/buscar/doc.php?id=BOE-A-2014-2709.

Spain. *Ministerio de la Presidencia, Relaciones con las Cortes y Memoria Democrática*. (2020). *Anteproyecto de Ley de Memoria Democrática*. https://www.mpr.gob.es/servicios/participacion/Documents/APL%20Memoria%20Democr%C3%A1tica.pdf.

United Nations. (1998). Diplomatic Conference of Plenipotentiares on the Establishment of an International Criminal Court. (1998). International Criminal Court statute. Doc. No.: A/CONF.183/9. https://legal.un.org/icc/rome/proceedings/e/rome%20proceedings_v1_e.pdf.

United Nations. (1998). Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Doc. No.: A/CON.183.10. https://legal.un.org/icc/statute/finalfra.htm.

United Nations. (2002). Agreement on the Privileges and Immunities of the International Criminal Court. https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/23F24FDC-E9C2-4C43-BE19-A19F5DDE8882/140090/Agreement_on_Priv_and_Imm_120704EN.pdf.

United Nations. (n.d.(a)). International Day for the Right to the Truth Concerning Gross Human Rights Violations and for the Dignity of Victims (24 March). https://www.un.org/en/observances/right-to-truth-day/message.

United Nations. (n.d.(b)). International Day for Universal Access to Information 28 September. https://www.un.org/en/observances/information-access-day.

United Nations. General Assembly. (2010). Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims. Doc. No.: A/RES/65/196. https://www.refworld.org/legal/resolution/unhrc/2010/en/73125.

United Nations. General Assembly. (2013). Resolution on the right to the truth. Doc. No. A/RES/68/165. https://undocs.org/es/A/RES/68/165.

United Nations. Human Rights Council. (2009). Resolution 12/12 on the right to the truth. No.: A/HRC/RES/12/12.https://documents.un.org/doc/resolution/gen/g09/165/99/pdf/g0916599.pdf.

United Nations. Human Rights Council. (2014). Report of the Working Group on Forced or Involuntary Disappearances. Addition. Mission to Spain. Doc. No. A/HRC/27/49/Add.1. https://www.refworld.org/reference/mission/unhrc/2014/en/101042.

United Nations. Office of the High Commissioner for Human Rights. (2006). Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights. Doc. No.: E/CN.4/2006/91. https://www.refworld.org/reference/themreport/unchr/2006/en/43598.

United Nations. Office of the High Commissioner for Human Rights. (2009). The right to the truth. (A/HRC/12/19). Doc. No.: A/HRC/12/19. https://documents.un.org/doc/undoc/gen/g09/150/89/pdf/g0915089.pdf.

United Nations. Office of the High Commissioner for Human Rights. (2018). Michelle Bachelet Jeria. https://www.ohchr.org/sp/aboutus/pages/highcommissioner.aspx.

United Nations. Security Council. (2009). Report of the Secretary-General on the administrative and budgetary aspects of the different possible locations of the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and of the headquarters of the residual mechanism(s) of the Tribunals. Doc. No.: S/2009/258). https://digitallibrary.un.org/record/660262?v=pdf.

United Nations Security Council. (2011). The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General. Doc. No.: S/2011/634. https://digitallibrary.un.org/record/527647?ln=es&v=pdf.

United Nations. Secretary General. (2012). International Criminal Tribunals: information sensitivity, classification, handling and Access. Doc. No.: ST/SGB/2012/3. https://undocs.org/en/ST/SGB/2012/3.

PART III
NON-POSITIVIST APPROACHES THAT ADOPT MODERNITY AND ITS SUBJECTIVITIES

Chapter 4
The Perspective of Rational Choice Theory[*]

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1. INTRODUCTION

This chapter aims at studying the ICC's role from an Economic Analysis of Law (EAL) perspective, with a specific focus on the Theory of Rational Choice (TRC). After explaining the EAL and the TRC, their economic *rationale* will be applied to address the following issues: (a) the understanding of the ICC's role as preserving Global Public Goods (GPGs) provided for in the preamble of the ICC Statute; (b) the risk of free rider States as a result of fulfilling the ICC's

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[*] For the institutional ascription of this chapter, see the initial Note of the book.

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role, paying particular attention to this phenomenon within the reparations system through the Trust Fund for Victims (ICC TFV); and (c) deterrence as a central aspect of the ICC's role.

When analyzing these issues through the logic of the EAL and the TRC, one can observe how legal institutions, such as the ICC, share aspects of an economic nature, which are best reflected when their role is studied from the perspective of the interests guiding the rational decisions adopted by those actors who operate within them.

2. ANALYTICAL PERSPECTIVE

2.1. The Economic Analysis of Law

The EAL fosters the analysis of law through a lens of economic theory. Its main goal is to explain: (a) the behavior of the participants within the legal system; and (b) the institutional, procedural and doctrinal structure of the system (Posner, 2002: 39). In this way, the undesired consequences of the current legislation can be identified to propose reforms to address them (Posner, 2002: 39).

The EAL method consists of identifying the consequences that are derived from assuming that people are rational in their social interactions (Posner, 2002: 39). In this way, EAL allows us to describe how, in legal scenarios, certain actors take decisions based upon interests that go beyond legal rationality, taking also into consideration their possible economic results. This expands the horizon of analysis of international law (IL) through the application of basic economic concepts, such as efficiency or equity, which seek to explain the rationality of the decisions under analysis.

In this context, EAL promotes the study of the scenarios leading actors to take decisions based upon their interests. This is how Bentham, to whom Kaplow (1999) and Shavell (2004) attribute the origins of this type of analysis, studies the manner in which different actors would behave if they were to be offered profitable legal incentives.

Bentham's initial perspective was limited and required a case-by-case empirical analysis. As it did not consider that, despite their rele-

vance, incentives are only one of the possible economic factors that must be considered in a legal process (Kaplow, 1999)[1], new interpretations have been proposed for a broader understanding of the EAL.

Based upon the premise of the idea of *laissez-faire*, Coase (1960) states that when all actors act according to their own interest, the market is efficient. In turn, Posner composes an interpretation founded upon the concept of cost distribution, which implies the application of certain laws in decision making (Hermann, 1974).

In making rational decisions many variables are intertwined to maximize efficiency. This means that the EAL presents multiple variants depending on where the interpretative emphasis is placed. Nevertheless, the logic that underlays all of them reflects how actors taking legal decisions also base them on economic factors (Doménech Pascual, 2019). Consequently, for the EAL, justice and efficiency are concepts related to each other because one can only speak of justice when the laws enacted are efficient because their application does not generate unnecessary costs for those actors whose behavior they regulate.

The EAL applies this concept of justice in the field of IL, so that binding rules must be efficient as they materialize the interests of the actors operating within the system. As a result, the capacity of IL is limited by the interests of the States and the distribution of power between them, which prevents them from being forced to comply with something running contrary to their interests (Goldsmith & Posner, 2005: 13).

2.2. The theory of rational choice

Our analysis on decision-making by actors who operate within institutions of international criminal law (ICL) and, in particular, within the International Criminal Court (ICC), is based on explana-

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[1] For example, someone who commits a crime may consider the economic implications or incentives that may arise once the act has been committed, such as the amount of financial compensation that he might have to pay to the victims (Kaplow, 1999).

tory theories of the EAL. They include analytical frameworks which allow us to understand the costs and benefits weighed by these actors when they define their plans of action. Standing out among these is the TRC, which is the cornerstone in the expansion of the EAL into non-market behaviors (Posner, 2002: 39; Van Aaken, 2015). As a result, TRC has developed in relation to disciplines as varied as law, political science and international relations (IR). As regards IR, TRC is deeply linked to the dominant currents of liberalism and realism, which strive to explain: (a) the conditions under which States seek to act based upon their own interest; or (b) opt for alternatives conducive to the establishment of collective rules of the game, which take institutional forms through the international organizations (IOs) in which they cooperate amongst themselves.

According to Lovett (2006), the TRC does not correspond to a unified body of postulates about the behavior of actors but is based upon the fundamental idea that economic actors consciously select courses of action that seek to maximize their own benefits. The purpose of this tool is to demonstrate that certain social phenomena can be explained with reference to their usefulness in the resolution of problems arising out of the general pursuit of self-interest (Lovett, 2006: 238). This assumes that, considering the restrictions with which actors operate, they build their rationality based upon the maximization of their profits, while seeking to reduce losses to a minimum. Consequently, any action running contrary to this logic is considered to be irrational. Furthermore, although decision-making is oriented towards serving individual interests in the most efficient way possible, these decisions are often made in competitive (national or international) environments which, in turn, allow the limitation of the potentially harmful effects that self-interest can have upon others (O'Brien & Williams, 2013).

The TRC highlights the importance of information as the basis for the definition of scenarios and the selection of optimal courses of action. Therefore, the possibility of having a global rationality becomes impossible; only a limited rationality is compatible with the problems to access information and the evaluative capabilities actually possessed by different organisms, including human beings, within the types of environments in which they exist (Simon, 1965: 99). In

other words, when taking decisions at any given moment it is only possible to consider a limited number of factors (these rational decisions are always adopted within a specific framework that must also be considered).

In this sense, Simon (1965) considers that, even if rational choice models are usually built upon the basis that all alternatives are evaluated before decisions are taken, a perspective more grounded in reality considers that options are examined sequentially (considering the idea that decision makers are not obsessed with the search for optimal solutions, but rather satisfactory ones). Therefore, maximizing strategies are not the common denominator for decision makers, who frequently substitute what is optimal for what is possible or what is attainable. An example of this situation can be found in the ICC pragmatism when making decisions to use victims to provide evidentiary input (Vasiliev, 2015), given that the ICC budget and the cooperation received from States Parties in the situations under investigation are insufficient.

In principle, this idea may seem simple, but it becomes more complex if we place ourselves in a scenario in which patterns of individual rationality collide with patterns of collective rationality, as occurs with the so-called "prisoner's dilemma". In this classic game, individual rationality, which indicates that each actor should follow the interest that is most advantageous to him, is confronted with a collective rationality, which reveals how beneficial cooperation could be in satisfying mutual interests (Cohn, 2012).

The TRC thus seeks to model some aspects of social behavior based upon simplifications of the most complex aspects of the phenomena that it intends to explain (such as the behavior of actors in a particular context or the relationship between two or more variables) (Simon, 1965). Nevertheless, one should not lose sight of the complexity of social phenomena, which makes it unrealistic to try to find explanatory frameworks that account for these phenomena in an almost perfect way because, *inter alia*, if the model were to achieve this it would lose its usefulness.

This being the case and considering that States are the unit of analysis in this chapter, it is important to emphasize that, in accordan-

ce with the TRC, cooperative and institutionalized practices between States frequently encounter obstacles that do not favor their fruition. In this regard, Keohane (1984) has sought to explain the motivations under which States feel inclined to cooperate or establish collective rules, while discerning that uncertainty or lack of information constitutes a central problem in achieving commitments and may even induce States to withdraw from already existing agreements.

This has encouraged the progressive development of different mechanisms, such as international regimes[2], which permit States to obtain better information in a less costly way. This aims at reducing uncertainty, which is maximized within contexts in which actors are limited by the lack of available information for decision-making. Moreover, if they perceive large asymmetries in information, they will be reluctant to cooperate or will act aggressively for fear of betrayal (Haggard & Simmons, 1987).

Under the TRC, it is argued that States behave rationally when they identify what their interests are and act in conformity with them (Rao, 2011). In turn, this means that they only comply with IL when it is in their particular interest (Goldsmith & Posner, 2005). In this sense, Goldsmith and Posner (2005: 10) stress that the State is a unitary actor that can formulate goals and interests and work to reformulate them through IL (Rao, 2011). Therefore, the correct approach to IL would not assume that States have a preference to comply with their international legal obligations, but instead must explain why States decide to comply with them (Goldsmith & Posner, 2005: 10).

Regarding IOs, such as the ICC, according to Rudolph (2017), they are a manifestation of power, and not only a product of its exercise. For this reason, the interests of the States Parties to the ICC Statute, and even of the States not party to it, are reflected in the institutional design and in the activities that the different organs of the ICC undertake to fulfill the ICC's role as provided for in the preamble of the ICC Statute (González-Ruiz & Mijares, 2020: 409).

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[2] For Krasner (1982:186), an international regime is a set of explicit or implicit principles, norms, rules and decision-making procedures that govern specific issue areas and around which the expectations of actors in a given area of IR converge.

3. THE ROLE OF THE INTERNATIONAL CRIMINAL COURT SEEN THROUGH THE THEORY OF RATIONAL CHOICE

3.1. The preservation of global public goods as part of the role of the International Criminal Court

IOs have often the role of providing GPGs, which are a class of goods that have two essential characteristics: non-rivalry and non-exclusion (Samuelson, 1954). The first consists of the enjoyment of the public good by one actor without affecting the level of enjoyment by other actors. The second refers to that situation in which it is not possible to prevent an actor from enjoying the public good without cost.

According to the TRC, the ICC's role is to preserve those values protected by the crimes included in the ICC Statute that are GPGs (Van Aaken, 2015). Thus, the preamble of the ICC Statute establishes that the States Parties recognize that the crimes set out in the ICC Statute constitute a threat to the peace, security and well-being of humanity. Consequently, Olasolo and Galain (2018) consider that the collective values protected by genocide, crimes against humanity, war crimes and aggression are peace and international security, the preservation of which is part of the role of the ICC, but also of the United Nations (UN), as established in art. 1(1) of the UN Charter (Triffterer & Both, 2016).

Galand (2017) considers the fight against impunity, and the underlying idea of accountability for the commission of crimes provided for in the ICC Statute, as GPGs. However, his arguments are not limited to the fight of States Parties against impunity (as stated in the preamble of the ICC Statute) because such a fight responds to values that: (a) are of interest to all States (regardless of borders, population or generational factors) (Nollkaemper, 2012: 776); and (b) are to be satisfied in favor of all (Albin, 2003: 367). In this way, all States benefit from the fight against impunity and from accountability for the commission of the crimes included in the ICC Statute (Galand, 2017: 163). This also corresponds to their consideration as non-rival and non-exclusionary GPGs whose ownership is predicated on humanity.

Table 1: Categories of GPGs Proposed by Barrett (2007)

Category of GPGs	Essential factors for each category of GPGs	Necessity for international cooperation and joint funding	International mechanisms for the provision of each category of GPGs
GPGs of best individual effort	The best individual effort (unilateral or collective) of a single actor who applies his *best shot* to provide the relevant GPG, which benefits the rest of international society. An example of this is the case of peacekeeping.	International cooperation is necessary to define what the *best shot* is and to allocate the expenses to a State or a group of States. Joint funding is necessary so long as the relevant GPG is provided through a collective effort.	By means of international treaties or through IOs
GPGs of aggregated efforts	The efforts of all States in the international society. For example, mitigation measures for climate change.	International cooperation and joint funding are necessary in accordance with the specific case.	By means of international treaties.
GPGs of weakest link effort	The efforts of international society, as well as the efforts of the weakest link, that is to say, the weakest States or group of States. An example of this is the case of the global eradication of diseases.	International cooperation and joint financing are necessary and are to be materialized in assistance to the weakest States.	By means of resolutions of the UN Security Council or of the World Health Organization. This also includes international customary law
GPGs of mutual restriction	The inaction of States. For example, the non-proliferation of nuclear weapons.	Neither active international cooperation nor joint financing are necessary.	By means of international treaties or international customary law
GPGs of coordination	States that act in similar fashion. For instance, the establishment of international time measurement standards.	International cooperation is necessary to reach a consensus on what the international standard is. Joint financing is, however, unnecessary.	By means of non-binding resolutions and, in some cases, through international treaties.

Consistent with the foregoing, the preamble of the ICC Statute is based upon the premise that the cooperation of all States is necessary for the fulfilment of the ICC's role. In this way, international peace and security, and its preservation through the fight against impunity, are not GPGs of best individual effort, according to the classification propounded by Barret (2007). This is because the effort of a single actor (even if it is as relevant as the UNSC) is not enough (otherwise, the ICC would have no reason to exist).

Moreover, the foregoing does not mean that to effectively preserve the GPGs provided for in the preamble of the ICC Statute: (a) the contributions of all States Parties are needed in equal proportion (Kaul et. al., 1999; Galand, 2017); (b) there are no essential contributions; and (c) the contributions of States Parties can be replaced among each other, it being therefore irrelevant which one makes the contribution (Kaul et. al., 1999; Galand, 2017).

Likewise, if one considers that the preservation of the GPGs of weakest link effort require the cooperation from all States (if any State does not cooperate the efforts of the rest are lost) (Barret, 2007: 47), then the GPGs provided for in the preamble of the ICC Statute cannot be considered as GPGs of this kind. This conclusion is reached because the investigation and prosecution of the highest representatives of some States Parties means (as shown, in particular, by the Kenyan cases) that there will always be some States Parties affected by ICC proceedings which, either due to a lack of incentives (lack of willingness) (Olasolo, 2012: 11-13) or due to their lack of capacity as a result of being failed States (Cervera, 2014)[3], will not contribute to international peace and security through the fight against impunity.

In addition, the preservation of the GPGs provided for in the preamble of the ICC Statute requires the development of investigations and prosecutions that, by definition, are contrary to the essence (inaction) of the GPGs of mutual restriction.

Furthermore, concerning the GPGs of coordination, it is important to clarify that: (a) the States which are Parties to the ICC Statute are part of different legal systems; and (b) there is, therefore, no glo-

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[3] See, for instance, the situation in the DRC.

bal standard on the measurement of justice. Although the ICC Statute introduces some guidance criteria in this regard (for example, the seriousness of the crime), this does not imply that a coordinated effort by all States to agree on global standards to measure justice is required.

Consequently, based upon the classification of Barret (2007), only the category of GPGs of aggregated effort is left open to qualify the GPGs included in the preamble of the ICC Statute (the preservation of which is a core element of the ICC's role).

In addition to the need for an aggregated effort by the States Parties, one must take into account that not all contributions have the same relevance. In particular, the contributions of the two States Parties to the ICC Statute, that are also permanent members of the UNSC are, undoubtedly, more relevant. This is because, despite the theoretical independence of the ICC from the UNSC, the UNSC mandate is very relevant for the investigation and prosecution of the crimes under the jurisdiction of the ICC.

Thus, according to art. 13(b) of the ICC Statute, the UNSC may request the ICC Office of the Prosecutor (ICC OTP) to initiate the investigation of situations in which crimes under the ICC Statute have taken place after July 1, 2002 (even if they have occurred in the territory of States not party to the ICC Statute and have been committed by their nationals). Furthermore, according to art. 16 of the ICC Statute, the UNSC may also request the ICC OTP not to initiate, or to suspend, an ongoing investigation or prosecution for a renewable period of twelve months. Moreover, according to art. 115 of the ICC Statute, one of the sources with which the ICC is financed is through funds from the UN, especially with respect to expenses incurred in relation to situations referred to the ICC by the UNSC.

Although the contributions of the two States Parties that are members of the UNSC have a special relevance, the daily fulfillment by the ICC of its role depends upon the sum of contributions from all States Parties, since they provide: (a) the main assistance for the arrest and surrender of suspects; (b) the cooperation and judicial assistance to obtain evidence; and (c) the payment of budgetary contributions for financial support (Oosterveld, 2001). Likewise, through their ratifi-

cation of the ICC Statute, States Parties reaffirm that the ICC's role is the preservation of the GPGs provided for in the preamble of the ICC Statute.

Nevertheless, as some of the weaker States Parties do not contribute to the protection of said GPGs (in particular, those States Parties whose highest representatives are investigated and prosecuted by the ICC), one cannot but conclude that the maintenance of international peace and security through the fight against impunity (and the underlying idea of accountability for the commission of international crimes) are GPGs of aggregated effort.

3.2. "Stowaway" States in fulfilling the role of the International Criminal Court: particular attention to the reparations system through the Trust Fund for Victims

As the GPGs provided for in the preamble of the ICC Statute are GPGs of aggregated effort, the problem of "stowaway" States arises (Nordhaus, 2006). For Vidal (2008), the concept of "stowaway" refers to transgressors who consider that they have the faculty to avoid any negative impact from failing to comply with the cooperation expected from all actors within a specific situation. In this way, stowaway States profit from the cooperation of the other States.

The concept of "stowaway" actors is also applicable in the legal field because, although the TRC is a theory that is applied to commercial situations, it also provides coherent decision-making criteria in non-commercial scenarios. In this sense, Ulen (1994) suggests that the direct relationship between economics and law offers the possibility of analyzing judicial decisions with market criteria. Thus, for this author, legal decisions create implicit prices for different behaviors and decision makers conform their behavior to those prices. In other words, actors take decisions based on their effects or prices. This reasoning is also applied by the stowaway actors when they decide not to comply because the costs do not exceed the benefits of non-compliance.

This concept can also be extrapolated to the ICC Statute, and, in particular, to its process of victim reparation. This process is one of

the distinctive elements of the ICC Statute since it did not previously exist in ICL (Vasiliev, 2015). It has, as a *sine qua non* requirement for its application, the conviction of the accused persons (the Lubanga, Katanga and Al Mahdi cases were the first three cases in which final judgments of conviction were issued by the ICC).

The methods of reparation are described in a non-exhaustive manner in art. 75 of the ICC Statute which discusses restitution, compensation and rehabilitation. According to ICC Trial Chamber VIII in the Al-Madhi case, compensation is understood to be money awarded to one or more victims in recognition of the harm they suffered, while rehabilitation consists of restoring victims and their communities to their previous condition, which may include, for example, economic, social, medical or legal assistance (reparations can also be symbolic in nature) (ICC, Al Mahdi, 08/17/2017: 46-49). Furthermore, as established in the Lubanga case, the determination of the specific reparation measures in a case must seek a fair balance between the different rights and interests of the victims on the one hand, and those of the convicted person on the other (ICC, Lubanga, 3/3/2015: 34).

Nevertheless, the ICC, so far, has not been able to apply this legal framework consistently. Furthermore, given the impossibility of obtaining enough funds from defendants who have declared insolvency, the ICC TFV has had to provide 3.2 million euros (Lubanga case), 1 million dollars (Katanga case) and 2.7 million euros (Al Mahdi case) to fund the implementation of the reparation measures ordered by the relevant ICC Trial Chambers[4]. This has occurred because, according to art. 79 of the ICC Statute, the reparation measures ordered by the ICC Trial Chambers are to be executed by the ICC TFV, which ultimately means that the ICC TFV ends up assuming the cost of the reparation measures when the convicted persons are declared insolvent.

The money for the payment of reparation measures by the ICC TFV comes from voluntary contributions from States Parties, do-

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[4] See: https://www.trustfundforvictims.org/sites/default/files/Trust%20Fund%20for%20Victims-%20Overview%20of%20Activities%20ENG.pdf.

nations made by non-party States, IOs and civil society (including NGOs) and fines and confiscations ordered by the ICC (Resolution ICC-ASP/4/Res.3. Art. 21).

In this context, the existence of two types of stowaway actors can be evidenced. On the one hand, there are those States Parties who, despite not contributing financially to the ICC TFV, benefit from the ICC having a unique system of reparations. And, on the other hand, there are those convicted persons who, by declaring themselves insolvent, trigger the intervention of the ICC TFV.

3.3. The deterrence of potential most responsible perpetrators of crimes provided for in the Statute of the International Criminal Court

The last issue to be addressed in the analysis of the role of the ICC through the lens of the TRC is the issue of deterrence of those who could potentially commit new crimes of the kind provided for in the ICC Statute.

A review of the literature on the TRC and criminal law (CL) inevitably leads to the work of Becker, who is considered the pioneer in the economics of crime. This author, who represents for many an extreme version of the TRC, considers that behavior can be modeled micro-economically because crime manifests itself as the best possible "choice" within a range of options and limitations (Becker, 1968).

Becker not only focuses on analyzing criminal behavior based upon the criminal's own preferences, but his analysis extends to the legal system as a whole. He recognizes that compliance with the law cannot be taken for granted and that, therefore, it is necessary to allocate public and private resources to prevent crime and arrest criminals. Furthermore, he maintains that the issuance of a sentence cannot be considered as a real punishment. Based upon the foregoing, he raises the question as to how many resources and how much punishment should be used to enforce the law. Put in more unusual terms, how many crimes should be allowed and how many criminals should go unpunished? (Becker, 1968: 2).

This approach implies the need to determine the optimal amount of law enforcement. For this it is necessary to consider the following

factors: (a) the cost of arresting and prosecuting offenders; (b) the probability of being caught; and (c) the characteristics of the penalties. Furthermore, it also implies considering the idea that the optimal number of crimes is not necessarily zero, given that, as happens in microeconomics, an "equilibrium" should be found in which the marginal cost of each preventive measure or punitive action must be equal to the marginal income that the offender obtains for acting illegally (Becker, 1968).

Based on the foregoing, Cronin-Furman (2013: 437) emphasizes that provided the criminal system sets sufficiently high costs for those who incur criminal responsibility, potential perpetrators will rationally choose not to commit crimes. In this sense, and as previously discussed, the preamble of the ICC Statute establishes that a central aspect of the ICC's role is to end the impunity of the perpetrators of genocide, crimes against humanity, war crimes and aggression, and thus contribute to the prevention of new crimes. In fact, during the negotiation of the ICC Statute, one of the US representatives highlighted that the possibility of US support for the ICC was based, to a large extent, on the deterrent effect that the ICC could eventually have (Keeva, 1997: 22). Therefore, for Klabbers (2001), prevention is perhaps the main reason behind the creation of the ICC, which seeks to end impunity through the imposition of penalties aimed at fostering deterrence.

It is evident that the deterrence theory, embodied in the ICC Statute, is based upon rational actors (Kronin-Furman, 2013), because its main premise is that an individual commits a crime when its utility exceeds the utility that could be obtained in other activities (Becker, 1968: 176). This theory is, however, based upon an essentialist assumption that has not yet been demonstrated: that criminally responsible people are rational actors (Henham, 2005: 141). In fact, some consider those responsible for the most serious crimes of international concern to be deeply irrational because they are motivated by revenge, religious radicalism or ethnic hatred (Cronin-Furman, 2013: 439). Accordingly, if those who engage in this type of behavior are usually irrational actors, then it is unlikely that the penalties established in the ICC Statute will fulfill a deterrent function and make them act rationally (Minow, 1998: 50). Nevertheless, it cannot

be ruled out that the decisions of those who commit these types of international crimes may follow a rational strategy (especially, the decisions of those most responsible, understood as the highest superiors of the hierarchical state institutions or non-state organizations through which the crimes are committed) (Kalyvas, 1999; Waller: 2007; Cronin-Furman, 2013).

As seen above, the certainty of punishment and the severity of the penalties are two core criteria for the determination of the cost of the crimes. With respect to the second, art. 77 of the ICC Statute establishes that the ICC can impose sentences of imprisonment for up to 30 years, or even life imprisonment if justified by the extreme seriousness of the crime and the personal circumstances of the convicted person. Consequently, for Kronin-Furman (2013), the penalties that the ICC can impose are less strict than those that national jurisdictions can impose, which, in his opinion, does not help the ICC to fulfill its preventive-deterrent role.

The strength of the deterrent effect of the ICC also depends on the rational analysis of those leaders (most responsible) who are considering promoting the commission by their subordinates of conduct that the ICC Statute considers punishable. This type of analysis compares the chances of being investigated, tried and sanctioned by the ICC with the benefits they expect to obtain if they continue forward with their plans. For this reason, one of the main challenges of the ICC is to generate the perception among those leaders that the likelihood of being sanctioned is not too low (Cronin-Furman, 2013).

The need for collective action by the States Parties has a negative effect on the efficacy of the preventive-deterrent ICC's role, as it conveys the impression that there is a lower degree of certainty regarding the investigation, prosecution and sanction by the ICC (Schense, Carter, & International Nuremberg Principles Academy, 2017). This is because certain States Parties may choose to minimize their contribution to the ICC because they do not have sufficient incentives to contribute or to cooperate effectively with it.

Based on the foregoing, Cronin-Furman (2013) points out that there are two classes of potential most responsible persons of the crimes included in the ICC Statute. First, there are the leaders or

commanders who order the crimes to be committed (thus obtaining substantial benefits from their commission); and, secondly there are, leaders or commanders who shirk their duty to prevent or punish their subordinates for their commission. As a consequence, it is those who belong to the first group who obtain greater benefit from the commission of crimes, while it is the members of the second group who are in a position to carry out a more balanced cost-benefit analysis, and who, therefore, represent a more likely assumption of effective deterrence by the ICC (Kronin-Furman, 2013: 446).

Finally, it is worth highlighting that the fact that the first arrest warrants (and the first convictions) of the ICC have been limited to accused belonging to organized non-state armed groups (despite numerous allegations regarding the alleged commission by government officials of crimes provided for in the ICC Statute), has generated a negative effect. As a result, state officials in the Sub-Saharan Africa region have understood that they can rationally decide to promote this type of crimes, since most of the existing cases before the ICC allow them to disregard the risk of being investigated, prosecuted and sanctioned by the ICC (Kronin-Furman, 2013: 443).

4. CONCLUSIONS

IL in general, and ICL in particular, are susceptible to being analyzed through an economic rationality (Kontorovich & Parisi, 2016). In this sense, Jo and Simmons (2016), together with the authors mentioned throughout this chapter, approach the ICC's role from a perspective that uses the logic of the TRC. This perspective is limited to decision-making by actors who, like the States Parties to the ICC Statute, act rationally, and who, depending upon the circumstances, can decide to either contribute to the preservation of the GPGs provided for in the preamble of the ICC Statute or become stowaways.

In this way, the analysis of the ICC's role from the perspective of the EAL, and especially the TRC, allows us to examine how the ICC can maximize the contribution of States Parties to the maintenance of international peace and security by strengthening cooperation in the fight against impunity, promoting accountability and increasing

the certainty of punishment for those most responsible. Furthermore, considering that States Parties and their leaders are rational subjects that act in accordance with a cost-benefit analysis, this type of analysis also allows the ICC to design strategies to try to minimize the phenomenon of the free-riding States.

REFERENCES

Juriprudence

International Criminal Court

ICC [Trial Chamber VIII]. The Prosecutor v. Ahmad Al Faqi Al Mahdi. Case No. ICC-01/12-01/15. Reparations Order. 17 August 2017.

ICC [Appeals Chamber]. The Prosecutor v. Thomas Lubanga Dyilo. Case No. ICC-01/04-01/06-3129-AnxA. Order for Reparations. 3 March 2015.

Doctrine

Albin, C. (2003). Negotiating International Cooperation: Global Public Goods and Fairness. Review of International Studies. Vol. 29. No. 3. Pp. 365-385.

Barrett, S. (2007). Why Cooperate? The Incentive to Supply Global Public Goods. Oxford (United Kingdom): Oxford University Press.

Becker, G.S. (1968). Crime and Punishment: An Economic Approach. In: Fielding, N.G., Clarke, A. & Witt, R. (Eds.). The Economic Dimensions of Crime. London (United Kingdom): Palgrave Macmillan. Pp. 13-68.

Bodansky, D. (2012). What's in a Concept? Global Public Goods, International Law, and Legitimacy. European Journal of International Law. Vol. 23. No. 3. Pp. 651-668.

Cervera Vallterra, M. (2014). El caso de la República Democrática del Congo: efectos perversos de la globalización en un estado fallido. *Anuario Español de Derecho Internacional*. Vol. 30. Pp. 87-138.

Cohn, T.H. (2012). Global Political Economy. Boston (USA): Pearson Longman.

Cronin-Furman, K. (2013). Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity. International Journal of Transitional Justice. Vol. 7(3). Pp. 434-454.

Doménech Pascual, G. (2019). *Sobre el poder explicativo del análisis económico del derecho. RACO. Revistes Catalanes amb Accés Obert.* https://www.raco.cat/index.php/InDret/article/view/354515.

Galand, A.S. (2017). A Global Public Goods Perspective on the Legitimacy of the International Criminal Court. *Loyola of Los Angeles International and Comparative Law Review.* Vol. 41. Pp. 1-62.

Goldsmith, J.L. & Posner, E.A. (2005). The Limits of International Law. Oxford (United Kingdom): Oxford University Press.

González-Ruiz, C.D., & Mijares, V.M. (2020). *Los fuertes hacen lo que quieren: exponiendo los límites de la Corte Penal Internacional. Revista de Direito Internacional.* Vol 17. No. 1. Pp. 406-416.

Henham, R. (2005). Punishment and Process in International Criminal Trials. Farnham (United Kingdom): Ashgate.

Haggard, S. & Simmons, B.A. (1987). Theories of International Regimes. *International Organization.* Vol. 41. No. 3. Pp. 491-517.

Jo, H. & Simmons, B.A. (2016). Can the International Criminal Court Deter Atrocity?. International Organization. Vol. 70. No. 3. Pp. 443-475. https://doi.org/10.1017/S0020818316000114.

Kalyvas, S. N. (1999). Wanton and Senseless? The Logic of Massacres in Algeria. Rationality and Society. Vol. 11. No. 3. Pp. 243-285.

Kaul, I., Grunberg, I. & Stern, M. (Eds.) (1999). Global Public Goods: International Cooperation in the 21st Century. New York (USA): Oxford University Press.

Keeva, S. (1997). Global Justice Edges Closer. American Bar Association Journal. Vol. 83. No. 11. Pp. 22-23.

Klabbers, J. (2001). Just Revenge? The Deterrence Argument in International Criminal law. Finnish Yearbook of International Law. Vol. 12. No. 1. Pp. 249-267.

Krasner, S.D. (1982). Structural Causes and Regime Consequences: Regimes as Intervening Variables. International Organization. Vol. 36. No. 2. Pp. 185-205.

Lovett, F. (2006). Rational Choice Theory and Explanation. Rationality and Society. Vol. 18. No. 2. Pp. 237-272.

Minow, M. (1998). Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence. Boston (USA): Beacon Press.

Nordhaus, W.D. (2006). Paul Samuelson and Global Public Goods. In: Szenberg, M., Ramrattan, L. & Gottesman, A.A. (Eds.). Samuelsonian Economics and the Twenty-First Century (pp. 88-98). Oxford (United Kingdom): Oxford University Press.

Nollkaemper, A. (2012). International Adjudication of Global Public Goods: The Intersection of Substance and Procedure. European Journal of International Law. Vol. 23. No. 3. Pp. 769-791.

O'Brien, R. & Williams, M. (2013). Global Political Economy: Evolution and Dynamics. Houndmills (USA): Red Globe Press.

Olasolo, H. (2012). *El principio de complementariedad y las estrategias de actuación de la Corte Penal Internacional en la fase de examen preliminar. Revista Electrónica de Estudios Internacionales*. Vol. 24. No. 2. Pp. 1-45.

Olasolo, H. (2016). *Los fines del derecho internacional penal. International Law: Revista Colombiano de Derecho Internacional*. Vol. 14. No. Pp. 93-146.

Olasolo, H. & Galain, P. (2018). *Los desafíos del derecho internacional penal ante su encrucijada actual: atención especial a los casos de Argentina, Colombia, España, México y Uruguay, Perspectivas Iberoamericanas sobre la Justicia* Book Collection. Vol. 1. Valencia (Spain): Tirant lo Blanch, *Instituto Iberoamericano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional & Instituto Joaquín Herrera Flores*. https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-1-coleccion-desafios-derecho-internacional-penal.

Olson, M. (1971). The Logic of Collective Action: Public Goods and the Theory of Groups. Cambridge (USA): Harvard University Press.

Oosterveld, V. (2001). The Cooperation of States with the International Criminal Court. *Fordham International Law Journal*. Vol. 25. No. 3. Pp. 767–839.

Posner, R. (2002). *El movimiento del análisis económico del derecho: desde Bentham hasta Becker. THĒMIS-Revista de Derecho*. Vol. 44. Pp. 37-54.

Rao, N. (2011). Public Choice and International Law Compliance: The Executive Branch is a They, Not an It. Minnesota Law Review. Vol. 96. No. 1. Pp. 194-277.

Rudolph, C. (2017). Power and Principle: The Politics of International Criminal Courts. New York (USA): Cornell University Press.

Samuelson, P.A. (1954). The Pure Theory of Public Expenditure. The Review of Economics and Statistics. Vol. 36. No. 4. Pp. 387 et seq.

Schense, J., Carter, L.E., & International Nuremberg Principles Academy (Eds.) (2017). Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals. Brussels (Belgium): Torkel Opsahl Academic EPublisher.

Simon, H.A. (1955). A Behavioural Model of Rational Choice. The Quarterly Journal of Economics. Vol. 69. No. 1. Pp. 99 et seq.

Triffterer, O. & Ambos, K. (Eds.) (2016). The Rome Statute of the International Criminal Court A Commentary. Munich (Germany): C.H. Beck, Hart & Nomos.

Ulen, T.S. (1994). *La teoría de la elección racional en derecho y economía.* In: Encyclopedia of Law and Economics. Pp. 790-818.

Van Aaken, A. (2012). Rational Choice Theory. Oxford Bibliographies Online. Vol. 2012. No. 1. Pp. 1 et seq.

Vasiliev, S. (2015). Victim Participation Revisited: What the ICC is Learning about Itself. In: Stahn, C. (Ed.). The Law and Practice of International Criminal Court. Oxford (United Kingdom): Oxford University Press.

Vidal de la Rosa, G. (2008). *La teoría de la elección racional en las ciencias sociales. Sociológica.* Vol 23. No. 67. Pp. 221-236.

Waller, J.E. (2007). Becoming Evil: How Ordinary People Commit Genocide and Mass Killing. Oxford (United Kingdom): Oxford University Press.

Chapter 5
The Global Governance Perspective[*]

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1. INTRODUCTION

This chapter aims to analyze the role of the International Criminal Court (ICC) from the perspective of global governance, paying special attention to the impact of the ICC actions and its relationships with other actors involved in such governance. To do this, the notion of global governance will first be analyzed, emphasizing the role that international organizations (IOs) play within it (section 2). Subsequently, the concept of justice that guides global governance will be studied (section 3). Finally, the capabilities and potential of the ICC to play a relevant role in said governance, and the strengths and weaknesses of the ICC activities in its more than two decades of existence, will also be examined (section 4).

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2. THEORETICAL APPROACH TO THE NOTION OF GLOBAL GOVERNANCE: THE ROLE OF INTERNATIONAL ORGANIZATIONS IN GLOBAL GOVERNANCE

2.1. The notion of global governance: definition, foundation and elements of a notion in permanent discussion

Although the term "global governance" is characterized by its conceptual vagueness and interpretive flexibility (Cepiku, 2006:1), it highlights the loss by nation-States of their monopoly in decision-making processes and in the formulation of public policies (Betts, 2011: 5).

In 1995, in the report entitled "Our Global Neighborhood", the Commission on Global Governance (CGG) presented the first definition of the notion of "global governance" in an international political document. According to the CGG:

> Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.

This definition highlighted, in the first place, the weakening of the understanding of power and the conduct of society centered on States (Ansell & Torfing, 2016: 2). As the CGC itself admits, governments do not carry the full weight of global governance.

This weakening of state power is manifested through the participation of new actors in the discussion and decision-making processes in particular matters of common interest through formal or informal mechanisms. Thus, global governance includes the participation of many different actors in a decentralized process (Torfing, Peters, Pierre & Sorensen, 2012: 15), that is to say, regulatory and normative power is exercised in a decentralized manner. Among the participating actors, there are States, as well as supranational actors (such as international tribunals), subnational actors (such as regions or cities) or non-state actors (coming from civil society or the private sphere such as transnational enterprises and NGOs) that, despite having

their own agendas, are driven by common interests and concerns, and have the capacity to influence and even co-produce regulations, generally through non-binding instruments (soft law) and cooperation (such as persuasion or voluntary coordination).

Secondly, global governance is a complex, interactive and evolving process for the taking of decisions at the global level, in which different transnational actors interact with each other to negotiate responses to shared problems or concerns. This generates relationships of growing interdependence and new forms of coordination and cooperation between actors which are public and private, social and political, and governmental and non-governmental (Rhodes, 1996: 659).

In this way, "global governance" is presented as structure, process, mechanism and strategy (Levi-Faur, 2012: 8). It is a structure made up of a system of norms and practices, endowed with its own institutional architecture (formal and informal) and created by the traditional subjects of international law (IL) (States and IOs) and other transnational actors for the achievement of common goals.

Global governance is also a process for the collective management and taking of decisions, in which numerous actors participate, as they seek to foster these common goals through coordination and regulation at the international, regional, national and local levels (multilevel governance). It is a process in which States have no monopoly on the power to determine the rules to which individuals, corporations, organizations and institutions must adjust themselves, but instead share that normative power with other actors (Betts, 2011: 4). As Rosenau (2000: 4) puts it, there can be governance without government, since many functions historically exclusive to formal institutions (such as regulatory bodies, governmental institutions or state agencies) are today carried out jointly or autonomously by non-governmental entities whose rules are accepted by most of their members.

In this way, global governance is understood as a regulatory process resulting from: (a) the decentralization and diversification of politics (the activity of governing, or influencing the government of a State, is not exclusive to a single institution that exercises authority

exclusively at the central level); and (b) the expansion of regulatory governance beyond States (Levi-Faur, 2012: 13) through the distribution of regulatory powers among numerous actors that compete with each other in the carrying out of policies (Abbott & Snidal, 2009). Their effectiveness depends upon their ability to: (i) support and influence decision-making at local, national and international levels; (ii) take advantage of human and institutional resources at different levels; and (iii) build alliances and networks of institutions and procedures which allow actors to share capacities and develop joint practices and policies on matters of common interest (European Commission, 2001: 12).

Global governance is likewise a mechanism for the institutionalization of multilateral decision-making methods and procedures which are, generally, less hierarchical and more consensual than those applied by state authorities.

Finally, global governance is a strategy. The actors of global governance design decentralized, informal and collaborative governance systems (Levi-Faur, 2012: 9) and define tactics to be able to influence or modify the behavior of States or of other transnational actors (Finkelstein, 1995: 368).

As a result of the foregoing, there is international regulation resulting from the interaction of various actors at different levels of governance, which varies depending upon the will and efforts of the States in the establishment of international coordination and cooperation mechanisms with non-state actors.

Nevertheless, the process of governance occasionally confronts insufficient democratic representation and unequal participation in the professional and scientific organs and bodies that define norms, rules and procedures, as well as in the governmental agencies that implement them, and the organs charged with overseeing compliance. There is yet to be developed an adequate base to provide sufficient political and legal legitimacy to the institutions that play a role in global governance.

This reflects the complex, and sometimes conflicting, relationship between global governance and democracy (Benedict, 2001: 6232) and raises the question as to who regulates the regulator (Ben-

venisti, 2014: 21). The creation of international normative and regulatory frameworks has, in general, not been accompanied by the adoption of transparent rules as regards: (a) the participants and interests actually present in the decision-making processes; (b) the establishment of accountability mechanisms for the actors; and (c) the existence of clear and accessible information to the public regarding the content and implications of the decisions.

2.2. The role of international organizations in global governance

The decade following the fall of the Berlin Wall brought about an expansion of multilateralism which was manifested in the international legal system in two ways. On the one hand, there was institutional expansion, through the constant creation of new IOs, and the strengthening of those already in existence, which were capable of exercising authority over other global actors (including States). This authority was manifested in the recognition (or in the perception) of the binding nature of their decisions or the validity of the technical assumptions which supported their recommendations due to their specialized knowledge in certain fields (Voelsen & Schettler, 2019: 544- 546; Zürn, 2018: 9).

On the other hand, there was a normative expansion, which was expressed in the proliferation of norms, regulations and international standards, which found justification in the new-born notion of Global Public Goods (GPGs), and which were, therefore, appropriate to condition state sovereign competences (thus affecting their structures and internal organization) (Hurrell, 1999: 60; Zürn, 2018: 8). It was precisely during this period, on July 17, 1998, that the signing of the ICC Statute took place, which created both an IO, with its own institutional interests, and a permanent international criminal tribunal (Quesada-Alcalá, 2019). It is one of the few IOs that, according to some authors, exercises, together with the UN Security Council (UNSC), an international political authority, understood as an institutionalized form of practical authority (Voelsen & Schettler, 2019: 545-546; 558).

The creation of IOs contributed to the process of global governance by promoting the emergence of legal pluralism beyond national

borders (Delbruck, 2002: 422). This has translated into the existence of a broad spectrum of international, hetero- and self-regulatory systems, functionally interconnected with national law (Nowrot, 2004: 6) and composed of a multiplicity of normative instruments arising out of inter-state sources (created by States or IOs) and non-state sources (being developed and applied by private actors). Such instruments, regardless of their legal nature: (a) are endowed with significant regulatory force; (b) blur the distinction between binding and non-binding norms (Nowrot, 2004: 6); and (c) compete for the authority to resolve international disputes.

Within this process, IOs have generated transformations in methods for the adoption and implementation of decisions in the international arena. With the aim of guaranteeing preferably consensual decisions among their members, IOs have moved towards informal or semi-formal models that are less centralized and more flexible, and whose decisions are adopted following standardized working methods or procedures which they apply autonomously and voluntarily.

However, while the institutional and normative expansion of the global governance system has deepened, the contestation of the authority of IOs by States and civil society has also been accentuated. The global governance system has been criticized as suffering from problems of democratic legitimacy which undermine the principle of equality and the prohibition of arbitrariness in decision-making, caused by a technocratic bias and the absence of separation of powers (Zürn, 2018: 9-11). This refers to the primacy of technical rationality as the foundation for decisions in matters which share a highly specialized and political nature. The main consequence of this is the lack of internal public debate and democratic scrutiny. Nevertheless, although technical competence is an essential element of good politics (Innerarity, 2012: 14), the authority of those who exercise global governance should not be separated from popular control or standards of democratic equality, deliberative dispute, and protection of human rights (Besson, 2020).

A final criticism notes that inequality between States (ranked according to their power and influence) affects in practice the process of decision-making by IOs and is, according to Zürn (2018: 10; 252;

262), part of the institutional architecture of most currently existing IOs and international institutions. Within this context, civil society demands a more democratic, representative, transparent, and equitable public participation, through the provision of clear and effective rules on participation in such procedures, the creation of spaces for open deliberation, access to information, mechanisms of accountability and independent external control (Sewanyana, 2019:26).

3. THE NOTION OF JUSTICE IN GLOBAL GOVERNANCE AND THE UNDERSTANDING OF INTERNATIONAL JUSTICE

The idea of justice in global governance also implies the recognition in the latter of an ethical dimension (CGG, 1995: chapter 2). In other words, global governance, in addition to the definition of rules for the participation of global actors in the management and decision-making in world affairs, is founded upon: (a) their prior acceptance of common values that, in some cases, justify their own existence; and (b) the attribution of legal responsibility. As a result, peace, security, justice, or human dignity have provided the basis for the creation of many IOs and international tribunals, which have competence to resolve legal disputes by adopting binding decisions and ensuring the application, interpretation and compliance with conventional standards.

As regards international tribunals, their decisions have effects beyond individual disputes; they outstrip the limits of specific cases and affect general legal structures. Each judicial decision that resolves a specific controversy generates the expectation that similar legal situations will probably be decided in a similar way in the future. This allows international tribunals to indirectly contribute to the definition, planning and/or execution of decisions or strategies by global actors which were not parties to the dispute. Furthermore, such decisions contribute to the development of a normative system. Thus, the impact of the case law of international tribunals transcends the individual case and influences the more general sphere of relations between different global actors. In that sense, it

constitutes an undeniable facet of global governance (Von Bogdandy & Venzke, 2012: 4-5).

In this way, international tribunals, within the framework of their competences, fulfill the role of "guardians" of the fundamental values of international society. Thus, global governance and international justice (IJ) are connected as it is desirable and possible to regulate relations between States based upon the defense and guarantee of the aforementioned common values.

In this context, the ICC represents the recognition of a collective (or "humanity") conscience; a "realistic utopia" (Stahn, 2020: 192) that, through criminal law, permits the safeguarding of human rights and the protection of human dignity (Cortés Rhodes, 2018: 59-60; Zolo, 2002: 200-201). In this sense, for Ferrajoli (2018: 45), the ICC is one of the few institutions of IL that can be considered a truly global guardian, as it has been conceived to investigate and punish the commission of the most serious crimes of international concern that affect common values considered essential for international society.

The ICC is a response by international society to conduct that most seriously undermines its fundamental values. It investigates and prosecutes the allegedly most responsible persons and imposes penalties for such conduct, with the aim of retribution (punishment of the offenders), general and special negative prevention (deterrence of new crimes by the convicted persons or by other leaders) and positive general prevention (formation of a universal legal conscience). In other words, the ICC seeks to correct the imbalance generated in international society, to prevent a new undermining of its essential values and to reaffirm them (Olasolo, 2016).

4. THE INTERNATIONAL CRIMINAL COURT IN GLOBAL GOVERNANCE

4.1. The potential of the International Criminal Court as an actor of global governance

The principles that have inspired the development of the notion of global governance were of fundamental importance in the creation of the ICC, which was born as an expression of the conviction of the States Parties of the necessity of protecting certain common values of international society.

The wording of the preamble of the ICC Statute places on record: (a) the existence of an international community in which all peoples are united by common bonds and their cultures pieced together in a shared heritage (paragraph 1); (b) the risks posed to the international community by atrocities which defy imagination (paragraph 2), constitute serious crimes, and pose a threat to the peace, security and well-being of mankind (paragraph 3). It is the protection of these values, and in particular the need to end the impunity of the perpetrators of these crimes and thus contribute to the prevention of new crimes (paragraph 5), which justifies the creation of the ICC, as a permanent international criminal tribunal which is independent, linked to the United Nations system and with jurisdiction over the most serious crimes of concern to the international community as a whole (paragraph 9).

In this way, the preamble of the ICC Statute expressly highlights the existence of those common values of international society, which require joint action and cooperation. This is reinforced by its explicit reference to the purposes and principles of the Charter of the United Nations. This shows the close connection between the ICC and global governance, which seeks to defend and protect the fundamental values of international society and relies on international structures (beyond States) to provide common solutions to global problems.

Likewise, the preamble defines the specific role of the ICC in the governance process, which is, to put an end to impunity for those responsible for the most serious crimes of international concern and to thereby contribute to the prevention of new crimes. Thus, one of the

central elements of the ICC's role is the prevention of new international crimes through the adoption of measures necessary to put an end to their impunity (Olasolo, 2016: 122-123; Schabas, 2010: 43)[1].

As a result, the ICC is currently the most relevant international judicial body when it comes to enforcing international criminal justice (ICJ) (Olasolo, 2016: 98-99).

For all these reasons, it can be affirmed that the ICC not only welcomes the idea and makes up a part of the global governance process, but that it was created with the goal of playing a relevant role when regulating certain behaviors of human beings, which due to their gravity require the intervention of international society —the ICC's role can even be considered essential, if one considers that it was created because the pre-existing mechanisms did not provide an appropriate response to the problem of impunity for those responsible for perpetrating international crimes, which traditionally are committed through state institutions or with their acquiescence.

However, the ability of the ICC to act is limited by its jurisdiction, which restricts (and delimits) the role it can play in global governance. Despite this, the ICC has a calling for universality and, thanks to the mechanisms for the extension of its temporal, territorial and personal jurisdiction provided for in arts. 12(3) and 13(b) of the ICC Statute, it can have, in practice, a broad jurisdiction (which is universal in cases of referral by the UNSC) over situations in which genocide, crimes against humanity, war crimes and aggression have been committed (Olasolo & Carnero Rojo, 2011: 108-109; Kaul, 2002: 612-614).

Nevertheless, the role entrusted to the ICC cannot be achieved on its own but must necessarily interact with other actors in international society. It is, thus, embedded within a (broader) global governance system, which is referred to by Burke-White (2005) as a "multilevel global governance system" because different international and national structures, deeply interconnected, participate in governance efforts in which each level of authority influences and, ideally, reinforces activities at the other levels of governance.

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1 The ICC case law also highlights prevention as one of the ends of punishment. See: ICC, Katanga, 23/05/2014: para. 38.

4.1.1. Interaction with States in the process of global governance

The ICC is governed by the principle of complementarity. Both the preamble and art. 1 of the ICC Statute refer to the ICC as an international institution that is complementary to national criminal jurisdictions. This complementary relationship means that national jurisdictions formally have primacy over the ICC. Therefore, the ICC may only exercise its jurisdiction when the competent national authorities have not adopted the necessary measures to investigate or prosecute those responsible for crimes within the jurisdiction of the ICC. States have the main obligation to investigate, prosecute and punish such crimes, with the ICC being a tribunal of last resort for those cases in which justice cannot be achieved at the national level (Benzing, 2003: 592-599; Olasolo, 2012: 5-6; Ambos, 2010: 18).

Nevertheless, it is the ICC itself that has the power to determine whether the States which have jurisdiction over a given situation or case are carrying out, or have carried out, a genuine investigation or prosecution (or if, on the contrary, there is inaction, unwillingness or inability to act on the part of national authorities) and whether the situation or case in question is of sufficient gravity (art. 17 of the ICC Statute).

The principle of complementarity is an unequivocal sign that the ICC forms part of a global governance system. The ICC is not set up as a mere international mechanism of accountability (or of establishing responsibilities for the most serious crimes). Moreover, the provisions on complementarity are not solely relevant for the determination of which situations and cases are admissible before the ICC. Rather, the ICC and the complementarity regime integrate within a system of interactions between national institutions and the ICC, which, collectively, have the potential to increase the chances of good governance at the national and supranational levels and to put an end to the impunity for those responsible for the most serious crimes of international concern. Thus, the ICC and States join forces with a common goal, forming two different levels of governance which are related to each other through political and legal interactions whereby each level is continuously responding to and influencing the actions of the other (Burke-White, 2005). In other words, an ICC based upon the principle of complementarity

guarantees international rule of law by creating an interdependent and mutually reinforcing international justice system[2].

The principle of complementarity, on the one hand, limits the exercise of the ICC jurisdiction, by granting priority to national jurisdictions. Nevertheless, on the other hand, it can have a multiplier effect in the fight against impunity at the national level and has the capacity of generating a significant impact on national governance structures. Through the regime of complementarity, ICC intervention can: (a) generate significant changes in national dynamics and policies; (b) promote legislative changes or reform and improvement of the capacities of the investigative bodies, the judicial system and national security forces; (c) offer parameters and guidelines for the evaluation of the capacity and effectiveness of national judicial systems that can serve as a guide for domestic bodies in processes of institutional strengthening; and (d) provide a deterrent to future crimes (Burke-White, 2005).

Furthermore, it also offers the opportunity of assisting national authorities so that they may fulfill their duty to investigate and prosecute crimes that have already been committed (the so-called "positive complementarity"), resulting in the strengthening of national justice systems and their capacity to carry out their own proceedings (Olasolo, 2012). The preliminary examinations of the ICC Office of the Prosecutor (ICC OTP), prior to the formal opening of an investigation, offer an essential tool for supervising actions taken at the national level.

It is true that the impact of the complementarity regime on politics and decision-making processes at the national level, or on the promotion of reforms that improve the judicial system, may sometimes be motivated by partisan interests (such as the risk-benefit assessment that the authorities and political class may make in the case of a possible ICC intervention). However, it is also true that the threat of ICC intervention has the capacity to spark: (a) important political and legal changes at the national level; and (b) incentives and support within States Parties to comply with their obligations to investigate,

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2 See: ICC, Office of the Prosecutor, 14/09/2006.

prosecute and punish international crimes thus, ultimately, contributing to the strengthening of the rule of law at the national level.

In addition to the ICC interaction with States Parties, which is necessary for the effective application of the complementarity regime, the ICC must also cooperate with them to successfully conclude its own investigations. Lacking real authority and the ability to enforce its decisions, the ICC is largely dependent upon state cooperation for the proper fulfillment of its role.

The States Parties to the ICC Statute have a general obligation to cooperate with the ICC (art. 86 of the ICC Statute), and the ICC may even enter into cooperation agreements with non-party States (art. 87(5)). Nevertheless, this obligation is neither absolute (the ICC Statute includes clauses that exempt States Parties from any obligation or allow them to postpone their fulfillment), nor is any sanction expressly provided for in cases of non-compliance with the duty to cooperate with the ICC (Olasolo, Carnero Rojo, Seoane & Carcano, 2018: 424). Furthermore, the ICC has no effective system to enforce its decisions (Anello, 2013: 46-49). Hence, state cooperation is the area where the ICC is especially vulnerable (Schabas, 2010: 976).

Moreover, in the field of cooperation between States Parties and the ICC, it is possible to observe the same pattern as indicated above in relation to the principle of complementarity. Cooperation with the ICC, particularly concerning those States Parties that are the subject of ICC investigations, varies in relation to the ability of national authorities to use such cooperation for their internal political benefit (Hillebrecht & Straus, 2017: 163; Vilmer, 2016: 1330-1331). Thus, for example, cooperation is more likely to occur when state authorities perceive that it may be useful to eliminate or neutralize internal opposition and consolidate their power (particularly when the potential targets of ICC investigations and prosecutions may be their political or military opponents); while, on the contrary, such cooperation is unlikely when the authorities (themselves or their political allies) are at risk of being investigated and prosecuted by the ICC.

However, even in situations where there is a risk of investigations being opened into ruling elites, those elites may be incentivized to cooperate if they are able to influence the timing and pace of the ICC

investigations. For those elites, cooperation is the result of a balance between the risk of being prosecuted and their desire to use cooperation to advance their own political agenda (Hillebrecht & Straus, 2017; Burke-White, 2005). The ICC is, therefore, subject to state policy considerations: when the interests of the States coincide with the need for cooperation with the ICC, it is supported by state actors, but not so in those cases in which their interests diverge (Quesada-Alcalá, 2019).

This governance process is not only bidirectional between the State involved in an investigation and the ICC but involves other actors which come into play (such as other States, the UN, IOs or civil society), giving rise to a complex system of global multilevel governance. The impact that the lack of cooperation may have on the international reputation of a State may induce it to cooperate, particularly when it is in a position of institutional weakness or does not hold a preponderant position in international society. Factors, such as pressure from IOs, civil society or international donors (particularly, on those States Parties that may be receiving external aid or international cooperation), the aspirations (political, economic, or military) of the States Parties at the international or regional levels, and the influence that their international allies can exert on them can create conditions rendering non-cooperation too costly.

The high price of non-cooperation in these cases can end the ability of States to maneuver and thus contribute to the generation of a certain deterrent effect on the part of the ICC. Both cooperation with the ICC and the categorical rejection of any interaction with it can entail significant costs for States Parties political authorities (Hillebrecht & Straus, 2017), which encourages continuous interaction amongst the different actors of global governance.

Although the ICC has at its disposal limited tools to force cooperation by States, it is no mere observer in this set of interactions. Its decisions have an immediate reflection in the predisposition of States Parties authorities to cooperate (as shown by the cost-benefit assessments of the ruling elites). This occurs because the ICC actions have an impact on national governance; and, in the same way, the actions of States Parties affect the functioning and actions of the ICC. The ICC is no stranger to this process and must navigate the political panorama of both the countries with which it works and international society.

The attitude of the State Parties irremediably affects the way in which the ICC interacts with them, for example, when selecting and deciding on which situations and cases to act or what actions to take to put pressure on a State that refuses to cooperate (Hillebrecht & Straus, 2017; Quesada-Alcalá, 2019). The criteria for selecting situations and cases (among them, the possibility of obtaining cooperation and judicial assistance in support of the ICC activities) are among the most criticized issues in the operation of the ICC OTP (due to its limited resources, the ICC OTP is forced to prioritize where and what to investigate). Without the cooperation of State Parties, it cannot carry out its work; yet choosing to investigate those situations and cases in which greater cooperation is expected can be a "double-edged sword", which encourages non-cooperation and lends itself to the political instrumentalization of the work of the ICC. Thus, insufficient resources and lack of cooperation can create the perception that the ICC OTP acts without independence and impartiality.

4.1.2. Interaction of the International Criminal Court with the United Nations and other international organizations

The ICC is a permanent institution with international legal personality (arts. 1 and 4 of the ICC Statute), which is independent, although linked to the UN system (preamble and art. 2 of the ICC Statute). As a result, there is a preferential relationship between the ICC and the UN, which has been given effect through the execution of an agreement between both institutions. In this relationship, the fundamental role assigned by the ICC Statute to the UNSC stands out. In addition to the power, acting under Chapter VII of the UN Charter, to refer for investigation situations in which crimes falling under the ICC jurisdiction appear to have been committed (art. 13(b) of the ICC Statute), the UNSC may also delay or suspend the exercise by the ICC of its jurisdiction over a particular situation or case (art. 16 of the ICC Statute). Likewise, the UNSC, particularly in the resolutions through which it refers situations to the ICC, may also require any non-party State to cooperate with the ICC (Schabas, 2010: 982-983).

The ICC Statute also provides for cooperation with intergovernmental organizations, from which the ICC may request information or documents (as well as other forms of cooperation and assistance) (art. 87(6) of the ICC Statute). These organizations include, for example, the European Union (with which the ICC concluded a cooperation agreement in 2006) and Interpol (an assistance agreement has been signed between the ICC OTP and Interpol).

A final element that contributes to the interconnection between the ICC and IOs when it comes to consolidating and applying certain international standards, particularly in the field of human rights, is article 21(3) of the ICC Statute, which establishes that the application and interpretation of its provisions must be consistent with internationally recognized human rights. Art. 21(3), which plays a fundamental role, has facilitated the ICC making continuous references to the case law of the European and Inter-American Courts of Human Rights (Bitti, 2009; Sheppard, 2010; Schabas, 2010: 397-400), thereby establishing a continuous interaction (or dialogue) between international and regional courts in the protection of those values that justified the creation of the ICC.

4.1.3. Interaction of the International Criminal Court with civil society organizations, victims and other individuals

The ICC Statute has also granted a role in ICC proceedings to civil society organizations, victims and other individuals. Within the framework of the powers of the ICC OTP to initiate an investigation *motu proprio* (art. 15 of the ICC Statute), it may receive information about possible crimes falling within the jurisdiction of the ICC. In practice, the principal sources of such communications are individuals and NGOs (Schabas, 2010: 319-320), which provides them an important avenue to influence future ICC investigations. By providing information to the ICC OTP, civil society can alert it to a particular situation and ultimately lead the ICC OTP to launch an investigation (Williams, 2018). Another participation mechanism is the presentation of observations by *amicus curiae*.

The inclusion of these participation mechanisms also allows victims and civil society to play a role in support of the ICC OTP and

to have knowledge of the decisions taken by the ICC. This does not, however, grant them a formal right of participation in ICC proceedings. As a consequence civil society lacks standing to appeal decisions by the ICC OTP not to investigate a referred situation (Williams, 2018; Schabas, 2010: 42).

The interaction between the ICC and civil society is mutual. On the one hand, the ICC OTP, to analyze the veracity of the information received, may seek additional information from States, the UN, IOs, NGOs and other reliable sources (art. 15(2) of the ICC Statute). On the other hand, if the ICC OTP concludes that the information received does not provide a sufficient basis for an investigation, he must inform those who submitted the information (art. 15 (6)).

Civil society also plays a key role in publicizing, disseminating, and raising awareness of the work of the ICC and in promoting its role. Bringing to light the different factors that encompass situations of systematic violence and adequately informing the population that suffered such violence about these factors is a step that is fundamental to achieving the goals for which the ICC was created (Olasolo, 2012: 43). In contrast, the lack of support from local communities can serve to delegitimize international efforts to conduct investigations and trials effectively (Chan & Wouters, 2015: 147).

4.2. Has the International Criminal Court been a true driver of global governance?

Although, on paper, the ICC has all the necessary elements to become a true driver of global governance, in practice its impact has been limited by several factors.

4.2.1. Weaknesses of the International Criminal Court as a driver of global governance

The main weaknesses of the ICC as a driver of global governance can be grouped into three main categories. First, despite its undoubted calling for universality, the ICC has been unable to generate unanimous support among States. Although 124 States (representing

all regions of the world) are parties to the ICC Statute, there are significant gaps that considerably limit the ICC jurisdiction and ability to play a significant role in global governance. Three of the five permanent members of the UNSC (China, USA and Russia), seven of the nine nuclear powers (the three mentioned plus India, Pakistan, Israel and North Korea), major regional powers (Saudi Arabia, Egypt, Indonesia, Iran and Turkey), and several countries in which generalized violence or armed conflict is currently taking place or has recently taken place (Azerbaijan, Mozambique, Syria, South Sudan and Yemen), continue to not accept its jurisdiction. These are States that jointly have a large percentage of the territory and population of the world, and comprise some of the main economic, political, and military powers.

Even countries which had initially ratified the ICC Statute, such as Burundi and the Philippines, have decided to denounce it and have ceased to be States Parties to the ICC. They did so after the initiation of preliminary examinations of events which had occurred in their territories (and which have led to the opening of investigations into the situations in both countries)[3]. Moreover, there has been, in recent years, a significant reduction in the rate of ratifications of the ICC Statute (which are essential to universalize its jurisdiction)[4].

Furthermore, the potential universal reach of ICC jurisdiction has also not been attained by means of UNSC referrals (art. 13 (b) of the ICC Statute). The UNSC, acting in accordance with the provisions of Chapter VII of the UN Charter, has not remedied the limitations on the ICC jurisdiction and has only referred two situations to the ICC: Darfur (Sudan) (2005)[5] and Libya (2011)[6].

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3 South Africa and Gambia also initially decided to denounce the ICC Statute. Nevertheless, they eventually withdrew their notifications of denunciation and remain States Parties to the ICC Statute.

4 As of the end of November 2023, the last State to ratify the ICC Statute has been Armenia, which has deposited its instrument of acceptance on November 14, 2023. In addition to Armenia, since 2015, only four States have become parties to the ICC Statute: Kiribati in 2019, El Salvador in 2016 and Palestine in 2015.

5 See: UNSC, Resolution 1593 (2005).

6 See: UNSC, Resolution 1970 (2011).

In these circumstances, it may be perceived by many that the ICC is not currently a truly global actor or, at least, is not capable of having a global impact, as its jurisdiction has been unable to fully develop. As a result, there have been situations of alleged crimes that, despite complying with the material and temporal jurisdiction of the ICC, fell outside its personal or territorial jurisdiction (Olasolo & Carnero Rojo, 2011:108-109; Olasolo, Carnero Rojo, Seoane & Carcano, 2018: 447-448).

Secondly, the lack of cooperation by the States has been one of the most significant obstacles in ICC proceedings and has significantly limited its ability to complete satisfactorily its investigations and prosecutions. This lack of cooperation has been evident in the investigations initiated into the situations in Darfur (Sudan) and Libya, even though they were referred by the UNSC. In relation to the first one, the ICC has been powerless for over a decade and a half to obtain the arrest and surrender of Al-Bashir (president of Sudan for almost 30 years until he lost power in a *coup* that took place in April 2019). Moreover, five and a half years after the *coup*, the Sudanese government has not yet transferred Al-Bashir to the ICC, even though he has been in detention in Sudan since he lost power. This is despite the two arrest warrants issued against him in 2009 and 2010.

Indeed, between 2009 and 2019, the former president of Sudan traveled to many countries with total impunity while exercising his position as president, including with the express support of the African Union (Vilmer, 2016: 1324-1325). This situation led the ICC to request and remind various States Parties of their obligation to arrest Al-Bashir. It even declared that Jordan, South Africa, Djibouti, Uganda, DRC and Sudan itself (ICC, Al-Bashir, 04/04/2014; 09/03/2015; 11/07/2016a; 11/07/2016b; 06/07/2017; 11/12/2017), to name just a few, deliberately failed to comply with their obligation to cooperate with the ICC by failing to arrest and transfer to the ICC Al-Bashir when he was in their territory. Despite this, this absence of cooperation did not generate any significant reaction from the UNSC (Olasolo, Carnero Rojo, Seoane & Carcano, 2018:410-411). Except for the Al-Rahman case (who was transferred to the ICC custody on 9 June 2020, after surrendering himself voluntarily in the Central African Republic), none of the other cases currently pending before the ICC

in relation to this situation have been able to continue because those under investigation or accused remain fugitives.

Concerning the situation in Libya, although there are notable differences with respect to the situation in Darfur (Sudan), the result has been similar. Although the main defendants, Gaddafi and Al-Senussi, were arrested, their surrender to the ICC never took place. In the case against Gaddafi, the ICC has repeatedly demanded his surrender and even declared the case admissible despite the defense of Gaddafi having argued that he had already been tried and sentenced in Libya; these arguments were dismissed by the ICC[7]. To make matters worse, Gaddafi was released in April 2016 and currently remains a fugitive.

The Al-Senussi case had a different outcome. The ICC declared his case inadmissible based on the principle of complementarity since he was undergoing legal proceedings at the national level. The ICC agreed to let him stand trial in Libya[8]. The remaining two individuals being investigated in the Libyan situation, Al-Werfalli and Khaled, died in 2022 while they remained at large, despite the arrest warrants issued by the ICC against them (in 2013 and 2017). In the words of the ICC OTP, the non-execution of arrest warrants continues to be the greatest obstacle it faces concerning state cooperation[9].

There are other cases, especially those States in which investigations have been initiated, that have tried to use cooperation with the ICC as a political instrument. Thus, the decision to cooperate by Côte d'Ivoire (it opened an investigation at the request of the ICC OTP), the Central African Republic (CAR), the Democratic Republic of the Congo (DRC) and Uganda (whose situations were referred by the States themselves) have been marked and conditioned by national (and international) political interests.

These situations present common patterns in terms of the degree of cooperation with the ICC by those States which are being investigated by the ICC OTP. In these cases, cooperation *à la carte* has taken place, varying in intensity depending upon the moment and

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7 See: ICC, Gaddafi, 09/03/2020.

8 See: ICC, Al-Senussi, 24/07/2014.

9 See: ICC OTP, 05/05/2020; ICC, Gaddafi, 11/12/2014.

the risk-benefit analysis that the ICC investigation represented for the ruling political elite. In the beginning, the States showed high levels of cooperation, coinciding with the initiation of investigations against their political opponents. Nevertheless, when they perceived that the political cost at the national level was very high, or there was a risk that the investigations could affect themselves or their political allies, the cooperation decreased significantly (Hillebrecht & Straus, 2017; Quesada-Alcalá, 2019; Burke-White, 2005; Kambale, 2015).

One case that shows the complexity and challenges presented by this set of interests and interactions between different levels of governance within the framework of cooperation with the ICC is the investigation initiated in Kenya in March 2010 at the request of the ICC OTP. The investigation, which focused on the violence that occurred because of the 2007 general elections, resulted in the opening of proceedings against those who, after having been indicted, would become the president (Kenyatta) and vice president (Ruto) of the country (the latter became the current president of Kenya in September 2022).

Despite this, Kenya was not opposed openly to cooperating because of the costs this could entail, particularly in terms of the electorate and the international partners and donors to the country (including supporters and major contributors to the ICC budget). Instead, it adopted a strategy that included: (a) cooperation on certain matters (but not on others) at a superficial level (for example, with summonses or documents and field visits); (b) the use of legal mechanisms to challenge ICC decisions (particularly in relation to admissibility); and (c) the use of extrajudicial means to bribe and intimidate witnesses (Hillebrecht & Straus, 2017: 180-183). The latter tactic caused several witnesses to decide not to testify for fear of their safety, thus forcing the ICC OTP to withdraw the charges against Kenyatta[10] and causing the proceedings against Ruto[11] to be dismissed due to insufficient evidence. As a result, the ICC declared that Kenya had failed in its obligation to cooperate with the Court[12].

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10 See: ICC, Kenyatta, 13/03/2015.

11 See: ICC, Ruto & Sang, 05/04/2016.

12 See: ICC, Kenyatta, 19/09/2016.

These limitations in achieving the cooperation of States have raised doubts about the ability of the ICC to investigate and prosecute incumbent political leaders or high-ranking state officials while they remain in office, or in power. Examples of this are the proceedings against the former presidents of Kenya and Sudan (Kenyatta and Al-Bashir), and the case brought against the current president of Kenya (Ruto). These cases show that the rejection of ICC proceedings by those political leaders who continue to exercise power has become a major obstacle to ICC proceedings.

The lack of cooperation, however, is not an isolated phenomenon, nor is it exclusive to States that find themselves in or emerging from situations of widespread violence or institutional weakness and have an interest in, or are being forced to maintain, a balance between cooperating and not cooperating in ICC investigations. What is truly surprising is that established democracies such as the US have shown a confrontational attitude and hostility towards the ICC that is without precedent. Following the ICC Appeals Chamber decision to authorize the initiation of an investigation into the situation in Afghanistan[13], which could eventually implicate US nationals (an authorization that was initially denied by ICC Pre-Trial Chamber II due to the limited prospects for the success of the investigation given the few available resources and the limited possibilities of obtaining cooperation from the competent national authorities)[14], the US government-imposed sanctions against the ICC Prosecutor and the staff of the ICC OTP. The ICC described these sanctions as another attempt to interfere with its role, judicial independence, and investigation.

The ICC OTP itself has recognized that the lack of cooperation with the ICC by some States is unlikely to improve soon. It predicts that the difficult security and cooperation environment will continue or become even more difficult in the coming years, in which the ICC will face new and possibly more complex or sensitive situations (ICC, 2019). The ability of the ICC to deal with these problems in the fu-

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13 See: ICC, Situation in Afghanistan, 05/03/2020.

14 See: ICC, Situation in Afghanistan, 12/04/2019.

ture will be key to its credibility and will determine in large measure whether it can be perceived as a relevant actor in global governance.

Thirdly, the perception of the ICC as a driver of global governance has also been encumbered by the limited scope of the investigations and prosecutions undertaken to date. After more than 20 years of operation, only seven final judgments have been issued (after completing trials at first instance and on appeal), which include six convictions (five for international crimes in the cases against Lubanga, Katanga, Al Mahdi, Ntaganda and Ongwen, plus one conviction for crimes against the administration of justice in the Bemba case) and two acquittals (Ngudjolo Chui and Bemba). On the other hand, a number of defendants remain at large.

In addition, more than a few criticisms have been aroused by the strategy of selection and prioritization of cases of the ICC OTP. In practice, this has resulted in most of the completed cases having been directed against members of non-state armed groups (mainly rebel leaders) and have left people close to governments out of the investigations. This is particularly striking in those situations that have been referred by the concerned States themselves, such as Uganda, DRC or Mali (Quesada-Alcalá, 2019; Kambale, 2015; Oola, 2015). These criticisms have also extended to the situation in Côte d'Ivoire, where investigations have focused on crimes committed by forces loyal to the former president, even though the atrocities were committed by both parties to the conflict (Hillebrecht & Straus, 2017: 178-180; Vilmer, 2016: 1331-1332). Concerns have also been expressed in some cases about the narrow scope of investigations and prosecutions, and the relatively limited level of accountability of those under investigation (Kambale, 2015).

There has also been criticism that the situations and cases selected by the ICC OTP have focused primarily on Africa, leading some leaders of African countries to accuse the ICC of not being impartial and being biased against Africa. This has even generated a confrontation with the African Union (AU), which has come to question the authority and legitimacy of the ICC and whose members have threatened to denounce the ICC Statute *en masse* (Hillebrecht & Straus, 2017: 164; Olasolo, Carnero Rojo, Seoane & Carcano, 2018: 434-435). Once again, the political and partisan interests of the Heads

of State and Government of some of the AU Member States seem to have prevailed, in some cases with the sole goal of escaping ICC proceedings by using the pretext of their immunity. As Vilmer (2016) has set out in detail, the criticisms leveled by these States against the ICC have not been accompanied by persuasive arguments and have mainly resulted in unjustified attacks on the work of the ICC.

As has been recognized by the ICC OTP in its case prioritization strategy, one of the elements on which the choice to investigate one matter over another may depend is the international cooperation or judicial assistance that the ICC may have received (or may expect to receive) in each case. In fact, in many of the aforementioned matters under investigation, practical or operational interests have prevailed when selecting upon which cases to act, and prioritizing those in which the circumstances make their viability possible (depending, for example, on the availability of evidence, international judicial cooperation and assistance, the protection and safety of ICC staff and those collaborating in the investigations, and the potential to ensure the appearance of suspects before the ICC). This entails a risk of political instrumentalization, which may lead to the perception of the ICC as a body that is not independent or impartial (Quesada-Alcalá, 2019; Kambale, 2015). This would undoubtedly undermine its authority, credibility, and legitimacy and, therefore, its role as driver of global governance.

4.2.2. Strengths of the International Criminal Court as a driver of global governance

The intervention of the ICC has also been able to generate positive dynamics, especially through the application of the regime of complementarity. The first situations in which it intervened were the DRC and Uganda, both referred in 2004 by the States themselves. The study of Burke-White (2005) on the impact of the initiation of the ICC investigation on the situation in the DRC shows some of the positive effects that the intervention of the ICC had in the initial moments of the investigation. In his view, the DRC case provides a powerful example of the model of interaction between the ICC and national governments which, as part of a system of multilevel global governance, was created by the regime of complementarity.

The analysis carried out by the author shows that the existence of the ICC offered a politically convenient solution to the Congolese president in facing possible electoral rivals. An incentive to refer the situation to the ICC was created when he perceived that it was in his own interest. Given the impossibility of initiating investigations and conducting criminal proceedings at the national level (due to the inability of the Congolese judicial system as well as the fragility of both the peace process and the transitional government), the referral of the situation to the ICC served as a political weapon for the president of the DRC in the next elections, since his possible rivals at that time (his vice-presidents in the transitional government, as leaders of rebel groups directly implicated in crimes within the ICC jurisdiction) were among the people most likely to be investigated and prosecuted by the ICC.

This situation, in turn, caused sectors of the Congolese government to regard the ICC intervention as a danger to themselves or to their interests, which led them to promote legislative and structural reforms to strengthen the capacity of the judiciary and the police. The ICC complementarity regime caused a chain of reactions and created the paradox that, although in other circumstances those responsible for international crimes (now in government) would have preferred to maintain a weak judicial system that could not investigate and prosecute them, the intervention of the ICC generated the perception that national proceedings represented a lesser risk, because the damage that they could generate could be controlled in some way.

Although this type of initiative was partly motivated by an attempt to have domestic tribunals exercise their jurisdiction and therefore avoid a process before the ICC, the reality is that in practice it promoted the adoption of a series of concrete measures having the capacity to strengthen governance processes at the national level. Moreover, the interviews conducted in this study also show that the threat of international criminal proceedings had a deterrent effect on rebel leaders in the DRC, who finally saw their investigation and prosecution as a possibility (Burke-White, 2005).

Recent studies on the possible preventive effects of the ICC activities in the DRC have also shown that they may have varied over time,

due to the type of activity taken by the ICC (related to the procedural status of the proceedings), the timing of the conflict, the rebel factions involved, and other external factors not strictly linked to the ICC (Broache, 2016).

Other authors, however, have criticized the application of the complementarity regime carried out by the ICC OTP at later stages of the investigation, arguing that it has been characterized by a lack of support for the procedures initiated at the national level and a lack of assistance in the reconstruction of the Congolese system of justice which has ended up even harming the efforts of the national authorities (Kambale, 2015). Thus, improvements in the capacities of the Congolese judicial system to deal with international crimes have not been consolidated. Furthermore, the perception of victims and survivors of the conflict has been marked by skepticism regarding the length of ICC proceedings and their selective nature because they have been focused mainly on crimes committed in the Ituri district and have not included top leaders, some of whom currently hold public office (Tunamsifu, 2019).

Emphasis has also been placed on the preventive role played by the ICC, citing as an example the arrest warrants issued against leaders of the Lord's Resistance Army (LRA) in the Ugandan situation, which caused those under investigation to be forced to negotiate and to decrease significantly the crimes that the LRA continued committing (Schabas, 2010: 44; Vilmer, 2016: 1334-1335). Nevertheless, other authors have highlighted that although, at first, the ICC arrest warrants may have been among the factors that forced the LRA to sit down at the negotiating table, over time, since they were not withdrawn by the ICC, they became a "stumbling block" for the peace process that ultimately contributed to its collapse and led traditional and religious leaders to reject ICC intervention (Moffett, 2016: 510-511).

As to the effects that the ICC complementarity regime can generate, the potential for ICC OTP preliminary examinations to encourage national authorities of concerned States to put an end to the crimes and proceed with their investigation and prosecution has also been highlighted. When the situations under analysis have allowed it, preliminary examinations have proven to be an important tool for

strengthening the rule of law at the national level and contributing positively to the national system of governance.

On the one hand, ICC OTP preliminary examinations have had the immediate effect of putting the crimes that were being committed and the impunity of their alleged perpetrators under the spotlight of international society. On the other hand, the maintenance of preliminary examinations has allowed the application of positive complementarity by providing assistance and advice to national authorities (so that they could carry out their own investigations and prosecutions effectively), as well as direct support in investigative tasks (especially when there have been problems of lack of capacity at the national level) (Olasolo, 2012).

An example in which the positive impact of ICC OTP preliminary examinations can be appreciated is the situation in Colombia. Keeping the preliminary examination open between 2004 and 2021 has generated the strengthening of the rule of law and of Colombian judicial institutions (Olasolo, 2012). Moreover, the ICC OTP has fostered the weakening of those actors that were obstructing progress in national proceedings, while supporting those other actors who, despite the difficulties, were investigating and prosecuting some of the most responsible leaders for the massive violence deployed against the civilian population in Colombia.

The monitoring of national proceedings by the ICC OTP allowed the ICC: (a) to influence and promote certain results in terms of justice within the framework of the Colombian peace process; and (b) to provide some legitimacy to the national authorities in that process. This allowed the ICC to act in the most controversial aspects of the peace process (Aksenova, 2018; Easterday, 2015; Maculan, 2017). It is precisely some of these aspects that have aroused the most criticism and skepticism among a number of authors, who have questioned whether the judicial proceedings carried out in Colombia are compatible with the complementary regime (Chan & Wouters, 2015:154-155; Loyo Cabezudo, 2017).

Even though the preliminary examination has contributed to the opening of numerous investigations in Colombia, and, due to them, many of those responsible for crimes against humanity and war cri-

mes have been prosecuted and convicted[15], the success or failure of the application of the complementarity regime in Colombia must be ultimately assessed in relation to the effective application of the normative framework contained in the peace agreements. And from this perspective, as some organizations have pointed out, the implementation of these agreements has faced important difficulties, continues to be slow, and the investigations and prosecutions have not advanced as expected. Moreover, serious crimes perpetrated against civilians by different armed groups and guerrillas continue to occur[16]. Hence, it is from this perspective that the closing of the preliminary examination in Colombia at the end of 2021 has been rather controversial, even though the ICC OTP continues to have the Colombian situation under its watchful eye[17].

Beyond the Colombian preliminary examination, the ICC OTP has shown its satisfaction with the application of its strategy of positive complementarity to close the impunity gap. In its view, this strategy has shown enormous potential due to the fact that: (a) new investigations have been initiated in several States, or their investigations have progressed, based upon the information provided by the ICC OTP; (b) the increase in requests for assistance to the ICC OTP shows the need and the added value that the ICC OTP brings to national investigations and prosecutions; and (c) the coordination between States Parties and the ICC OTP in relation to the investigation of specific situations has increased the capacity of the ICC OTP and its partners to investigate crimes within the jurisdiction of the ICC, as well as related crimes, thus jointly contributing to the goal of ending impunity[18].

Finally, although the number of cases carried out by ICC may be insufficient, there is no doubt that, without the ICC investigations and prosecutions, most, if not all, of those responsible for such crimes would have enjoyed impunity. Although for many this may mean a minimal success, it is a milestone that should not be forgotten as it

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15 See: ICC, Office of the Prosecutor, 05/12/2019.

16 See: United Nations Verification Commission in Colombia, 2020; HRW, 2020; Amnesty International, 2019.

17 See: ICC, Office of the Prosecutor, 28/10/2021.

18 See: ICC Office of the Prosecutor, 17/07/2019.

has contributed to the promotion of truth, justice, and reparation in certain situations. Each of the prosecutions of those most responsible for international crimes must be hailed as a triumph of the global rule of law, which opposes the prevailing culture of impunity in international society (Chan & Wouters, 2015:145). Such cases have also served: (a) to clarify and develop norms and standards of ICJ through ICC case law (showing the normative power of the ICC as an actor of governance); and (b) to promote their acceptance and incorporation into national legal systems.

5. CONCLUSIONS

Global governance is based on the weakening of the power centered on state sovereignty and is manifested in the public and private participation of new (non-state) actors in joint decision-making in the management of matters of common global interest. Among these actors is the ICC, which was created with the goals of: (a) ending impunity for the most serious crimes of international concern; (b) contributing to the prevention of new crimes; and (c) promoting processes of governance at the national level through its regime of complementarity and its cooperation mechanisms with States and OIs.

Although the ICC possesses the elements necessary to become a driver of global governance, its impact has, in practice, been restricted by various factors. First, the limited number of ratifications of the ICC Statute has generated the perception that the ICC is not a true global actor or, at least, not one with the capacity to have a global impact.

Second, the lack of cooperation from States Parties to the ICC Statute has significantly affected the ability of the ICC to successfully complete investigations and prosecutions. States Parties (or rather their Heads of State and Government) have sought to use the ICC for the benefit of their own political and partisan interests, while trying to remain outside of the scope of its actions and have even deliberately failed to comply with their obligations to cooperate with the ICC. These limitations in securing the cooperation of States Parties

have called into question the ICC ability to investigate and prosecute political leaders and high-ranking state officials. The regime of complementarity does not contribute to correcting this situation (indeed the opposite), despite the fact that it is precisely this (the prosecution of those most responsible for international crimes) which is the core element of the ICC's role.

Third, the limited scope of the investigations and prosecutions conducted by the ICC has been insufficient in the view of many. Added to this is the criticism of the ICC OTP for its strategy of selecting and prioritizing cases, which in practice has led to the majority of completed cases being directed against members of non-state armed groups (in some cases having a relatively limited level of responsibility for the crimes committed).

Nevertheless, the positive impact that the existence of the ICC as an institution (and the commencement of its investigations) has had on the concerned States Parties and, more broadly, on global governance cannot be ignored. Its intervention in various situations and cases (for example, in the DRC) has been able to generate positive dynamics (including the strengthening of institutions and national judicial systems, and the promotion of the rule of law at the national and international levels), especially through the application of the complementarity regime. The potential of the preliminary examinations carried out by the ICC OTP to encourage the national authorities of the concerned States Parties to put an end to the crimes and proceed with the investigation and prosecution of international crimes has also been highlighted. In this sense, the Colombian situation is a clear example of what can be achieved through the application of positive complementarity.

Finally, despite the limited number of convictions at the ICC, each one represents a victory for the global rule of law; the alternative would have been impunity. This has also generated the perception that the commission of international crimes entails a certain risk of prosecution and punishment, which enhances the preventive effect of the ICC.

Moreover, the success or failure of the ICC should not be measured solely by the number of cases completed. Given its potential to become

a true driver of global governance, more should be demanded of the ICC, but one should not ignore that it has always faced numerous difficulties. The ICC's ability to deal with these problems in the future will be key to its credibility and will determine, to a large extent, whether it can be perceived as a relevant actor in global governance.

REFERENCES

Case Law

International Criminal Court

Libya

ICC [Appeal Chamber]. The Prosecutor v. Saif Al-Islam Gaddafi. Case No. ICC-01/11-01/11. Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'. 24 July 2014.

ICC [Appeals Chamber]. The Prosecutor v. Saif Al-Islam Gaddafi. Case No. ICC-01/11-01/11. Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April. 9 March 2020.

ICC [Pre-Trial Chamber I]. The Prosecutor v. Saif Al-Islam Gaddafi. Case No. ICC-01/11-01/11. Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council. 11 December 2014.

Darfur (Sudan)

ICC [Appeals Chamber]. The Prosecutor v. Omar Hassan Ahmad Al Bashir. Case No. ICC-02/05-01/09. Judgment in the Jordan Referral re Al-Bashir Appeal. 6 May 2019.

ICC [Pre-Trial Chamber II]. The Prosecutor v. Omar Hassan Ahmad Al Bashir. Case No. ICC-02/05-01/09. Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court. 4 April 2014.

ICC [Pre-Trial Chamber II]. The Prosecutor v. Omar Hassan Ahmad Al Bashir. No. ICC-02/05-01/09. Decision on the Prosecutor's Request for a Finding of Non-Compliance against the Republic of the Sudan. Case 9 March 2015.

ICC [Pre-Trial Chamber II]. The Prosecutor v. Omar Hassan Ahmad Al Bashir. Case No. ICC-02/05-01/09. Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the States Parties to the Rome Statute. 11 July 2016.

ICC [Pre-Trial Chamber II]. The Prosecutor v. Omar Hassan Ahmad Al Bashir. Case No. ICC-02/05-01/09. Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute. 11 July 2016.

ICC [Pre-Trial Chamber II]. The Prosecutor v. Omar Hassan Ahmad Al Bashir. Case No. ICC-02/05-01/09. Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir. 6 July 2017.

ICC [Pre-Trial Chamber II]. The Prosecutor v. Omar Hassan Ahmad Al Bashir. Case No. ICC-02/05-01/09. Decision under article 87(7) of the Rome Statute on the non-com pliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir. 11 December 2017.

Kenya

ICC [Trial Chamber V(A)]. The Prosecutor v. William Samoei Ruto and Joshua Arap Sang. Case No. ICC-01/09-01/11. Public redacted version of Decision on Defence Applications for Judgments of Acquittal. 5 April 2016.

ICC [Trial Chamber V(B)]. The Prosecutor v. Uhuru Muigai Kenyatta. Case No. ICC-01/09-02/11. Decision on the withdrawal of charges against Mr Kenyatta. 13 March 2015.

ICC [Trial Chamber V(B)]. The Prosecutor v. Uhuru Muigai Kenyatta. Case No. ICC-01/09-02/11. Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute. 19 September 2016.

Democratic Republic of Congo

ICC [Pre-Trial Chamber II]. The Prosecutor v. Germain Katanga. Case No. ICC-01/04-01/07. Decision on Sentence pursuant to article 76 of the Statute. 23 May 2014.

Afghanistan

ICC [Appeals Chamber]. Situation in the Islamic Republic of Afghanistan. Situation No. ICC-02/17. *J*udgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan. 5 March 2020.

ICC [Pre-Trial Chamber II]. Situation in the Islamic Republic of Afghanistan. Situation No. ICC-02/17. Decision Pursuant to Article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan. 12 April 2019.

Doctrine

Abbott, K. W. & Snidal, D. (2009). The Governance Triangle: Regulatory Standards Institutions and The Shadow of the State. In: Mattli, W. & Woods, N. (Eds.). The Politics of the Global regulation. Princeton (USA): Princeton University Press. Pp. 44-88.

Aksenova, M. (2018). The ICC Involvement in Colombia: Walking the Fine Line between Peace and Justice. In: Bergsmo, M. & Stahn, C. (Eds.). Quality Control in Preliminary Examination: Volume 1. Brussels (Belgium): Torkel Opsahl Academic EPublisher. Pp. 257-282.

Ambos, K. (2010). *El test de complementariedad de la Corte Penal Internacional (artículo 17 Estatuto de Roma). Indret: Revista para el Análisis del Derecho*. Vol. 2. Pp. 1-47.

Anello, C. (2013). *Desafíos de la Corte Penal Internacional en torno a la cooperación con los Estados. Anuario Iberoamericano de Derecho Internacional Penal (ANIDIP)*. Vol. 1. Pp. 43-60.

Ansell, C. & Torfing, J. (2016). Introduction: theories of governance. In: Ansell, C. & Torfing, J. (Eds.). Handbook on Theories of Governance. Cheltenham (United Kingdom): Edward Elgar Publishing. Pp. 1-17.

Benedict, K. (2001). Global Governance. In: Smelser, N.J. & Baltes, P.B. (Eds.). International Encyclopedia of the Social & Behavioral Sciences. Oxford (United Kingdom): Pergamon-Elsevier. Pp. 6232-6237.

Benvenisti, E. (2014). The Law of Global Governance. Leiden (The Netherlands): Brill.

Benzing, M. (2003). The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity. Max Planck Yearbook of United Nations Law. Vol. 7. Pp. 591-632.

Besson, S. (2020). COVID-19 and the WHO's Political Moment. EJIL:Talk! Blog of the European Journal of International Law. www.ejiltalk.org/covid-19-and-the-whos-political-moment.

Betts, A. (2011). Introduction: Global Migration Governance. In: Betts, A. (Ed.). Global Migration Governance. Oxford (United Kingdom): Oxford University Press. Pp. 1-33.

Bitti, G. (2009). Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC. In: Stahn, C. & Sluiter, G. (Eds.). The Emerging Practice of the International Criminal Court. Leiden (The Netherlands): Brill Nijhoff. Pp. 281-304.

Broache, M. (2016). Irrelevance, Instigation and Prevention: The Mixed Effects of International Criminal Court Prosecutions on Atrocities in the CNDP/M23 Case. International Journal of Transitional Justice. Vol. 10. No. 3. Pp. 388-409.

Burke-White, W. (2005). Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo. Leiden Journal of International Law. Vol. 18. No. 3. Pp. 557-590.

Chan, K. & Wouters, J. (2015). Constructing the International Criminal Court's rule of law identity. In: De Baere, G. & Wouters, J. (Eds.). The contribution of international and supranational courts to the rule of law. Cheltenham (United Kingdom): Edward Elgar Publishing. Pp. 127-175.

Delbruck, J. (2002). Prospects for a 'World (Internal) Law'? Legal Development in a Changing International System. Indiana Journal of Global Legal Studies. Vol. 9. No. 2. Pp. 401-431.

Dobre, D. (2020). *Nuevos actores en la gobernanza económica europea: los tribunales constitucionales y el Tribunal de Justicia de la Unión Europea*. In: Pérez Miras, A., Teruel Lozano, G., Raffiotta, E. & Iadicicco, M. (Eds.). *Setenta años de Constitución Italiana y cuarenta años de Constitución Española*. Vol. V. Pp. 147-163. Madrid (Spain): Agencia Estatal Boletín Oficial del Estado.

Easterday, J. (2015). Beyond the 'shadow' of the ICC. Struggles over control of the conflict narrative in Colombia. In: De Vos, C., Kendall, S. & Stahn, C. (Eds.). Contested Justice: The Politics and Practice of International Criminal Court Interventions. Cambridge (United Kingdom): Cambridge University Press. Pp. 432-455.

Ferrajoli, L. (2018). *Constitucionalismo más allá del Estado*. Madrid (Spain): Editorial Trotta.

Finkelstein, L. (1995). What Is Global Governance?. *Global Governance*. Vol. 1. No. 3. Pp. 367-372.

Hillebrecht, C. & Straus, S. (2017). Who Pursues the Perpetrators? State Cooperation with the ICC. Human Rights Quarterly. Vol. 39. No. 1. Pp. 162-188.

Holmes, J. (2002). Complementarity: National Courts *versus* the ICC. In: Cassese, A., Gaeta, P. & Jones, J. (Eds.). The Rome Statute of the International Criminal Court: a Commentary. Oxford (United Kingdom): Oxford University Press. Pp. 667-686.

Hurrell, A. (1999). *Sociedade internacional e governança global. Lua Nova: Revista de cultura e política*. Vol. 46. Pp. 55-75.

Innerarity, D. (2012). *La gobernanza global, de la soberanía a la responsabilidad. Revista CIDOB d'Afers Internacionals*. Vol. 100. Pp. 11-23.

Kambale, P. (2015). A story of missed opportunities. The role of the International Criminal Court in the Democratic Republic of Congo. In: De Vos, C., Kendall, S. & Stahn, C. (Eds.). Contested Justice: The Politics and Practice of International Criminal Court Interventions. Cambridge (United Kingdom): Cambridge University Press. Pp. 171-197.

Kaul, H. (2002). Preconditions to the exercise of jurisdiction. In: Cassese, A., Gaeta, P. & Jones, J. (Eds.). The Rome Statute of the International Criminal Court: a Commentary. Oxford (United Kingdom): Oxford University Press. Pp. 583-616.

Klabbers, J. (2015). The EJIL Foreword: The Transformation of International Organizations Law. The European Journal of International Law. Vol. 26. No. 1. Pp. 9-82.

Levi-Faur, D. (2012). From 'Big Government' to 'Big Governance'?. In: Levi-Faur, D. The Oxford Handbook of Governance. Oxford (United Kingdom): Oxford University Press. Pp. 3-18.

Loyo Cabezudo, J. (2017). *La justicia transicional en Colombia: ¿Un instrumento creado para erradicar la impunidad? Anuario Iberoamericano de Derecho Internacional Penal (ANIDIP)*. Vol. 5. Pp. 32-61.

Maculan, E. (2017). *El acuerdo de paz colombiano ante la obligación internacional de persecución penal y castigo. Cuadernos de estrategia*. Vol. 189. Pp. 91-124.

Moffett, L. (2016). Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo. International Criminal Law Review. Vol. 16. No. 3. Pp. 503-524.

Nowrot, K. (2004). Global Governance and International Law. Beiträge Zum Transnationalen Wirtschaftsrecht. Vol. 33. Pp. 1-34.

Olasolo, H. (2012). *El principio de complementariedad y las estrategias de actuación de la Corte Penal Internacional en la fase de examen preliminar: ¿por qué la Corte Penal Internacional mantiene su examen preliminar, pero no abre una investigación, sobre la situación en Colombia?. Revista Electrónica de Estudios Internacionales*. Vol. 24. Pp. 3-45.

Olasolo, H. (2016). *Los fines del Derecho Internacional Penal. Revista Colombiana de Derecho Internacional*. Vol. 14. No. 29. Pp. 93-146.

Olasolo, H., & Carnero Rojo, E. (2011). *Extensión y límites de la jurisdicción personal, territorial y temporal de la Corte Penal Internacional*. In: Olasolo, H. (Ed.). *Ensayos de Derecho Penal y Procesal Internacional*. Medellín (Colombia): Biblioteca Jurídica Diké. Pp. 81-109.

Olasolo, H., Carnero Rojo, E., Seoane, D., & Carcano, L. (2018). *El limitado alcance de las actuaciones de la Corte Penal Internacional en su decimoquinto aniversario y sus posibles causas.* In: Olasolo, H., Buitrago Rey, N.E., Bonilla Tovar, V. & Canosa Cantor, J. (Eds.). *Alcance y limitaciones de la Justicia Internacional. Perspectivas Iberoamericanas sobre la Justicia* Book Collection. Vol. 4. Valencia (Spain): *Tirant Lo Blanch, Instituto Iberoamericano de la Haya para la Paz, los Derechos Humanos y la Justicia Internacional & Instituto Joaquín Herrera Flores.* https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-4-coleccion-alcance-y-limitaciones-de-la-justicia-internacional. Pp. 395-449.

Olasolo, H., & Galain Palermo, P. (2018). *Los Desafíos del Derecho Internacional Penal: Atención especial a los casos de Argentina, Colombia, España, México y Uruguay. Colección Perspectivas Iberoamericanas sobre la Justicia. Vol. 1. Valencia (Spain): Tirant Lo Blanch, Instituto Iberoamericano de la Haya para la Paz, los Derechos Humanos y la Justicia Internacional & Instituto Joaquín Herrera Flores.* https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-1-coleccion-desafios-derecho-internacional-penal.

Oola, S. (2015). In the shadow of Kwoyelo's trial. The ICC and complementarity in Uganda. In: De Vos, C., Kendall, S. & Stahn, C. (Eds.). Contested Justice: The Politics and Practice of International Criminal Court Interventions. Cambridge (United Kingdom): Cambridge University Press. Pp. 147-170.

Pace, W. & Schense, J. (2002). The Role of Non-Governmental Organizations. In: Cassese, A., Gaeta, P. & Jones, J. (Eds.). The Rome Statute of the International Criminal Court: a Commentary. Oxford (United Kingdom): Oxford University Press. Pp. 105-143.

Quesada-Alcalá, M.C. (2019). *Levantando el velo de la lucha contra la impunidad': la Corte Penal Internacional y sus intereses para actuar.* In: Rocha-Herrera, M., Quesada-Alcalá, M.C. & Urueña Sánchez, M.I. (Eds.). *Actores Internacionales Contemporáneos. Normatividad y Poder en las Relaciones Internacionales. Perspectivas Iberoamericanas sobre la Justicia Book Collection. Vol. 7. Valencia (España): Tirant Lo Blanch, Instituto Iberoamericano de la Haya para la Paz, los Derechos Humanos y la Justicia Internacional & Instituto Joaquín Herrera Flores.* Pp. 225-255.

Rhodes, R.A. (1996). The New Governance: Governing without Government. Political Studies. Vol. XLIV. Pp. 652-667.

Rosenau, J. (2000). Governance, order and change in world politics. In: Rosenau, J. & Czempiel, E. Governance without Government: Order and Change in World Politcs. Cambridge (United Kingdom): Cambridge University Press. Pp. 1-29.

Schabas, W. (2010). The International Criminal Court: a commentary on the Rome Statute. Oxford (United Kingdom): Oxford University Press.

Sheppard, D. (2010). The International Criminal Court and 'Internationally Recognized Human Rights': Understanding Article 21(3) of the Rome Statute. International Criminal Law Review. Vol. 10. No. 1. Pp. 43-71.

Stahn, C. (2020). Justice as Message: Expressivist Foundations of International Criminal Justice. Oxford (United Kingdom): Oxford University Press.

Torfing, J., Peters, B.G., Pierre, J. & Sørensen, E. (2012). Interactive Governance: Advancing the Paradigm. Oxford (United Kingdom): Oxford University Press.

Tunamsifu, S.P. (2019). Twelve years of judicial cooperation between the Democratic Republic of the Congo and the International Criminal Court: Have expectations been met?. African Human Rights Law Journal. Vol. 19. No. 1. Pp. 105-125.

Vilmer, J-B.J. (2016). The African Union and the International Criminal Court: counteracting the crisis. International Affairs. Vol. 92. No. 6. Pp. 1319-1342.

Voelsen, D. & Schettler, L.V. (2019). International political authority: on the meaning and scope of justified hierarchy in international relations. International Relations. Vol. 33. No. 4. Pp. 540-562.

Von Bogdandy, A., & Venzke. I. (2012). Beyond Dispute: International Judicial Institutions as Lawmakers. In: Von Bogdandy, A. & Venzke, I. (Eds.). International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance. Berlín-Heidelberg (Germany): Springer. Pp. 3-33.

Williams, S. (2018). Civil Society Participation in Preliminary Examinations. In: Bergsmo, M. & Stahn, C. (Eds.). Quality Control in Preliminary Examination. Vol. 2. Brussels (Belgium): Torkel Opsahl Academic EPublisher. Pp. 553-586.

Zolo, D. (2002). *Una crítica realista del globalismo jurídico desde Kant a Kelsen y Habermas. Anales de la Cátedra Francisco Suárez*. Vol. *36*. Pp. 197-220.

Zürn, M. (2018). A Theory of Global Governance: Authority, Legitimacy and Contestation. Oxford (United Kingdom): Oxford University Press.

Resolutions, Reports and Other Documents

Amnesty International. (2019). *Colombia 2019*.

Cepiku, D. (2006). Public Governance: research and operational implications of a literature review. En Tenth international research symposium on public management (IRSPM X). Panel track on "conceptual and empirical models of governance and public management. Glasgow (United Kingdom): Caledonian University.

Commission on Global Governance. (1995). Our Global Neighborhood. www.gdrc.org/u-gov/global-neighbourhood.

European Commission. (2001). European gobernance. A White paper. Brussels, COM(2001) 428 final. https://ec.europa.eu/commission/presscorner/detail/en/doc_01_10.

Human Rights Watch. (2020). World Report 2020: Colombia. https://www.hrw.org/world-report/2020/country-chapters/colombia.

International Criminal Court. Office of the Prosecutor. (2006). Report on Prosecutorial Strategy. 14 September 2006. https://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf.

International Criminal Court. Office of the Prosecutor. (2016). Policy Paper on Case Selection and Prioritization. 15 September 2016. https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

International Criminal Court. Office of the Prosecutor. (2019). Strategic Plan 2019-2021. 17 July 2019. https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf.

International Criminal Court. Office of the Prosecutor. (2019). *Informe sobre las Actividades de Examen Preliminar de 2019 (Colombia)*. 5 December 2019. https://www.icc-cpi.int/itemsDocuments/2019-PE-Report-COL-SPA.pdf.

International Criminal Court. Office of the Prosecutor. (2020). Nineteenth Report of the Prosecutor of The International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970 (2011). 5 May 2020. https://www.icc-cpi.int/itemsDocuments/19th-report-icc-otp-UNSC-libya-ENG.pdf.

International Criminal Court. Office of the Prosecutor. (2021). ICC Prosecutor, Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice. 28 October 2021. https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-exami-

nation-situation-colombia#:~:text=The%20signature%20of%20the%20Agreement,the%20framework%20of%20the%20Agreement.

Sewanyana, L. (2019). Promotion of a democratic and equitable international order-Report of the Independent Expert on the promotion of a democratic and equitable international order. (A/HRC/42/48). 30 July 2019. https://www.ohchr.org/en/documents/thematic-reports/ahrc4248-promotion-democratic-and-equitable-international-order-report.

United Nations. Security Council. (2005). Resolution 1593 (2005). 31 March 2005. https://www.acnur.org/fileadmin/Documentos/BDL/2005/3803.pdf?view=1.

United Nations. Security Council. (2011). Resolution 1970 (2011). 26 February 2011. https://digitallibrary.un.org/record/698927?v=pdf&ln=es.

United Nations. Verification Mission in Colombia. (2020). Report of the Secretary-General (S/2020/943). 25 September 2020. https://undocs.org/en/S/2020/943.

Chapter 6
The Global Justice Perspective[*]

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1. INTRODUCTION

The adoption of the ICC Statute in 1998 and its entry into force in 2002 represented, for many, a gift of hope for new generations, and a huge step forward in the march towards universal human rights and the rule of law (Koffie Annan, cited by Glasius, 2009: 496-497). The ICC was established as a permanent international criminal tribunal, with an aspiration of universality, to complement national jurisdictions to end impunity for the most serious crimes of international concern. It joined the efforts that regional human rights tribunals had been carrying out through international human rights law (IHRL).

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[*] For the institutional ascription of this chapter, see the initial Note of the book.

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In light of the foregoing, this chapter seeks to analyze the role of the International Criminal Court (ICC) from the perspective of global justice theory (GJT), which understands international society as comprised of a plurality of actors beyond States and seeks to analyze the structure of the institutional global order in relation to the needs and interests of human beings (Pogge, 2008:109). In this way, GJT, which is based on cosmopolitan currents, places human beings and their well-being at the center of its analysis. By embracing the notion of a "global community of human beings" (Brock, 2009: 8), this approach moves away from a vision of international society centered on States and their relationships.

GJT shows the need to adopt a global perspective to solve global problems. Thus, it sees the ICC as an institution called upon to play a key role in the prevention and fight against impunity of those most responsible for the most serious crimes that threaten the peace, security, and well-being of humanity. In this way, this chapter studies, the concept of global justice as a horizon of analysis (section 2), its understanding of international justice (IJ) (section 3) and the ICC's role (section 4). The chapter ends with a summary of the main conclusions reached (section 5).

2. THE THEORY OF GLOBAL JUSTICE AS A HORIZON OF ANALYSIS

Traditionally, the study of the characteristics of a just society has focused on the forms of organization and human behavior within the frontiers of a State. Throughout history, countless theories of justice have emerged in the field of political philosophy. Among them, it is worth highlighting the work of Rawls, A Theory of Justice, in which he identifies the fundamental principles upon which the social contract of any just national society should be built. Rawls (1971: 7) discusses how domestic social justice systems should be institutionally structured in order to distribute fundamental rights and duties and take advantage of social cooperation.

Later, in his work The Law of Peoples, Rawls analyzes the norms that should govern behavior between States. To accomplish this, his

analysis is based on the premise that States are and act independently of their peers. Responsibility for the well-being of societies under their tutelage falls exclusively on them (Brock, 2009: 24; Rawls, 1999: 39). Consequently, Rawls maintains that the levels of prosperity of national societies respond primarily to differences in political culture and the virtuous nature of their citizens (Brock, 2009: 24, 25).

However, humanity currently faces problems that have, or may have in the future, a global impact. Therefore, as Pogge (2008: 102 et seq.) proposes, a correct moral analysis of intranational and international justice must take into consideration both the behavior of individual and collective actors that make up the society under study (interactive moral analysis), and of the normative and institutional design of society (institutional moral analysis).

As a result, it is increasingly difficult to study justice systems without considering, in turn, the implications that certain forms of institutional organization at the national and international levels may have with respect to human groups globally. Furthermore, even individual or collective interactions that take place within the borders of States often have the potential to considerably affect different social groups around the world.

Faced with this, traditional systems of justice, such as those proposed by Rawls, are insufficient for the construction of a conception of justice that adapts to the different levels of complexity and interaction that a globalized society demand. Thus, the Law of Peoples is often criticized because it ignores: (a) the degree to which unfavorable conditions may result from factors external to society; and (b) the existing relationships between States in the global economic order (Brock, 2009: 25).

Given this situation, GJT arises within the field of political philosophy and international relations (IR) to address the main challenges currently facing humanity. To do this, it analyzes: (a) the world institutional order from the viewpoint of justice; and (b) the moral responsibility of all individual and collective actors who are relevant to said challenges.

Pogge (2008: 109) considers that GJT seeks to study the structure and organization of the institutional global order in relation to basic

human needs and human interests of greater moral relevance. In this respect, Beitz maintains that, while at the international level there are today institutions capable of exercising some of the traditional functions of States, considerations about the notion of justice cannot be limited to the domestic sphere (Beitz, 1975; cited by Dietzel, 2017: 92). Consequently, for some critics of Rawls, modern reality demands a concept of justice that takes into consideration that some societies are disadvantaged by causes of a global nature (Brock, 2009: 26).

Based on the foregoing, GJT proposes that citizens of rich countries are potentially involved in the horrors that so many people suffer in less developed countries, as well as in the violence and the hunger that is inflicted on them (Pogge, 2008: 104). Hence, those who live in the affluent and developed world cannot, therefore, defensively isolate themselves from the misery of the most disadvantaged in the world, since they are complicit in keeping them in a state of poverty (Brock, 2009: 25).

GJT finds its roots in the philosophical currents of cosmopolitanism, as it places human beings at the center of moral reflection, and dislodges States to the second place (Dietzel, 2017: 91). To do this, it starts with the premise that each person belongs to and must be valued as a member of a global community of human beings and, therefore, has responsibilities with respect to other members of the global community. Consequently, the state borders and other limits considered restrictions on the scope of justice are irrelevant obstacles in the appreciation of our responsibilities towards everyone else in the global community (Brock, 2009: 9). In this way, cosmopolitanism places the well-being of human beings at the center of attention and examines whether the well-being of the less privileged can be improved (Rawls, 1999: 120).

Under this conception, every person deserves equal moral consideration as a member of the human species. In this way, GJT constitutes, and will constitute, a relevant theory to the same extent that there are problems of global cohabitation (Dietzel, 2017: 92). This approach seeks, then, to study the moral duties that human beings have, not only with respect to their fellow citizens, but towards all other members of the human species (Tan, 2017: 5). Therefore, it is necessarily in conflict with traditional conceptions of state sovereignty and nationalist doctrines.

Despite the above, for authors such as Yael Tamir and David Miller, GJT, as a representation of cosmopolitanism, is considered compatible with liberal interpretations of nationalism that, in addition to playing an essential role in the construction of the individual and cultural identity of each person, are morally valuable (Brock, 2009: 247 et. seq.). As a consequence, cosmopolitanism and nationalism can coexist in harmony as long as both perspectives pursue a commitment to global egalitarianism, which in turn accepts the value of nationalism (Tan, 2017: 57).

There is no doubt that GJT imposes limitations on traditional feelings of patriotism, as it seeks to achieve global egalitarianism. This implies a rejection of biased visions in favor of fellow nationals (which are inherent to nationalist ideas). Furthermore, in the field of political philosophy and IR, it propounds the consolidation of a more restricted conception of state sovereignty (Tan, 2017: 72 et. seq.). As Risse (2012: 3) points out, the process of globalization that has taken over the modern world erodes the political and economic importance of national borders (Risse, 2012: 3).

This means, for example, that the principle of non-interference in the internal affairs of States could be subject to important limitations when faced with serious violations of human rights, to the extent that it is understood that there are certain moral conditions that States must satisfy so that human rights can be adequately satisfied (Tan, 2017: 83). In this sense, the Inter-American Court of Human Rights (IACtHR) has established relevant standards regarding the international obligation of States to investigate facts that constitute serious violations of human rights and, where appropriate, prosecute and punish those responsible. Furthermore, it has declared inadmissible those norms that seek to hinder the fulfillment of this obligation, such as laws granting amnesty, exempting from liability, or providing for a statute of limitations (Inter-American Court, Barrios Altos, 2001: para. 41; Inter-American Court, Gomes Lund, 2010: para. 147). According to the IACtHR, this position has also been adopted, *inter alia*, by the European Court of Human Rights (ECtHR), the African Commission on Human and Peoples' Rights, various UN bodies, international criminal tribunals, and national high courts (Inter-American Court, Gomes Lund, 2010: paras. 147 to 170).

GJT has multiple variants. Some focus their efforts on analyzing the problems linked to distributive justice from a global perspective. Others focus on issues such as the need to increase equality of opportunity, or the determination of the criteria that should govern the intervention of third States in issues traditionally considered internal affairs (Brock, 2009: 10).

Valentini and Torresi (2011: 2035) have underlined that challenges such as climate change, massive violations of human rights and high levels of global inequality highlight the need to address universal problems from a global perspective. In this regard, there is no doubt that the impact that climate change could have on human populations around the planet will not respect state borders, nor will it selectively affect differentiated sectors of human society. On the contrary, climate change could have serious consequences on life throughout the world, having the potential to disproportionately affect those who have contributed the least to its production, as well as the most vulnerable human groups (Harris, 2010; cited in Dietzel, 2017: 94). This illustrates why climate change constitutes a clear example of the current relevance of GJT.

In this sense, the UN Framework Convention on Climate Change is particularly illustrative, as it highlights that changes in the climate of the Earth and their adverse effects are a common concern of all humanity (UNGA, 1992: 2). Similarly, for the World Meteorological Organizations (WMO), the risks associated with climate change often depend on complex interactions between climate-related hazards and the vulnerability, exposure, and adaptive capacity of human and natural systems (WMO, 2020: 27). This suggests that the most vulnerable human groups or those with less capacity to adapt are, in turn, more exposed to the risks posed by higher global temperatures.

According to the WMO (2020: 28), the high temperatures recorded in recent years have disproportionately affected people over 65 years of age who have been exposed to various heat waves around the world. Likewise, high temperatures have favored the increase in the transmission of diseases such as dengue, have impacted the food security of hundreds of millions of people, and have contributed to the displacement of multitudes of people resulting from devastating natural disasters (WMO, 2020: 28-31).

In response to this problem, defenders of GJT have raised the need to recognize that climate change constitutes a moral problem whose burdens must be divided fairly (Risse, 2012: 202). Consequently, while the possible consequences of climate change threaten our entire planet, the fragility of the climatic conditions favorable for human life demands a greater degree of collective responsibility regarding climate change as a global problem (Risse, 2012: 131).

Similarly, high levels of inequality at a global level (and not just within the borders of states), as well as their possible causes, are receiving increasing attention from proponents of GJT. The role played by the most powerful States and the international institutions that regulate world trade is at the center of their analysis. In this sense, Risse (2012: 4; 263 et. seq.) underlines that the forms of institutional organization that shape the current global economic order require special attention, including economic policies of subsidies, which generate winners and losers (Risse, 2012: 263 et. seq.). In the same sense, Pogge (2001: 12) highlights that societies, which contain approximately one-seventh of humanity, control most of the global product, as well as access to the most lucrative markets in the world and, consequently, they have an enormous advantage over others in terms of bargaining power, information, and expertise.

GJT has been criticized by those authors who maintain that the strategies proposed by its proponents are inapplicable because there are no global institutions that have power over individuals and States as a whole (Nagel, 2005; Blake, 2001; both cited by Dietzel, 2017: 93). Others reject its foundations because it is an idea primarily focused on fundamentally Western values, and not on universal ideals (Young, 2011; cited by Dietzel, 2017: 93). Furthermore, there are those who believe that a cosmopolitan approach that seeks to conduct moral analysis at a global level is not possible, because conceptions of justice require historical and cultural links that are only preserved within state borders (Miller, 2007; cited by Dietzel, 2017: 93).

Despite the foregoing, discussions about the principles and values that should govern the actions of individual and collective actors at a global level are increasingly relevant. Likewise, the idea of a globalized world governed by institutions of global governance takes on greater prominence, to the extent that the inequalities and tragedies

faced by human beings throughout the planet cease to have a merely local or domestic nature; they have become problems of a global nature that affect all human beings equally.

Furthermore, even if a globalized form of government does not exist at present, there is no doubt that, particularly since the middle of the last century, a new world order has been consolidated under the hegemony of the five permanent members of the UNSC, whose main actors are organizations having global reach such as the UN, the International Monetary Fund, the World Bank and the World Trade Organization, among others (Risse, 2012: 4).

The ICC is part of the complex framework that constitutes this new world order. Within it, it carries out its role of fighting against the impunity of those most responsible for the crimes provided for in the ICC Statute. In doing this, it faces a global reality: the most powerful States maintain their ability to exercise their influence over international institutions.

3. THE TREATMENT OF INTERNATIONAL JUSTICE FROM THE PERSPECTIVE OF GLOBAL JUSTICE

The study of international justice (IJ) has traditionally focused on the principles and norms that regulate relations between States (Brown, 2009: 1). From this perspective, human beings are not part of the analysis, and their interests are understood to be protected through the decisions taken by national governments (Pogge, 2008: 101). Nevertheless, this approach is insufficient because it does not include the majority of actors participating in current international society, such as IOs, transnational corporations, NGOs and human beings (Pogge, 2008: 103).

Cançado Trindade highlights that the founders of modern IL (Francisco de Vitoria, Alberico Gentili, Francisco Suárez and Hugo Grotius) in the 16th and 17th centuries already placed importance of giving recognition to human beings of legal personality in IL. They understood the law of nations as being based on an international society made up of human beings, as members of a universal *societas gentium* (Cançado, 2007: 277). Consequently, for the fathers of mo-

dern IL, international society cannot claim to be based on the *voluntas* of each State, because human beings occupy a central position in IR and have rights *vis-à-vis* sovereign States (Cançado, 2007: 277).

However, at the end of the 19th century, IL was influenced by the notion of absolute state sovereignty, which caused human beings to lose their relevance in IL. This situation would last until the end of World War II. Only then would human beings begin to gradually recover their importance for IL, through the recognition of state responsibility for acts that infringed upon their rights. This led to the development of international human rights law (IHRL) (Cançado, 2007: 278) and international criminal law (ICL).

The establishment of the International Military Tribunal (IMT) (Nuremberg) and the International Military Tribunal for the Far East (IMTFE) (Tokyo) was a key precedent for: (a) recognizing all human beings, regardless of their nationality, as actors in international society (and not just within the limits of sovereign States); and (b) the crystallization of the concept of individual international criminal responsibility for the commission of atrocious crimes that breach universal human values. It is upon these two elements that foundations were laid for the development of principles of integral reparation for the victims of atrocious crimes, and the recognition of their legal personality and moral value in IL.

The concept of individual international criminal responsibility is based upon two main elements. On the one hand, human beings have international duties that override national duties of obedience imposed by some States, when obedience constitutes a crime against the laws of nations. On the other hand, atrocities committed by governments against their own population are punishable as international crimes (Schabas, 2012: 1). In this way, as the IMT affirmed, crimes against IL are committed by human beings, not by abstract entities, and only by punishing those who commit such crimes can IJ be enforced (Ambos, 2013a: 102).

The development of ICL has allowed for a better understanding of the type of widespread and systematic criminality that is at its roots. Indeed, although international crimes covered by ICL are committed by individuals, they are usually carried out through complex co-

llective structures (such as the State) or in the exercise of an official position (Stahn, 2019: 414). As a result, ICL pays special attention to two phenomena: (a) the political macro-criminality strengthened by States (internal state criminality) that aims to attack their citizens (Ambos, 2005: 45); and (b) other forms of macro-criminality originating in organizations distinct from States (Ambos, 2011: 9).

In terms of reparations, the development of IHRL and ICL has caused an incontrovertible general recognition that the ultimate beneficiaries of the reparations are the victims (human beings with legal personality in IL) (Trindade in ICtJ, Democratic Republic of the Congo v. Uganda, 12/06/2016: 20; ICC, Lubanga, 08/07/2012: paras. 177, 185, 195).

In the Lubanga case, the ICC has expressly indicated that the reparation system contemplated in the ICC Statute reflects the need to go beyond the concept of punitive justice, towards a notion that focuses on the need to provide effective remedies for victims (ICC, Lubanga, 08/07/2012: para. 177). This has resulted in the issuance, based on rule 97(1) of the ICC Rules of Procedure and Evidence (ICC RPE), of orders for individual and collective reparations for direct and indirect victims of the crimes included in the ICC judgments (ICC, Lubanga, 03/03/2015: para. 53; Katanga, 03/24/2017: 118). For Cançado Trindade (2007: 292), this evolution represents a significant point of confluence between contemporary ICL and IHRL.

As a result of the foregoing, contemporary IL is in a process of gradual humanization. This is why, the full development of the legal personality of human beings has become one of the goals of IL. Moreover, this goal has been institutionalized (Pérez-Leon, 2008: 606).

Nevertheless, although current IL recognizes legal personality in human beings (with rights and obligations) in IL (Decaux in Mazzeschi & De Sena, 2018: 8 et. seq.), their rights are more difficult to identify, because: (a) many treaties concerning human beings are not self-executing, leaving their implementation to domestic legislation; and (b) the international mechanisms to ensure supervision are still weak, even if directly applicable rights are recognized (Decaux in Mazzeschi & De Sena, 2018: 9). This means that current IL continues

to focus mainly on States and the forms of institutional organization that they adopt, so that the scope of the legal personality of human beings in IL is still limited (Pérez-León, 2008: 605).

In this context, GJT carries out an institutional moral analysis that takes into account the interests of all relevant actors in international society (Pogge, 2008: 103). In this way, it seeks to study problems of global cohabitation, highlighting the limitations of traditional moral analysis at the international level (which mainly focuses on States). With this, it tries to find how to ensure a fair life for all people (Dietzel, 2017: 91), while developing moral principles that allow for the protection of fundamental human interests at a global level (Valentini & Torresi, 2011: 2036).

Consequently, from the perspective of GJT, IL cannot limit itself to studying how States should act but must put into question statecentrism and consider alternatives so as to adopt a broader perspective of justice (Risse, 2012: 3).

In this way, GTJ seeks to convert IL into a more dynamic system that considers human beings as the protagonists of the international legal order and not only as having legal personality, duties and obligations. This leaves behind old conceptions of IL that consider States as the primary legal persons of IL (Decaux in Mazzeschi & De Sena, 2018: 10, et. seq; Pérez-León, 2008: 641).

In effect, taking human rights seriously, and recognizing that citizens are entitled to those rights, changes the focus from the collective (sovereign States) to the individual (citizens with rights). This allows the application of the *ius puniendi* for violations of universally, transnationally and interculturally recognized rights (Ambos, 2013b: 38).

In this sense, ICL has gained acceptance because it has combined: (a) the demand for a relative understanding of state sovereignty, that is, one that makes state power accountable; with (b) reaffirming state power (or even being deferent to sovereignty) (Stahn, 2019: 414). As a result, an act that can be legitimate under domestic law, can constitute a violation of an international obligation under ICL (Stahn, 2019: 414).

The traditional concept of state sovereignty has also been transformed into what is today understood as "sovereignty as responsibility", which gives rise to modern doctrines such as the doctrine of "responsibility to protect" (especially relevant for GJT). According to this doctrine, in those cases in which assistance measures are ineffective due to the lack of willingness of the national ruling class or the existence of serious capacity problems at the national level, the responsibility to protect populations that are in danger of suffering atrocious crimes is transferred to international society (to adopt rapid and effective measures, which, in exceptional circumstances, may include armed intervention) (Olasolo, 2011: 6).

Based on the above, GJT proposes that IL goes beyond the State, and places human beings at the center of new forms of global institutional organization and of new fundamental values and interests on which said institutional order should be based. This means, *inter alia*, that IJ must ensure the existence of global institutions aimed at protecting human beings against atrocious crimes committed by their own States.

Furthermore, IJ must also consider human beings as a central element of its decisions, creating judicial mechanisms that allow the punishment of those who commit atrocious crimes, regardless of their nationality or official position (in particular, when the concerned States are unwilling or unable to carry out the necessary investigations and prosecutions). The traditional omission of States to investigate and prosecute political macro-criminality (because they facilitate or execute it), has justified the incorporation at the international level of a power that has been traditional part of state sovereignty: the *ius puniendi* (Olasolo & Kiss, 2010: 13:3).

This raises the question as to the legitimation of the international legal order to impose penal sanctions on individuals. In this regard, the cosmopolitan GJT affirms that the justification of the *ius puniendi* in international criminal justice (ICJ) lies in the underlying moral position of universal fundamental human rights, as conduct constituting serious crimes against fundamental legal values of humanity which cannot be approved by any culture (Ambos, 2013b: 29).

This has inspired the creation of the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), as well as the ICC (a permanent tribunal with potentially universal jurisdiction). Although they constitute, to a certain extent, a manifestation of the fundamental assumptions of GJT, their capacity to effectively contribute to the construction of a more just world for humanity should be assessed based on the role attributed to them and that which they effectively can manage to carry out.

4. ANALYSIS OF THE ROLE OF THE INTERNATIONAL CRIMINAL COURT FROM THE PERSPECTIVE OF GLOBAL JUSTICE

The ICC has confronted innumerable challenges and obstacles, so it is important to compare the role that the ICC is called upon to play from the perspective of GJT, with the role it has actually played since its creation more than two decades ago.

The ICC was born as an independent institution, with international legal personality (ICC, Kenya: para. 19), whose main role is, according to the preamble of the ICC Statute, to end impunity for the most serious crimes of international concern and thus contribute to their prevention. It represents, therefore, a fundamental step in the reconceptualization of IJ, by placing human conduct (especially, that of state and non-state leaders) and its implications for international society at the center of moral analysis at a global level (Ambos, 2013b: 38).

The ICC Statute, therefore, represents new limits on the traditional concept of state sovereignty, as it enshrines international individual criminal responsibility for atrocious crimes, even if they occur on the territory and under the auspices of the concerned State. This materializes, to a certain extent, the ideal of a permanent international criminal tribunal being at the center of a global justice system. It is for this reason that its adoption was celebrated as a "constitutional" moment for the international legal order (Stahn, 2019: 159-160).

The moral foundation that led to the establishment of the ICC is set out in the preamble of the ICC Statute. According to the pream-

ble, the States Parties recognize: (a) that all peoples are united by close ties and their cultures make up a common heritage; and that (b) they are aware that millions of children, women and men have been victims of atrocities that defy the imagination and deeply move the conscience of humanity. These crimes, the preamble continues, constitute a threat to the peace, security and well-being of humanity and must not go unpunished. To this end, the States Parties call to: (a) adopt measures at the national level and intensify international cooperation to ensure that those responsible for such crimes are effectively brought to justice; and (b) guarantee that international justice is respected and implemented in practice in an enduring way. Based on this, the primary ICC's role is to help put an end to impunity for the most serious crimes of international concern.

Moreover, according to the ICC case law, retribution and prevention are the main goals of criminal sanction (ICC, Al Mahdi, 27/09/2016: para. 66). Retribution expresses the condemnation of criminal conduct by international society, recognizes the harm suffered by victims and promotes the restoration of peace and reconciliation. Prevention, for its part, refers to the need to deter from committing such crimes both those convicted and those who may be considering perpetrating these crimes in the future (ICC, Al Mahdi, 09/27/2016: para. 67).

The ICC is a jurisdiction complementary to national criminal jurisdictions. It does not replace the latter, which maintain the primary responsibility for exercising their jurisdiction over the crimes provided for in the ICC Statute. Thus, according to art. 17 of the ICC Statute, only when the concerned States are unwilling or do not have the necessary capacity to investigate or prosecute, can the ICC exercise its jurisdiction over genocide, crimes against humanity, war crimes and aggression. Furthermore, as established in art. 13 of the ICC Statute, the ICC may only exercise its jurisdiction if: (a) a State Party or the UN Security Council (UNSC) refers a situation to the ICC Office of the Prosecutor (ICC OTP), in which it appears that one of these crimes has been committed; or (b) the ICC OTP initiates an investigation *ex officio*.

Although, since its creation, the ICC has shown its aspiration for universality to strengthen its legitimation and capacity for action to

fight impunity, its operation has not been free of vicissitudes, even though some of the traditional criticisms of international criminal justice (ICJ), such as the ex post facto establishment of all international criminal tribunals except for the ICC (Stahn, 2019: 194), are not applicable to it. In this sense, as Werle and Zimmermann (2019) point out, it cannot be ignored that the ICC is the product of an international treaty that, like all such instruments of this nature, is subject to the will of States Parties and the possibility that some of them may withdraw from it.

Moreover, from the beginning, the ICC had to face the reluctance of very relevant States at the international level to accede to the ICC Statute, including the United States (US), China, Russia, Israel and India (Stahn, 2019: 195). In the case of the US, despite maintaining one of the largest delegations during the Rome Plenipotentiary Conference (where the ICC Statute was adopted), and being present throughout the negotiation process, it was not finally successful in confronting several key proposals that, for the US, ran contrary to the doctrine of state sovereignty (Sadat & Carden, 2000: 456) and its hegemony over international affairs (Leonard, 2007: 162).

Indeed, for States Parties, one of the main virtues of the ICC Statute is that all of them, without distinction, have equal power to speak and vote on issues relevant to the ICC (Werle and Zimmermann, 2019: vi). Although this has not been convenient for some States accustomed to having veto power, or a high level of influence, in other international organizations and institutions, it shows the interest of States in making the ICC an independent and impartial tribunal, at the service of international society on equal terms.

Stahn (2019: 196) also points out that another problem that the ICC has dealt with is its high dependence on States Parties, needing, to a large extent, their consent to facilitate its work. Furthermore, the application of the ICC decisions depends upon the cooperation of state authorities (Popovski, 2000: 415). For example, arrest warrants can only be executed with the collaboration of States Parties, since the ICC lacks its own police forces to arrest people suspected of committing crimes under the ICC Statute. Likewise, it has inherited, from the UNSC, two highly complex situations, namely Libya and Darfur (Sudan), but with very limited resources to be able to properly carry

out the required investigations. And, in addition, there is a constant tension with the States Parties in relation to the ICC annual budget.

Although faced with the above-mentioned circumstances, and from the perspective of GJT, the ICC constitutes an institution of a global nature that aims to contribute to solving a global problem: impunity for ICC crimes. In this sense, the ICC can stimulate the implementation of domestic judicial processes that lead to closing the gaps of impunity and even reducing its commission (Brock, 2009: 167, 168), to the extent that the threat of criminal prosecution in The Hague is perceived as a real possibility. For some, this effect has manifested itself in relation to the situations in Uganda (Brock, 2009: 168), Colombia (Olasolo, 2012: 45; Both, 2010: 89-90) and, initially, Afghanistan (Olasolo, 2011: 11, 12).

Nevertheless, as with any other international organization, the ICC lives in the midst of a certain global order dictated by the international politics of the historical moment in which it operates. As a consequence, its ability to execute the role that it has been handed by the States Parties is closely linked to the dynamics of international politics and its power relations. For this reason, Kearney and Reynolds (2013: 430) argue that the premise that ICJ can completely transcend international politics is a false premise (ICJ is inherently political). Similarly, for Hirsch (2019: 204), to the extent to which leaders are interested in peaceful settlements, their interest is usually found more in the results of negotiations than in justice. This explains why African leaders, while sincerely fighting for peace in Sudan, have opposed the arrest and surrender to the ICC of former Sudanese President Omar Al-Bashir.

Brown (2009: 9) highlights the capacity of the US to significantly impact the future of initiatives such as the Kyoto Treaty or the ICC, due to the position it adopts in relation to them. In fact, the US has not only expressed its opposition to the idea of an international judicial institution exercising its jurisdiction over US nationals (Orentlichter, 2004: 415-416), but has effectively adopted a hostile policy of sanctions against ICC officials, their families and the ICC itself, as a consequence of the steps taken by the ICC to initiate an investigation into the situation in Afghanistan.

For its part, Israel has called for the application of similar sanctions because of the ICC preliminary examination and investigation into the

situation in Palestine. Given the dependence of the ICC on state cooperation to carry out its investigations and prosecutions successfully (Anello, 2013: 44 et. seq.), the positions of the US and Israel highlight the unlikelihood that the ICC can fulfill its role effectively, independently and impartially in the situations of Afghanistan and Palestine. The problem is even greater if one considers the difficulties for the ICC in obtaining cooperation from non-party States (Wenqi, 2006: 25-26).

There is no doubt that multilateralism in general, and the ICC in particular, are encountering significant challenges given the current geopolitical context. These challenges have cemented new feelings of realism, if not skepticism, about the future of the ICC. There is a certain paradigm shift, and domestic, hybrid and regional responses are gaining greater attention in light of the limitations of the ICC (Stahn, 2019: 159-160).

In the face of this reality, some authors have argued that international criminal tribunals have been created to satisfy a desire for global responsibility, reparation for victims and justice for the accused persons, but in practice only one part of the world is called to account, victims find little reparation in international criminal proceedings, and the fair trial rights of the defendants suffer from the acceptance of illiberal criminal doctrines (Nouwen & Werner, 2014: 5).

Considering the above, it can be stated that the ICC Statute suffers, in part, from the same problems as any other human rights treaty lacking self-executing mechanisms, since its success depends largely on the support and cooperation provided by the States Parties. There is no doubt that, in some cases, States ratify treaties aimed at the protection of human rights and reparation for victims more as a symbolic gesture of their commitment to human rights, than as a real expression of their intention to assume the obligations and responsibilities that arise from said instruments. As a result, lax monitoring and weak enforcement mechanisms for non-compliance allow States to get away with human rights violations (Handmaker & Arts, 2019: 3)[1].

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[1] This is evident in the universal system of human rights protection, where it is common to observe that States ratify treaties that impose obligations on

As mentioned previously, the ICC Statute as a treaty, and the ICC as an institution, cannot escape the same reality. The final outcome of the negotiations that culminated in the adoption of the ICC Statute in 1998 reveals that: (a) the universal reach of the ICC is only real when the UNSC refers situations to it; and (b) the ICC depends on the States Parties to be able to carry out its role, which leaves, to a large extent, ICC effectiveness in their hands (Olasolo, Carnero, Seoane & Carcano, 2018: 423-424).

It is, therefore, not surprising that the ICC is often accused of not meeting the expectations of many because its actions are far from putting an end to impunity for the crimes set out in the ICC Statute. Thus, although the ICC is a laudable institution, which is frequently held out as the only opportunity to obtain "some" justice when States do not want, or cannot, prosecute and investigate, the truth is that expectations raised by the ICC are frequently let down because of a lack of understanding about how the Court works (Cronin-Furman & Taub, 2013: 449-450). Moreover, the ICC faces a number of other criticisms, such as its inability to prevent the commission of atrocious crimes (Grono & de Courcy, 2015:1243-1244), its inefficiency in the use of its financial resources (Ford, 2015: 104), its non-recognition of its inevitable politicization in some cases (Schabas, 2013: 404-405), its excessive politicization in other cases (Vinjamuri, 2015: 24-27) and the obstacles generated by States Parties to avoid the criminal persecution of their highest representatives (Olasolo, Carnero, Seoane & Carcano, 2018: 449).

Although the debate over the reasons behind the unsatisfactory performance of the ICC is, in some ways, inexhaustible, it is no less true that the entry into force of the ICC Statute and the implementation of the ICC also presents several positive elements that should be underlined. First, a relatively recent paradigm has been consolidated that seeks to place human beings as actors (not just objects) in

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them, but do not ratify their Optional Protocols that establish clear procedures to guarantee real protection and reparation for victims. The situation of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is a good example (Izquierdo & Ugalde, 2018: 232, 233).

international events (Handmaker & Arts, 2019: 4), thereby humanizing IL (Cançado, 2007). This has allowed it to definitively overcome the long-lasting discussions about the need to: (a) recognize legal personality in IL to human beings; (b) establish individual criminal responsibility for the commission of atrocious crimes as one of the pillars of IJ; and (c) create institutions such as the ICC.

Secondly, even though the ICC is constantly accused of being ineffective and inefficient, the truth is that, to date, more than 20 arrest warrants have been executed and almost 20,000 victims have been authorized to participate in the proceedings of the more than 30 cases opened so far. These results would have been unthinkable until a few decades ago.

Furthermore, state inaction, unwillingness or lack of capacity to investigate and prosecute the commission of atrocious crimes on its territory or by its nationals, no longer constitutes the end of the road for victims; on the contrary, it allows them to resort to the ICC to request it to exercise its jurisdiction in a complementary manner. This new reality also encourages NGOs to interact with the ICC by presenting evidence of crimes to the ICC OTP, supporting individuals in witness protection programs, or offering legal and logistical support to victims who wish to participate in the hearings (Handmaker & Arts, 2019: 4).

Thirdly, from the perspective of GJT, the ICC represents an approach to justice, which focuses on the moral and legal recognition of human persons at a global level. The ICC also implies the recognition that political macro-criminality is a problem of global cohabitation, whose impact, consequences, and relevance exceed state borders. Thus, the adoption of the ICC Statute as the founding treaty of the ICC has been, undoubtedly, an important step in the global fight against impunity for the crimes of greatest concern to humanity.

Furthermore, political developments surrounding the situations in Afghanistan and Palestine also suggest that the ICC has a certain impact on the dynamics and developments of IR. In this regard, it should not be surprising that the transition from a system traditionally centered on state interests, to one centered on human beings, generates discomfort and opposition among the power structures that

have designed and cohabit a state-centric world order. An example is the activism of Kenya and Sudan to foster a growing reluctance towards the ICC among African countries, that is far from having a merely temporary nature (Olasolo, Carnero, Seoane & Carcano, 2018: 448-449).

Despite the foregoing, the ICC does not yet represent a complete manifestation of the ideals postulated by GJT. Its critical dependence on the cooperation of States Parties to fulfill its role, as well as the limitation of its jurisdiction to its territories and nationals (with the exception of UNSC referrals), are clear examples of the role that States continue to play in allowing, or not allowing, the ICC to: (a) effectively carry out its role; and (b) become a truly universal (or global) instrument of justice. Even recent efforts to identify and implement measures to strengthen the Court and improve its functioning (ICC-ASP/18/Res.7, 2019: para. 4), as part of the review process of the ICC and the system of the ICC Statute, are under the leadership of States Parties.

As a result, according to GJT, the ICC is not yet currently a suitable institution to provide a global response to the global problem it aims to address. This is because the ICC can, to a large extent, only do what the States Parties allow it to do. Consequently, despite the significant steps forward mentioned above, given the prevalence of States as protagonists of IJ and the absence of significant reforms to the ICC Statute to expand the ICC jurisdictional reach and capacity of action, there is still a long way to go.

5. CONCLUSIONS

GJT, as a manifestation of cosmopolitanism, moves the focus of IJ from States to other individual and collective actors having equal or greater prominence in current global relations. In this way, human beings: (a) are placed as actors (and not only objects) of global events; (b) become a central element of moral analysis at the national and international levels; (c) are holders of fundamental human rights that are universally valid and internationally enforceable; and (d) must take responsibility for the consequences of their behavior.

With the birth of ICJ, IJ has seen an expansion of its purpose and scope of application. Although IJ still primarily revolves around States, as main protagonists of IR, the events of the 20th century have led to the development of the concept of individual international criminal responsibility for atrocious crimes that affect humanity as a whole.

From the perspective of GJT, this constitutes a step forward towards an international system based on the consideration of human beings as part of the moral analysis of justice. This transformation has also increased at the international level the possibilities for victims of atrocious crimes to be adequately compensated for the harm suffered, even when their own State has facilitated, consented to, or encouraged the commission of said crimes against them.

In this context, the ICC, as the first international criminal tribunal of a permanent nature and potentially universal scope, means the consolidation of an IJ system built upon the recognition of human beings as subjects of rights and duties. The complementary jurisdiction of the ICC represents the possibility of reducing impunity for atrocious crimes when States Parties having primary jurisdiction over them cannot or do not want to genuinely investigate and prosecute those most responsible. This, in turn, represents a window of opportunity for victims of said crimes to obtain reparation when state jurisdictions, for one reason or another, close that possibility to them. In this way, the ICC, undoubtedly, constitutes a relevant step forward towards a global justice system.

Nevertheless, the ICC exists within the context of an international system whose main protagonists still are primarily States. Thus, the role that the ICC is called to play cannot escape the impact of a system having these characteristics on multilateral institutions that are potentially universal in scope. As a result, States Parties not only maintain control over whether their citizens have access to the ICC complementary jurisdiction, but even when they decide to accept its jurisdiction, they maintain control over issues of fundamental importance for the effective, efficient, independent and impartial functioning of the ICC. Thus, from the approval of their budget to the execution of arrest warrants and other forms of cooperation, States Parties continue to have a significant impact on the ICC.

Consequently, viewed from the perspective of GJT, the ICC represents an important, although still insufficient and incomplete, step forward towards a true system of global justice. Furthermore, given the geopolitical realities and dynamics that revolve around it, the ICC is not yet an institution of truly universal scope, which allows for an effective response to the commission of atrocious crimes as a problem that is also global in nature. Furthermore, despite efforts to improve the ICC functioning, the political climate it currently faces appears to dispel any possibility that, in the short term, the ICC will be able to fulfill its role with a truly global reach.

REFERENCES

Case Law

Inter-American Court of Human Rights

IACtHR. Barrios Altos v. Peru. *Judgement (merits).* March 14, 2001. Serie C. No. 75.

IACtHR. Gomes Lund et. al. (Guerrilha do Araguaia) vs. Brazil. *Preliminary Objections, Merits, Reparations and Costs.* November 24, 2010. Serie C. No. 219.

International Court of Justice

ICtJ. Democratic Republic of the Congo v. Uganda (Armed Activities on the Territory of the Congo). *Order of 6 December 2016. Separate Opinion of Judge Cançado Trindade.* ICtJ Reports 2016.

International Criminal Court

ICC [Appeals Chamber]. The Prosecutor v. Thomas Lubanga Dyilo. Case No. ICC-01/04-01/06. *Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations". Order for Reparations (Annex A).* 3 March 2015.

ICC [Trial Chamber I]. The case of the Prosecutor v. Thomas Lubanga Dyilo. Case No. ICC-01/04-01/06. *Decision establishing the principles and procedures to be applied to reparations.* 7 August 2012.

ICC [Trial Chamber II]. The Prosecutor v. Germain Katanga. Case No. ICC-01/04-01/07. *Order for Reparations pursuant to Article 75 of the Statute.* 24 March 2017.

ICC [Trial ChamberVIII]. The Prosecutor v. Ahmad Al Faqi Al Mahdi. Case No. ICC-01/12-01/15. *Judgment and Sentence*. 27 September 2016.

ICC Trial Chamber VIII]. The Prosecutor v. Ahmad Al Faqi Al Mahdi. Case No. ICC-01/12-01/15. *Reparations Order*. 17 August 2017.

ICC [Pre-Trial Chamber II]. Situation in the Republic of Kenya. Situation No. ICC-01/09. *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.

Doctrine

Ambos, K. (2005). *La parte general del derecho penal internacional*. Berlin (Germany): Konrad Adenauer Foundation.

Ambos, K. (2010). *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court. An Inductive, Situation-based Approach*. Göttingen: Springer.

Ambos, K. (2011). "Sobre la organización en el dominio de la organización". *InDret. Revista para el análisis del Derecho*. Vol. 3. Pp. 1-25.

Ambos, K. (2013a). *Treatise on International Criminal Law*. Oxford (United Kingdom): Oxford University Press.

Ambos, K. (2013b). "¿Castigo sin soberano? La cuestión del *ius puniendi* en derecho penal internacional. Una primera contribución para una teoría del derecho penal internacional consistente". *Revista Persona y Derecho*. Vol. 68. Pp. 5-38.

Anello, C. (2013). "Desafíos de la Corte Penal Internacional en torno a la cooperación con los Estados". *Anuario Iberio-Americano de Derecho Internacional Penal (ANIDIP)*. Vol. 1. Pp. 43-60.

Anderson, K. (2009). "The Rise of International Criminal Law: Intended and Unintended Consequences". *European Journal of International Law*. Vol. 20. No. 2. Pp. 331-358.

Britos, P. (2016). "¿Qué significa 'justicia global'?". *Justicia*. Vol. 29. Pp. 86-98.

Brock, G. (2009). *Global Justice. A Cosmopolitan Account*. Oxford (United Kingdom): Oxford University Press.

Brooks, T. (Ed.). (2012). *Global Justice and International Affairs*. Leiden (The Netherlands): Brill.

Brown, C. (2009). "From International to Global Justice?". In: Dryzek, J.S. (Ed.). *The Oxford Handbook of Political Theory*. Oxford (United Kingdom): Oxford University Press.

Cançado Trindade, A.A. (2007). "La persona humana como sujeto del derecho internacional: avances de su capacidad jurídica internacional en la primera década del siglo XXI". *Revista IIDH*. Vol. 46. Pp. 273-329.

Carter, L.E., Ellis, M. & Jalloh, C.C. (2016). *The International Criminal Court in an Effective Global Justice System*. London (United Kingdom): Edward Elgar Publishing.

Cortés, F. (2010). "Una crítica a las teorías de justicia global: al realismo, a Rawls, Habermas y Pogge". *Ideas y Valores*. Vol. 142. Pp. 93-110.

Cortés, F. (2013). "Perspectivas y límites de la justicia global y el cosmopolitismo democrático". *Revista Facultad Nacional de Salud Pública*. Vol. 31. No. Pp. 57-64.

Cronin-Furman, K. & Taub, A. (2013). "Lions and Tigers and Deterrence, Oh My: Evaluating Expectations of International Criminal Justice". In: W. Schabas & McDermott, Y. (Eds.). *The Ashgate Research Companion to International Criminal Law Critical Perspectives*. Farnham (United Kingdom): Ashgate. Pp. 436-452.

De Schutter, H. & Tinnevelt, R. (2008). "David Miller's theory of global justice. A brief overview". *Critical Review of International Social and Political Philosophy*. Vol. 11. No. 4. Pp. 369-381.

Dietzel, A. (2017). "Global Justice". In: Mcglinchey, S. (Eds.). *International Relations Theory*. Bristol (United Kingdom): E-International Relations Publishing.

Hirsch, E. (2019). "The Value of International Criminal Justice: How Much International Criminal Justice can the World Afford?". *International Criminal Law Review*. Vol. 19. No. 2. Pp. 201-213.

Ford, S. (2015). "How Much Money Does the ICC Need?". In: Stahn, C. (Ed.). *The Law and Practice of the International Criminal Court*. Oxford (United Kingdom): Oxford University Press. Pp. 84-104.

Gilabert, P. (2007). "Comentarios sobre la concepción de la justicia global de Pogge". *Revista Latinoamericana de Filosofía*. Vol. 33. No. 2. Pp. 205-222.

Glasius, M. (2009). "What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations". *Human Rights Quarterly*. Vol. 31. No. 2. Pp. 496-520.

Grono, N. & de Courcy, A. (2015). "The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders". In: Stahn, C. (Ed.). *The Law and Practice of the International Criminal Court*. Oxford (United Kingdom): Oxford University Press. Pp. 1225-1244.

Handmaker, J. & Arts, K. (2019). *Mobilising International Law for 'Global Justice'*. Cambridge (United Kingdom): Cambridge University Press.

Izquierdo, R. & Ugalde, A. (2018). "La actividad cuasi-judicial del sistema de protección universal del Comité de Derechos Económicos, Sociales y Culturales, Comité para la Protección de los Trabajadores Migrantes y Comité para la Protección de las Personas Discapacitadas: alcance y limitaciones". In: Olasolo, H. et. al. (Eds.). *Alcance y Limitaciones de la Justicia Internacional*. Perspectivas Iberoamericanas sobre la Justicia Book Collection. Volumen 4. Valencia: Tirant lo Blanch, Instituto Ibero-Americano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional y la Fundación Joaquín Herrera Flores. Pp. 221-252. https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-4-coleccion-alcance-y-limitaciones-de-la-justicia-internacional.

Kearney, M. & Renolds, J. (2013). "Palestine and the Politics of International Criminal Justice". In: W. Schabas et al. (Eds.). *The Ashgate Research Companion to International Criminal Law Critical Perspectives*. Farnham: Ashgate. Pp. 407-433.

Kendall, S. (2015). "Commodifying Global Justice: Economies of Accountability at the International Criminal Court". *Journal of International Criminal Justice*. Vol. 13. No. 1. Pp. 113-134.

Leonard, E. (2007). "A Case Study in Declining American Hegemony: Flawed Policy Concerning the ICC". *The Whitehead Journal of Diplomacy and International Relations*. Pp. 147-166.

Mazzeschi, R. & De Sena, P. (2018). *Global Justice, Human Rights and the Modernization of International Law*. Cham: Springer.

Moreno Ocampo, L. (2008). "The International Criminal Court: Seeking Global Justice". *Case Western Reserve Journal of International Law*. Vol. 40. No. 1. Pp. 215-225.

Nouwen, S. & Werner, W. (2014). "Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity". *Legal Studies Research Paper Series of the Faculty of Law of the University of Cambridge*. Vol. 63. Pp. 1-22.

Olasolo, H. (2011). "La función de la Corte Penal Internacional en la prevención de delitos atroces mediante su intervención oportuna: de la Doctrine de la intervención humanitaria y de las instituciones judiciales ex post facto al concepto de responsabilidad para proteger y la función preventiva de la Corte Penal Internacional". *Revista Liberdades*. Vol. 6. Pp. 38-52.

Olasolo, H. (2012). "El principio de complementariedad y las estrategias de actuación de la Corte Penal Internacional en la fase de examen preliminar: ¿por qué la Corte Penal Internacional mantiene su examen preliminar, pero no abre una investigación, sobre la situación en Colombia?". *Revista Electrónica de Estudios Internacionales*. Vol. 24. Pp. 3-45.

Olasolo, H., Buitrago Rey, N.E., Bonilla Tovar, V. & Canosa Cantor, J. (Eds.) (2018). *Alcance y limitaciones de la justicia internacional*. Perspectivas Iberoamericanas sobre la Justicia Book Collection. Vol. 4. Valencia (Spain): Tirant lo Blanch, Instituto Ibero-Americano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional e Instituto Joaquín Herrera Flores. https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-4-coleccion-alcance-y-limitaciones-de-la-justicia-internacional.

Olasolo, H., Carnero, E. Seoane, D. & Carcano, L. (2018). "El limitado alcance de las actuaciones de la Corte Penal Internacional en su decimoquinto aniversario y sus posibles causas". In: Olasolo, H. et al. (Eds.). *Alcance y Limitaciones de la Justicia Internacional*. Perspectivas Iberoamericanas sobre la Justicia Book Collection. Vol. 4. Valencia: Tirant lo Blanch, Instituto Ibero-Americano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional y la Fundación Joaquín Herrera Flores. Pp. 395-450. https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-4-coleccion-alcance-y-limitaciones-de-la-justicia-internacional.

Olasolo, H. & Kiss, A. (2010). "El Estatuto de Roma y la jurisprudencia de la Corte Penal Internacional en materia de participación de víctimas". *Revista Electrónica de Ciencia Penal y Criminología*. Vol. 12. Pp. 13:1- 13:37.

Orentlichter, D. (2004). "Unilateral Multilateralism: United States Policy toward the International Criminal Court". *Cornell International Law Journal*. Vol. 36. No. 3. Pp. 415-433.

Peña, J. (2010). "Los orígenes del debate sobre la justicia global". *Isegoría Revista de Filosofía Moral y Política*. Vol. 43. Pp. 363-386.

Pérez-León, J.P. (2008). "El individuo como sujeto de derecho internacional. Análisis de la dimensión activa de la subjetividad jurídica internacional del individuo". *Anuario Mexicano de Derecho Internacional*. Vol. 8. Pp. 599-642.

Pierik, R. & Werner, W. (2005). "Cosmopolitism, Global Justice and International Law". *Leiden Journal of International Law*. Vol. 18. No. 8. Pp. 679-684.

Pogge, T. (2001). "Priorities of Global Justice". *Metaphilosophy*. Vol. 30. No. 1/2. Pp. 6-24.

Pogge, T. (2008). "¿Qué es la justicia global?". *Revista de Economía Institucional*. Vol. 10. No. 19. Pp. 99-114.

Pogge, T. & Alvarez, D. (2010). "Justicia global: dos enfoques". *Isegoría Revista de Filosofía Moral y Política*. Vol. 43. Pp. 573-588.

Popovski, V. (2000). "International Criminal Court. A Necessary Step Towards Global Justice". *Security Dialogue*. Vol. 31. No. 4. Pp. 405-419.

Rawls, J. (1971). *A Theory of Justice*. Cambridge (USA): Harvard University Press.

Rawls, J. (1999). *The Law of Peoples*. Cambridge (USA): Harvard University Press.

Risse, M. (2012). *On Global Justice*. New Jersey (USA): Princeton University Press.

Sadat, L. & Carden, R. (2000). "The New International Criminal Court: An Uneasy Revolution". *Georgetown Law Journal*. Vol. 88. No. 381. Pp. 381-474.

Schabas, W. (2012). *Unimaginable Atrocities. Justice, Politics and Rights at the War Crimes Tribunals*. Oxford (United Kingdom): Oxford University Press.

Schabas, W. (2013). "The Short Arm of International Criminal Law". In: Schabas, W. & McDermott, Y. (Eds.). *The Ashgate Research Companion to International Criminal Law Critical Perspectives*. Farnham: Ashgate. Pp. 387-405.

Stahn, C. (2019). *A Critical Introduction to International Criminal Law*. Cambridge (United Kingdom): Cambridge University Press.

Tallgren, I. (2015). "The Voice of the International: Who is Speaking?". *Journal of International Criminal Justice*. Vol. 13. No. 1. Pp. 135-155.

Tan, K. (2017). *What is this thing called global justice?* London (United Kingdom): Routledge.

Ten Kate, W. & Nouwen, S. (2018). "The Globalisation of Justice: Amplifying and Silencing Voices at the ICC". *Legal Studies Research Paper Series of the Faculty of Law of the University of Cambridge*. Vol. 51. Pp. 1-20.

Valentini, L. & Torresi, T. (2011). "Introduction-International law and global justice: a happy marriage". *Review of International Studies*. Vol. 37. No. 5. Pp. 2035-2041.

Vinjamuri, L. (2015). "The ICC and the Politics of Peace and Justice". In: Stahn, C. (Ed.). *The Law and Practice of the International Criminal Court*. Oxford (United Kingdom): Oxford University Press. Pp. 13-29.

Wenqi, Z. (2006). "Acerca de la cooperación de los Estados que no son partes en la Corte Penal Internacional." *International review of the Red Cross*. Vol. 861. Pp. 1-26.

Werle, G. & Zimmermann, A. (2019). *The International Criminal Court in Turbulent Times*. The Hague (The Netherlands): Springer Asser Press.

Zhu, D. (2018). "China, Crimes Against Humanity and the International Criminal Court". *Journal of International Criminal Justice*. Vol. 16. No. 5). Pp. 1021-1041.

Resolutions, Reports and Other Documents

International Criminal Court. Assembly of States Parties. (2002). *Agreement on the privileges and immunities of the International Criminal Court*. 9 September 2002.

International Criminal Court. Assembly of States Parties. (2009). *Review of the International Criminal Court and the Rome Statute system*. Resolution ICC-ASP/18/Res.7. 6 December 2019.

International Criminal Court. Office of Public Information. (2020). *Cases*. https://www.icc-cpi.int/cases.

United Nations. General Assembly. (1992). *Convención marco de Naciones Unidas sobre el cambio climático*. 9 May 1992.

United Nations. General Assembly. (2006). Resolution 60/147. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. 16 de December 2005.

Chapter 7
The Perspective Of Economic Rights As A Manifestation Of Global Justice[*]

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1. INTRODUCTION

This chapter aims to analyze the role of the International Criminal Court (ICC), taking as its starting point the thought of the Indian economist Amartya Sen regarding global justice, which is founded upon the defense of fundamental human rights. For Sen, economic rights must be included among the latter and protected by interna-

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[*] For the institutional ascription of this chapter, see the initial Note of the book.

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tional law (IL), because the freedoms protected by these rights are as relevant to having a dignified life as the liberties associated with civil and political rights. There is, therefore, no reason to condemn violations of fundamental rights in one case and to not do so in the other.

2. HORIZON OF ANALYSIS

2.1. Justice in the thought of Amartya Sen

If the freedom to be safe from hunger is considered as important as the freedom to be safe from torture, it becomes necessary to recognize certain duties of promotion and protection of economic rights in the international order to guarantee the real freedom of people. These duties show the shortsighted approach of granting absolute priority to civil and political rights over economic rights. Why should vital economic needs, which can be matters of life and death, be less important than personal freedoms? (Sen, 2000: 87).

The relationship between justice and economy has been a recurrent theme of reflection throughout the history of Western thought (Aristotle, 2001; 2007; Thomasde Aquinas, 1989). With modernity and the transformation of the concept of justice due to the strength with which ideas of freedom and equality took hold, the European Enlightenment rendered this relationship into one of its greatest interests.

Many theories of social justice have theorized about the institutional arrangements that are necessary for a society to be considered just. Classic theories of contractualism, such as those of Hobbes (2017), Rousseau (1998), Locke (2002) and Kant (1984), adopt this approach; the same can be observed in contemporary theories such as those of Rawls (1995) and Dworkin (1984). All these theories are grouped by Sen into what he calls transcendental institutionalism (Sen, 2010: 37), more concerned with the identification of ideal institutions than with the injustices present in real societies.

Other enlightened thinkers focused their interest on the social achievements made possible by existing institutions in different societies, which served as points of comparison. This is the case of

Smith (1997), Bentham (1965), Mill (1996) and Marx (1993), whose reflection is founded upon an empirical basis that is shared by Sen. Instead of engaging in transcendental search for a just society, these authors focused their attention on comparisons based on social achievements, since they were primarily interested in the elimination of manifest injustice in the world they observed (Sen, 2010: 39).

Although Sen shares an empirically based vision with those who separate themselves from a justice based on ideal institutions and assumes the perspective that conceives justice in terms of social achievements, he approaches the latter from the capabilities that people really have (Sen, 2010: 50-51). These lead Sen to criticize not only transcendental institutionalism (including theories as relevant as those of Rawls), but also the welfarism derived from utilitarian positions.

2.2. Global justice

In The Idea of Justice, Sen (2010) proposes an alternative and broader perspective of justice than the theory of justice advanced by Rawls. Supranational justice is one of the points of distinction between the two. On the one hand, in his book A Theory of Justice, Rawls (1995: 21) proposes a procedural vision of justice, through which principles emerge that are limited to a particular State. Therefore, he conceives the basic structure of society, made possible thanks to principles of justice, as a closed system, which is isolated from other societies. Only in The Law of Nations, Rawls (2001) focuses on principles of justice applicable to international relations (IR) and makes a contractual proposal for a more just world.

On the other hand, Sen (2010) avoids proposing two versions of justice, one at the national level and the other at the supranational level. The unified vision of the Indian economist constitutes an important advantage over the approach of Rawls.

In addition to this difference between the two approaches to supranational justice, there is a difference in focus as between the two authors. Rawls concentrates his treatment of supranational justice within the field of international justice (IJ), while Sen does so in the field of global justice. The difference resides in that the first focuses

on relations between States, while the second focuses on relations between human beings from different States.

Sen presents two reasons for not treating the issues of global justice and national justice separately. Firstly, in a globalized world, decisions made within the framework of national States have important consequences in other States. Terrorism, pandemics, drug trafficking and migration are some of the issues that entail national decisions whose impact on other countries is evident. Thus, reflection of Sen exceeds the limits of transcendental institutionalism that can lead to ignoring the possible adverse effects of the acts and choices of a country on people who are beyond the borders of that country (Sen, 2010: 120).

Secondly, a global perspective has relevant implications in the determination of justice within the borders of a State because it allows the questioning of idiosyncratic moral or political beliefs, thereby avoiding parochialism (Sen, 2010: 101). A social contract in which only the representatives or members of a people participate will inevitably leave out the beliefs and preferences of those who do not make up that people, which would end up in making a greater degree of impartiality impossible. As Justice Ruth Bader Ginsburg (a critic of closed impartiality) states, why should one not consult the wisdom of a foreign judge at least as naturally as one would read a law journal article by a professor? (Sen, 2010: 439).

For Sen, in the search for ethical objectivity, the criterion for the inclusion of other perspectives should not be membership in a certain group, such as the State or the nation, but rather the value of the ideas expressed. In this sense, the ideas of external spectators unrelated to the group should also be taken into account (Smith, 1997), as they can be particularly illustrative for thinking about global justice.

2.3. Human rights and freedoms

Respect for human rights, and the duties that derive from them, constitutes the articulating axis upon which the proposal of Sen about global justice turns. For this reason, Sen examines the main objections posed to human rights. A first, well-known, objection is

that of their alleged non-existence. But this objection is not germane because it only arises if one expects human rights to exist just as the ruins of Machu Picchu or subatomic particles exist. Instead, the question one should ask is normative: should one respect the freedoms guaranteed by these rights? In short, the question about the existence of human rights is nothing more than a question about the ethical validity of the recognition of certain freedoms and the obligations that their protection imposes.

Sen warns that the freedoms safeguarded by human rights have two aspects: the opportunity aspect and the procedural aspect. The first refers to the options that one actually has, while the second refers to how one takes a decision. Capacities are part of the opportunity aspect because they are related to the opportunity to achieve certain states of being (such as being well nourished) or to carry out certain activities (such as protesting or traveling) (Sen, 2004).

On the other hand, the procedural aspect of freedom is not encapsulated directly from the perspective of capabilities. This aspect is what is violated when an action is imposed on a person even when it is an action that the person would have chosen freely (Sen, 2010: 403). For example, when a person is coerced by threats to remain well nourished, even when that is what the person wants, the procedural aspect of freedom is breached. Arguments in favor of human rights assert that freedoms must be protected in both the opportunity and procedural aspects.

Having presented the meaning that Sen gives to "freedoms", it is necessary to note that their protection through a human rights perspective differs from that carried out through the constitutional rights process because the scope of the former is not limited by belonging to any State (Sen, 2010). On the contrary, human rights impose obligations on all humanity, even when they are not included in national legislation.

Out of this reality, other criticisms of human rights have been raised, in the face of which it is necessary to insist that human rights must not necessarily be endorsed by legislation to preserve their legitimacy (Sen, 2010). Even more so, their moral force lies, in part, in the fact that these rights need not be positively formulated in national legislation to impose the ethical commitment to respect them.

But what are rights if not the legal protection of certain goods such as life, property, expression, or the environment? According to Bentham (1990), it is absurd to think about the existence of rights without legislation that establishes them, because rights are the product of legal conventions. The response of Sen to this objection is two-fold. First, legal rights should not be confused with human rights; the latter, as it has already been highlighted, are ethical mandates for the protection of certain freedoms (Sen, 2010). Second, just as advocates of human rights must justify why human rights should be promoted, utilitarians such as Bentham must also justify why utility should be promoted. Thus, a claim may be made to justify the ethical validity of human rights, but this claim is on the same level as the claim regarding the ethical validity of fostering pleasure and reducing pain.

That human rights differ from legal rights does not mean that the two are unrelated. On the contrary, human rights have served to enshrine legal rights. The ICC is, to a certain extent, an example of this. But it is important to highlight, and follows from the distinctions set out above, that the achievement of effective human rights recognition is not restricted to the legal field; social pressure, public debate and education are other ways by which it can be achieved.

Moreover, punitive legislation may not be the appropriate way to guarantee certain rights. Sen mentions the example of the right of a person with physical limitations to speak fluently to not be belittled or ridiculed (Sen, 2010: 398). Although this is an important right, pursuing it by means of legal coercion would not appear to be the best option. As will be seen below, part of the reflection on the relevance of economic rights and their relationship with the ICC's role consists precisely in ascertaining the appropriateness of criminal prosecution of conduct that breaches the norms related to such rights.

Despite addressing the relationship between criminal legislation and the effective protection of human rights, Sen does not mention the educational role that legislation can play. Sometimes, the legal recognition of certain rights can serve not only as protection of those rights, but also as an ethical message to the community (Aristotle, 2007). A legal change can lead to a change in the perception or behavior of members of society. As a result, the prosecution of crimes

against humanity and war crimes not only leads to the conviction of those responsible but can also contribute to the perception of their gravity.

2.4. Economic rights as human rights

It should be clarified that economic rights are recognized and protected by international human rights law (IHRL) and are generally treated as second-generation rights in conjunction with social and cultural rights (ESCR)[1] (civil and political rights are considered first-generation rights). Thus, the Universal Declaration of Human Rights (UDHR) is not limited to basic civil and political rights, since it also includes the right to work, the right to education, protection against unemployment and poverty, the right of union association and even the right to a fair remuneration (Sen, 2010: 412). Furthermore, such rights as the common right to subsistence or medical care, have recently been added to human rights declarations and have substantially expanded the domain of human rights (Sen, 2010: 412).

Sen identifies two criticisms that are usually directed against the inclusion of economic rights as part of human rights: the criticism of institutionalization and the criticism of feasibility. The first one refers to the recognition of economic rights as fundamental rights because the flip-side of obligations is forgotten. According to this criticism, it is easy to claim these rights, but it is difficult to determine who has the duty to satisfy them.

What does it mean to have a right if the freedoms that it guarantees does not impose obligations on others for compliance? When the alleged universal rights to goods, services or well-being are not satisfied, and the institutions have not yet been established to distribute or assign specific obligations, there is systematic uncertainty about whether you can talk about violations (and not just a contingent uncertainty about who could be responsible for them) (O'Neill, 1996: 132).

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1 This chapter is limited to economic rights, although they are often treated as part of the ESCR.

Institutions are necessary in order to determine upon whom falls the obligation to guarantee economic rights. The right to be free of hunger requires that institutions determine who is obliged to enable access to food. This is unlike the obligations imposed by the right to be free of torture that fall on certain actors. In this way, for authors such as O'Neil (2016: 36), these types of rights (which he refers to as institutional rights) are not natural or human rights because the obligations imposed depend on the institutions established in each society.

To respond to the objection of institutionalization, Sen appeals to the Kantian distinction between perfect and imperfect duties. The argument holds that the rights accepted by O'Neill as human rights also impose imperfect obligations and, therefore, do not assign obligations on specific actors prior to their institutionalization.

The general sense of the distinction between perfect and imperfect obligations in Kant (2002) could be reconstructed as follows: while perfect duties are those that are fulfilled by not performing a certain action (such as making a false promise or taking a life), imperfect duties impose the carrying out of an action, such as cultivating one's own abilities or helping those in need[2].

Sen illustrates his response through the well-known case of Kitty Genovese, murdered in New York City in front of dozens of witnesses who did not help her. Two types of obligations to protect the rights of Genovese seem to have been violated: on the one hand, the murderer failed to comply with a perfect duty; on the other hand, the onlookers who failed to assist her breached an imperfect duty. This shows how first-generation rights also impose perfect and imperfect obligations (Sen, 2010). Furthermore, the imposition of an imperfect obligation leaves undetermined who is actually obliged to comply.

Economic rights also give rise to both types of obligations. The right to work creates an obligation to not discriminatorily impede access to work, as well as one to facilitate the possibility to work to all members of society who desire to do so. The desperate act of Mo-

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[2] These are the four famous examples used by Kant in the *Groundwork for the Metaphysics of Morals.*

hamed Bouazizi, which constituted the trigger for the Arab Spring, illustrates this idea. This hard-working Tunisian informal street vendor had been expropriated by the police and had lost, once again, the means of subsistence for himself and his family. In frustration, he incinerated himself in front of a municipal building where he had been unable to obtain a response to the injustice from the authorities. Before igniting the fire, Bouazizi shouted: "How do you expect me to earn a living?". Bouazizi was deprived of the right to work both by the action and by the failure to act of the authorities.

Therefore, the criticism of institutionalization applies to both civil and political rights (as is illustrated by the example of Genovese) and economic rights and is not sustainable if the breach of imperfect obligations is accepted as a violation of human rights. In this sense, Sen (2010: 415) states that there is a wide space for fruitful public discussion around what a society or a State (including an impoverished State) is able to do to avoid violations of certain basic economic and social rights, but this margin also exists in the case of civil and political rights.

Who, then is responsible? In the case of Genovese, those neighbors who did not alert the police properly failed in their duties. In the case of Bouazizi responsibility falls: (a) on the police officers in charge of the operation that deprived him of his means of production; (b) on the authority under the orders of whom those actions were conducted (following the doctrine of superior responsibility); and (c) on the local authorities who failed to respond to his claim if it was foreseeable that he would be deprived of what would be necessary to make a living.

As regards the criticism of feasibility, this points to the difficulty in having economic rights respected in some parts of the world. How can compliance with the human right to livelihood, work or fair remuneration be demanded in poor countries? (Cranston, 1962; 1983). This objection, says Sen (2010: 416), is based on a confusion about the meaning of human rights: the viability of the human rights approach does not collapse only because additional social changes may be needed at any time to fully satisfy such rights.

Moreover, this criticism can also be applied to civil and political rights, since even with the best efforts, can one stop all mass murders, such as those of Rwanda in 1994, that of New York on 11 September 2001, or those of London, Madrid, Bali and Bombay (Sen, 2010: 416).

Consequently, high poverty rates, growing unemployment, low wages and the murder of trade unionists do not affect the legitimacy of economic rights. On the contrary, they show their relevance to the most urgent needs, to which a society must respond. It is not about programmatic rights but fundamental rights (Pogge, 2005), which must be the subject of protection by all members of society.

3. THE RELATIONSHIP BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL CRIMINAL LAW

The proposal of Sen on economic rights as human rights posits that their legitimacy does not depend on state legislation. Moreover, it remains to be determined if these rights must also be protected by international criminal law (ICL) and, if so, in what way. To answer this question, it is necessary to clarify some issues about the complex relationship between IHRL and ICL.

First, ICL was not born as a normative body for the protection of human rights, as it mainly aims to the establishment of individual criminal responsibility at the international level for the most serious crimes of international concern (Cryer, Friman, Robinson & Wilmshurst, 2014). Nevertheless, to conclude that there is no relationship between IHRL and ICL would mean ignoring their links.

In this sense, Bassiouni (cited in Chinchón, 2009) affirms that the last step towards achieving the protection of human rights is the imposition of sentences on those who seriously breach them by committing international crimes. Consequently, ICL is intrinsically linked to IHRL, since the notion of international crimes was born in response to those human rights violations that were considered especially atrocious and repudiable, to the point that international society

needed to face them in a unified way, regardless the place they were committed and the nationality of the victims and perpetrators (Cryer, Friman, Robinson & Wilmshursst, 2014).

Beyond the Hague Conventions of 1899 and the Treaty of Versailles of 1919 (the first ICL precedents), the events that occurred during the Nazi holocaust (which are to the present day remembered as one of the most heartbreaking episodes of the history of humanity) gave rise to the emergence of ICL and IHRL (Cryer, Friman, Robinson & Wilmshurst, 2014). While these two new regimes of IL deal with different spheres of responsibility, because the former is related to individual criminal responsibility and the latter is related to state responsibility, they both have a common origin and are concerned with addressing situations in which there have been serious human rights violations. Moreover, as Akhavan (cited in Krever, 2013) affirms, imposing punishment on the leaders whose subordinates commit international crimes can contribute to the internalization of norms related to human rights.

However, as Van Den Herik (2013) states, the relevance of serious human rights violations for ICL has focused mainly on civil and political rights; serious violations of economic rights have traditionally remained in the background.

4. THE TREATMENT OF ECONOMIC RIGHTS IN INTERNATIONAL CRIMINAL LAW

There is a strong belief that the normative framework of ICL deals exclusively with serious violations of first-generation rights, mainly because it has been imagined that they are hierarchically superior to the violations of other human rights (Schmid, 2015). However, this reasoning is erroneous.

Concerning the relevance of economic rights, it is important to first mention the criticism of the inclusion of economic rights within the group of human rights, because the supposed pre-institutional nature of such rights and the impossibility of their complete attainment would render them mere programmatic rights for all nations. Nevertheless, Sen (2010: 400) disagrees.

Moreover, according to Sen, for a right to exist, the protection of freedom must cross the threshold of public scrutiny over its relevance and the possibility to influence its attainment. Even though this position is unsatisfactory, there seems to be no reason to consider that civil and political rights are more relevant than economic rights. In other words, why should one consider hunger, malnutrition, and lack of medical attention as less important than the violation of any type of personal freedom (Sen, 2010: 94).

However, part of the doctrine considers that the effective materialization of economic rights is a mere aspiration and that their fulfillment must be achieved progressively and not immediately (Schmid, 2015). It is even believed that international criminal norms related to economic rights are not justiciable (Schmid, 2015; Van Den Herik, 2013).

Given these criticisms, it is worth remembering that avoiding generalized or systematic attacks that constitute murders, torture and other violations of civil rights is also aspirational. In this way, the effective materialization of freedoms protected by civil and political rights has not taken place completely, and there are no reasons to believe that this will happen to a greater extent than the materialization of economic rights.

Criticism can also be read in a different way. What is criticized is perhaps not that such freedoms cannot be completely achieved, but the cost of their full realization, which would then make the rights "aspirational". However, as Holmes and Sunstein (2011) have noted, it is untrue that safeguarding civil and political rights is not expensive, or that all States can guarantee them to the same degree. Nor is it true that it is always less expensive to safeguard these rights than economic rights. It should also be considered that: (a) since the protection of all rights has its cost; and (b) their protection does not benefit all people in the same way (the protection of the right to private property does not equally benefit owners and non-owners). Consequently, it must be decided as to which rights are fairer and more efficient, and resources should be provided for their protection[3].

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[3] For authors such as Moyn (2014; 2018), economic rights are compatible with wide inequalities, and historically their claim has replaced the claim for greater equality.

Unlike those who have relegated second-generation rights, others are troubled about claiming the role for economic rights in ICL. Although it is not a widely discussed issue, in the last decade there have been some proposals aimed at making economic rights visible in IL and raising the possibility of analyzing violations of these rights when they are constitutive of international crimes through ICL instruments. Likewise, the need to assure the protection of economic rights has been raised by conceiving fundamental rights in a more extensive way.

The proposals on the relevance of economic rights, as part of ESCRs, are not new. During the 1993 World Conference on Human Rights in Vienna, which resulted in the Vienna Declaration and Action Plan, the importance of equating the ESCRs with other human rights categories was discussed. This was enshrined in said international instrument, which urged international society to strengthen the means of promotion, materialization and protection of ESCRs. Moreover, it was also the beginning of the process related to the optional protocol to the International Convention on Economic, Social and Cultural Rights, which entered into force in May 2013.

In this context, it is clear that there is a growing concern within a sector of international society for increasing the visibility of the need to guarantee the enjoyment of economic rights, as well as to protect them internationally. Regarding ICL, Christine Chinken affirmed in 1999, prior to the coming into force of the ICC Statute, of both the justiciability of ESCRs, and the possibility of using the ICC for this purpose (Odi, 1999). In this way, although the ICC Statute had not yet entered into force, the possibility that the ICC would be seized, at least in some cases, with serious violations of ESCRs, was already being discussed. However, Chinken considered at that time that the ICC would end up giving priority to those international crimes that constitute serious violations of civil and political rights (Odi, 1999).

In 2006, Louise Arbour, then UN High Commissioner for Human Rights, highlighted the need to leave behind the belief that ESCRs represent an "aspirational goal", and proposed to use ICL to deal with violations of this category of rights (Arbour, 2006; Schmid, 2016). Likewise, UN Secretary-General, Ban Ki-moon, affirmed in 2010 the importance of using both national and international law to guarantee

the enjoyment of ESCRs, as well as using criminal law at the national and international levels to investigate and prosecute those behaviors that represent serious violations of ESCRs (UN, 2010; Schimd, 2016). Ban Ki-Moon was especially clear when indicating how serious violations of ESCRs can make situations in which there are political and social tensions, which can trigger both armed conflicts and episodes of repression (UN, 2010).

Nevertheless, ICL has dealt explicitly with this issue. In jurisprudential matters, little or nothing has been said with respect to it, since the different international criminal tribunals established throughout recent history have not incorporated normative provisions that explicitly deal with economic rights. A rapid reading of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), the Statute of the International Criminal Tribunal for the Rwanda (ICTR Statute) and the ICC Statute show that they do not give economic rights the importance they deserve (in fact, it is not possible to find express references to them).

Van Den Herik (2013) considers that, even though the ICTY Statute has not explicitly addressed violations of ESCRs, it has taken some constituent elements of the violations of these rights into consideration. He mentions, for example, the Brdjanin case (09/01/2004: paras. 1031 et. seq.) in which Trial Chamber (TC) II of the ICTY indicated that denying the rights to work and receiving medical care could mean a deprivation of fundamental rights constituting the crime against humanity of persecution. Likewise, in the case of Simic et. al. (2003: para. 775), TC II affirmed that the deprivation of food and water, the detention in unhealthy conditions and the denial of medical assistance were inhuman acts and could constitute acts of persecution (Van Den Herik, 2013).

The Special Court for Sierra Leone (SCSL) has studied the complicity and cover-up committed by Charles Taylor during his dictatorship. It has, however, limited itself to analyzing the looting perpetrated against private goods, obviating the illicit extraction of diamonds and other natural resources, which involved important violations of the economic rights of the population. This is a lost opportunity to analyze realities of high economic relevance in armed conflicts (Sander, 2015).

As a result, as Sander highlights (2015), there is an important lack of knowledge in international criminal tribunals about the economic causes of the armed conflicts (both national and international) they deal with. Furthermore, the omission in their statutes and case law of the economic dimension of international crimes has generated insufficient attention to: (a) the different economic actors and their interests in armed conflicts; and (b) the incidence of violations of economic rights in armed conflicts and in the socioeconomic conditions that surround them (Krever, 2013; Sander, 2015). These important limitations have so far prevented tackling effectively through ICL the economic realities that propitiate and intensify armed conflicts (Sander, 2015).

5. THE RELEVANCE OF ECONOMIC RIGHTS IN THE ROLE OF THE INTERNATIONAL CRIMINAL COURT

In the same way that ICL has not been created specifically as a regulatory framework for the protection of human rights, but rather to prohibit international crimes and to determine individual criminal responsibility, the ICC has not been established as an international tribunal for the protection of human rights, much less for the protection of economic rights recognized by IHRL. Nevertheless, as shown above, ICL is intrinsically linked to IHRL, which leads to the question of their application by the ICC.

In this context, in the coming sections the following issues are analyzed: (a) whether serious breaches of economic rights can also constitute international crimes; and (b) to what extent economic rights comprise a part of international human rights standards, which, according to art. 21(3) of the ICC Statute, constitute a central criterion for the interpretation of the ICC Statute and its complementary instruments. It is important to clarify that only some examples are presented (which are not intended to be exhaustive) by which the existence of a close relationship between economic rights and the role of the ICC can be observed.

5.1. Economic rights and genocide

The crime of genocide has five modalities of commission. One of them consists of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" (art. 6(c) of the ICC Statute). The reference to "conditions of life" appear to also include those that constitute serious violations of economic rights, such as, for example, intentionally starving a national, ethnic, racial or religious group.

Nevertheless, the subjective elements of the crime of genocide limit its scope, because they require that such conditions of life be imposed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" (*chapeau* of art. 6 of the ICC Statute). Consequently, the famines that have taken place throughout the 20th century in China, North Korea, Spain, India or Ukraine (to mention some examples of grave breaches of economic rights) do not clearly constitute this crime, because their motivations do not appear to have been specifically aimed at totally or partially destroying the targeted group (although there has been extensive discussion in the Ukrainian case) (Stark, 2010).

On the contrary, as happens in most cases, these famines seem to have been a consequence of economic policies such as the transfer of food in a direction opposite to the needs of the population, the economic consolidation of an autarkic system, prioritizing the provision of food for soldiers on a battlefront, the implementation of the "Great Leap Forward" or the maintenance of a certain negotiating position at the global level.

Although the situation concerning the Ethiopian famine in the mid-1980s seems to be different, as it may be shown that what was pursued was the total or partial destruction of a political group, it does not constitute a crime of genocide, because, unlike what happens in some national legal systems such as in Colombia[4] (Carcano, 2019), political groups are not groups protected by the customary definition of genocide in ICL (which is the same as the definitions enshrined in art. 2 of the 1948 Genocide Convention, art. 4 of the

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4 See: art. 101 of the Colombia Penal Code.

ICTY Statute, art. 2 of the ICTR Statute and art. 6 of the ICC Statute) (Rocha-Herrera, 2019: 403; Liñán, 2019: 373).

5.2. Economic rights and war crimes: the prohibition of using hunger as a method of combat and the war crime of plunder

A second example of the relationship between economic rights and the ICC Statute can be found in art. 8(2)(xxv) of the ICC Statute, which defines as a war crime "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions". Marcus (2003: 258) affirms the commission of this war crime in the aforementioned Ethiopian case because relief manipulation played an especially important role in the governmental counterinsurgency campaign.

There are, however, two important limitations in the definition of this crime. First, famines can be produced in the absence of armed conflict. Second, traditionally, violations of the international humanitarian system committed in internal conflicts cannot serve as a basis for individual criminal responsibility (Marcus, 2003: 270). Nevertheless, it is worth mentioning that, as reflected in the case law of the ICTY, customary law has overcome this second limitation (ICTY, Delalic Case, 02/20/2001: para. 140).

"Pillaging a town or place, even when taken by assault", is another war crime provided for in arts. 8(2)(b)(xvi) and 8(2)(e)(v) of the ICC Statute, that could have important implications in terms of the violation of economic rights. According to the ICC Elements of the Crimes (ICC EC), this war crime is comprised of the following elements:

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

In the Katanga case (05/23/2014: paras. 953-956), Trial Chamber (TC) II referred to the war crime of pillaging, by declaring, *inter alia*, that this crime significantly affected the owners of the looted assets in the Bogoro municipality (located in the DRC (Ituri district)), as they were deprived of their most valuable belongings (including their livestock and other means of subsistence, as well as the tiles of their homes and their furniture). This had a very deep impact on their daily lives, generating, according to TC II, serious consequences for the inhabitants of that municipality.

According to Schmid (2016), the severity of the looting in this case provides a clear example of how this crime affects economic rights. Although the trial judgment did not textually discuss the violation of ESC rights, much less economic rights, it recognized that those affected were deprived of goods essential for their subsistence, which necessarily implies that their economic rights were violated (Schmid, 2016).

Furthermore, it is worth highlighting that, according to TC II (05/23/2014: 953), the gravity of the war crime of pillaging in this case resulted from its magnitude and its implications for the affected population. This means, ultimately, that the scope and nature of the violations of economic rights can be an important factor in determining the nature and duration of the sentence to be imposed on the convicted person. This is because, in accordance with art. 78 of the ICC Statute, the gravity of the crime is one of the central criteria for this purpose. In this sense, the ICC could consider the violations of the economic rights of the victims as a factor in assessing the gravity of the crime.

5.3. Economic rights and crimes against humanity: extermination, persecution and forced prostitution

5.3.1. The crime against humanity of extermination

The crime against humanity of extermination is provided for in art. 7(1)(b) and (2)(b) of the ICC Statute. According to art. 7(2)(b):

> "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.

As provided for in the ICC EC, the crime against humanity of extermination requires the following four elements:

1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.
2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. 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.

In this way, although the crime against humanity of extermination does not cover all economic rights, it appears that it would include, in principle, their most serious violations. Thus, the cases of famine in China, North Korea, Spain, Ethiopia, India and Ukraine could fulfill all the objective elements of this crime.

Concerning its subjective elements, art. 30(2) of the ICC Statute requires that, unless otherwise provided in the definition of crimes, all crimes under the ICC jurisdiction must be committed with intent in the first or second degree. Thus, those who caused famine in the population as a result of implementing certain policies must have directly sought its extermination or, at least, they must have been aware that this would be the result "in the normal course of events"[5].

This means that, in principle, in cases in which intent in the second degree has not been acted upon there would be no criminal liability under the ICC Statute —for example, when the perpetrators were only aware of the possibility that famine could occur, or were

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[5] On the content of art. 30(2) of the ICC Statute, see: ICC, Bemba, 15/06/2009); Katanga, 07/03/2014.

not even aware of such possibility due to their failure to: (a) take into consideration the information available on the matter; or (b) obtain such information due to their lack of diligence in establishing an effective system for gathering information. As stated by ICC case law, the recklessness standard provided for in the case law of ICTY and ICTR (awareness of substantial likelihood) is not included in the definition of the general subjective element provided for in art. 30(2) of the ICC Statute (ICC, Bemba, 06/15/2009: para. 360 et. seq.; Katanga, 03/07/2014: para. 775).

Faced with this situation, Marcus (2003: 279) affirms that the doctrine of superior responsibility, provided for in art. 28 of the ICC Statute, could allow for the conviction of the hierarchical superiors of those who implemented the policies causing the famine, as long as said superiors did not adopt all the necessary and reasonable measures within their reach to: (a) prevent or repress the generation of famine by their subordinates; or (b) bring the matter to the attention of the competent authorities for the purposes of investigation and prosecution.

Nevertheless, even if one accepts the scenario proposed by Marcus, the crime against humanity of extermination would not include many serious violations of economic rights, including those of the rights to decent work, to union association, to a fair remuneration and to protection against unemployment and poverty, among others.

5.3.2. The crime against humanity of persecution

Art. 7(1)(h) of the ICC Statute refers to the crime against humanity of "persecution 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" (art. 7(1)(h) of the ICC Statute). According to art. 7(2)(g) of the ICC Statute, this crime is defined as "the intentional and severe deprivation of fundamental rights

contrary to international law by reason of the identity of the group or collectivity"[6].

Unlike the statutes and case law of the ICTY[7] and the ICTR[8], which limit the crime against humanity of persecution to those discriminatory acts that are carried out against political, racial or religious groups, the ICC Statute provides for a much broader range of grounds, including, as Chella (2004: 159) emphasizes, economic grounds (economic rights are recognized and protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is one of the instruments of IHRL having a larger number of States Parties (171 to date) (UN, 2020). Consequently, the crime of persecution could be carried out against a union group, a professional association or another group that fights for the recognition of decent work and a fair wage. Moreover, it could also be a committed against a group persecuted due to the economic conditions of its members, such as, for example, street dwellers (Olasolo & Hernández, 2021).

The ICESCR recognizes and protects, *inter alia*, the rights to work (art. 6), to fair remuneration (art. 7), to union association (art. 8), and to an adequate standard of living, including housing, clothing and food (art. 11). Since all these categories of economic rights are

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6 According to the ICC EC, the crime against humanity of persecution is comprised of the following elements: "1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights. 2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such. 3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law. 4. 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. 5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 6. 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".

7 ICTY, Tadic, 07/05/1997: para. 697.

8 ICTR, Nahimana et. al., 28/11/2007: para. 985.

internationally recognized and protected, it is possible to commit the crime of persecution for economic grounds,

in the event that members of a group or human collectivity identified by claims related to the satisfaction of these rights are deprived of their fundamental rights. Likewise, this crime could also be committed when members of groups identified by other characteristics see their fundamental economic rights violated in a widespread or systematic manner.

The question arises as to what type of rights are considered by art. 7(2)(g) of the ICC Statute to constitute fundamental rights, whose intentional and serious deprivation would give rise to a crime against humanity of persecution. Neither the ICC Statute nor the ICC EC answer this question, because they draw no distinction between categories of rights, as it is only required that fundamental rights recognized by IL are breached, without further clarification. Consequently, the question arises as to whether there is any kind of understanding about what the expression "fundamental rights" means in ICL.

No international criminal tribunal (including the ICC) has so far defined this concept in its statutes or case law (Chella, 2004). The ICTY has been the only one that has analyzed this issue in two of its decisions related to the crime against humanity of persecution (Kupreskic et. al. case, 01/14/2000: paras. 622-623; Stakic case, 03/31/2003: para. 773). In both decisions, the ICTY warned against defining the notion of "fundamental rights" because this could result in restricting its scope of interpretation and in excluding certain rights. As a result, this concept has been treated in the same way as the notion of "(other) inhumane acts", which is an open-ended category that is interpreted on a case-by-case basis (Chella, 2004).

Furthermore, as Tolbert (2019) has underscored, the punishment of flagrant violations of economic rights is a way of listening to the global human rights movement that seeks to eliminate injustices in the international order, because without some progress towards economic equality, human rights will seem like a highly theoretical exercise (Tolbert, 2019).

Finally, it is worth highlighting that, although the above considerations reflect the possibility of resorting to the crime against hu-

manity of persecution to investigate and punish serious violations of economic rights, it is no less true that art. 7(1)(h) of the ICC Statute requires, for the ICC to have jurisdiction over it, that it be linked to another international crime included in the ICC Statute. Consequently, any analysis of serious violations of economic rights (or of attacks directed against groups identified by economic characteristics) as a possible crime against humanity of persecution, requires the commission of, at least, another crime under the jurisdiction of the ICC.

More recently, ICC TC IV has examined this issue in the Ntaganda case (07/11/2019). For TC IV, those rights enshrined in the 1966 International Covenants (including the ICESCR) and in, at least, another international instruments must be considered when interpreting the concept of "fundamental rights" under art. 7(2)(g) of the ICC Statute. Nevertheless, TC IV has not provided a definition for this concept because, in its view, it must be analyzed on a case-by-case basis.

In turn, ICC Pre-Trial Chamber (PTC) I has found in the Al Hassan case (11/13/2019: para. 664) that the deprivation of the rights to assembly and association, as well as of the right to education, among others, can be acts of persecution because such rights are considered fundamental rights. To this extent, it can be stated that the ICC has recognized the possibility that some economic rights constitute fundamental rights, the deprivation of which in a systematic or widespread manner can provide a basis for a crime against humanity of persecution.

Given the uncertainty with respect to the definition of the concept of "fundamental rights" in art. 7(2)(g) of the ICC, Kalin and Kunzli (cited in Schmid, 2015: 51) affirm that, although ESCRs differ from civil and political rights by virtue of the difficulties that their implementation entail, they do not differ in terms of their nature as fundamental rights.

This position is also supported by the UN Office of the High Commissioner on Human Rights (OHCHR), which also states that fundamental economic rights include, *inter alia*: (a) some union rights of workers; (b) the prohibition of forced labor; (c) the right to choose

one's own job, to receive fair remuneration, to have reasonable working hours and to social security; (d) the right to social protection, which includes the protection of the individual against unemployment and lack of means of subsistence; (e) the right to an adequate standard of living (which includes the rights to food, adequate housing, water and clothing); and (f) the rights to health and education (OHCHR, 2008).

5.3.3. The crime against humanity of forced prostitution

There are other crimes against humanity that could be relevance when analyzing serious violations of economic rights. Among them, forced prostitution stands out (art. 7(1)(g) of the ICC Statute). As with the other sexual and gender crimes included in the ICC Statute, it owes its inclusion to the special significance that conduct of this nature has for international society as a result of its recurrent use as an illicit means of combat in contexts of war or widespread violence (CICC, n.d.; ICC, Office of the Prosecutor, 2014).

Indeed, the ICC Statute is the first constituent instrument of an international criminal tribunal that covers a wide range of sexual and gender crimes, including forced prostitution (ICC, Office of the Prosecutor, 2014). Furthermore, the ICC Statute is also a pioneer in its recognition of forced prostitution as a war crime in both international (art. 8(2)(b)(xxii)) and non-international armed conflicts (art. 8(2)(e)(vi)) (ICC, Office of the Prosecutor, 2014).

Regarding the constitutive elements of its definition, and despite the fact that the ICC has not issued any decision to date on the crime of forced prostitution (either as a crime against humanity or as a war crime), the ICC EC requires that the perpetrator: (a) has forced one or more persons to perform sexual acts against their will; and (b) has obtained, or expected to receive, financial or other benefits in exchange for said acts[9].

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[9] According to the ICC EC, the crime against humanity and the war crimes of enforced prostitution provided for in arts. 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) of the ICC Statute are comprised of the following specific elements:

Given the assumption that the crime against humanity of forced prostitution can be used as a source of income for its perpetrators, it is necessary to analyze the punishable conduct from a double perspective: the violation of the sexual and reproductive rights of the victims, on the one hand, and its economic dimension, on the other. With respect to the latter, it is necessary to emphasize that the exchange of non-consensual sexual services would imply, among other things, a manifest violation of the rights to non-labor exploitation, to free choice of economic activity, to social benefits and to fair remuneration. Moreover, other rights with important economic implications could also be affected, such as the rights to enjoy a good quality of life and health (WAS, 2014).

5.4. The need to interpret the Statute and Elements of Crimes of the International Criminal Court in accordance with international human rights standards

Art. 21 (3) of the ICC Statute establishes that the application and interpretation of the ICC Statute and the ICC EC "[…] 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".

Consequently, as Bailey (2014), Irving (2019) and Sheppard (2010) emphasize, the ICC's role to investigate and punish international crimes provided for in the ICC Statute must be unremittingly permeated by "internationally recognized human rights". In this way,

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"1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent. 2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature".

an intrinsic and unbreakable link is created between the role of the ICC and IHRL.

Likewise, the ICC Appeals Chamber (AC) has stated in the Lubanga case (12/14/2006: 37) that, by virtue of art. 21(3), human rights are the cornerstone of the ICC Statute. This statement is reiterated by Bitti (cited in Davidson, 2016), who highlights that any interpretation and application of the standards of the ICC Statute must be consistent with internationally recognized human rights. In this way, as Sheppard (2010) and Irving (2019) point out, the latter are not simple additional tools for the interpretation of the ICC Statute and its complementary instruments; but, on the contrary, they constitute the main normative body in the interpretation and application of the ICC regulatory framework, including the definitions of international crimes provided for in the ICC Statute and in the ICC EC (Grover, cited in Davidson, 2016).

As with concept of "fundamental rights" in relation to the crime against humanity of persecution, the ICC Statute does not define the concept of "internationally recognized human rights" (Bailey, 2014). Neither does it establish what the scope of art. 21(3) of the ICC Statute should be when ensuring the recognition of human rights in the judicial decisions issued by the different chambers of the ICC. However, as seen above, the economic rights internationally recognized by the ICESCR and the UDHR must form part of such concept. Failing to do so would ignore the relevance of these international instruments and their general acceptance in international society.

Consequently, the interpretation of each crime provided for in the ICC Statute, and in particular those analyzed in this chapter, must take into account serious breaches of economic rights. Likewise, the gravity of such breaches must be considered when determining the sentences of the convicted persons.

All of this should lead the ICC, as an important part of its role, assigning economic rights a more prominent place in its case law, thereby contributing both to their visibility and to raising awareness about the relevance of their satisfaction. The ICC should address them in a more effective manner than other international criminal tribunals. Moreover, the ICC should also in greater depth account for

the economic realities, which are at the roots of armed conflicts and atrocious crimes of international concern.

However, as Irving (2019: 840) has highlighted, the content of art. 21(3) of the ICC Statute and the relevance of human rights (including economic rights) in the fulfillment of the ICC's role have not yet been fully addressed. Therefore, unfortunately, there is still no clarity about the scope and limits of this provision.

6. CONCLUSION

There is a strong link between the ICL and IHRL because of: (a) their common origin; and (b) the contribution of the punishment of those most responsible for serious human rights violations constituting international crimes to their visibility and the internalization of human rights norms. This is despite the fact that they deal with different spheres of responsibility: individual criminal responsibility (ICL) and state responsibility (IHRL).

Nevertheless, until now, the relevance for ICL of serious human rights violations has focused mainly on civil and political rights, with serious violations of economic rights having traditionally been relegated to a second tier. This has led international criminal tribunals to currently operate under a significant lack of knowledge of the economic causes underlying those armed conflicts which they are seized with.

Furthermore, by omitting the economic dimension of international crimes from their statutes and case law, insufficient attention has been dedicated by international criminal tribunals to: (a) the economic actors and their interests in armed conflicts or in situations of widespread violence; and (b) the impact of breaches of economic rights on armed conflicts and the socioeconomic conditions surrounding them. These important limitations have prevented ICL from effectively addressing the economic grounds that foster and intensify armed conflicts (Krever, 2013; Sander, 2015).

Given this situation, this chapter has shown the shortsighted approach of ICL and the ICC in prioritizing civil and political rights over economic rights. The thinking of Sen on human rights and glo-

bal justice raises questions about the freedoms related to economic rights that should be protected by ICL. This implies an expansion of the traditional perspective, according to which ICL should only be concerned with violations of civil and political rights because they are more important than violations of economic rights.

This chapter reflects that the approach of Sen is also implicit in the ICC Statute and its complementary instruments due to the following two reasons: (a) some serious breaches of economic rights may constitute genocide, crimes against humanity and war crimes under the ICC Statute; and (b) economic rights are part of the internationally recognized human rights standards that, according to art. 21(3) of the ICC Statute, are a central criterion for the interpretation of the ICC Statute and its complementary instruments.

As a result of the foregoing, it can be concluded that important aspects of the ICC's role are the following: (a) addressing with due depth the economic realities that foster and intensify armed conflicts and atrocity crimes of international concern; (b) fostering the visibility of serious violations of economic rights constituting international crimes; (c) promoting the effective protection of economic rights; and (d) fostering the internalization of IHRL norms.

Furthermore, even though it is true that the definition of the content of art. 21(3) of the ICC Statute and the investigation and prosecution of serious violations of human rights (including economic rights) are part of the ICC's role, they have not yet been fully addressed by its case law. As a result, there is still no clarity on these issues; situation that should change in the coming years if the ICC aspires to properly fulfill its role.

REFERENCES

Case Law

International Criminal Court

ICC [Appeals Chamber]. The Prosecutor v. Thomas Lubanga Dyilo. Case No. ICC-01/04-01/06. *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*. 14 December 2006.

ICC [Trial Chamber II]. The Prosecutor v. Germain Katanga. Case No. ICC-01/04-01/07. *Judgment pursuant to article 74 of the Statute*. 7 March 2014.

ICC [Trial Chamber II]. The Prosecutor v. Germain Katanga. Case No. ICC-01/04-01/07. *Décision relative à la peine (article 76 du Statut)*. 23 May 2014.

ICC [Trial Chamber VI]. The Prosecutor v. Bosco Ntaganda. Case No. ICC-01/04-02/06. *Sentencing Judgment*. 7 November 2019.

ICC [Pre-Trial Chamber I]. The Prosecutor v. Al Hassan. Case No. ICC-01/12-01/18. *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. 13 November 2019.

ICC [Pre-Trial Chamber II]. The Prosecutor v. Jean-Pierre Bemba Gombo. Case No. 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.

International Criminal Tribunal for Rwanda

ICTR [Appeals Chamber]. The Prosecutor v. Ferdinan Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze. Case No. ICTR-99-52-A. *Judgement*. 28 November 2007.

International Criminal Tribunal for the former Yugoslavia

ICTY [Trial Chamber]. The Prosecutor v. Dusko Tadic. Case No. IT-94-1-T. *Opinion and Judgment*. 7 May 1997.

ICTY [Trial Chamber]. The Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic & Vladimir Santic. Case No. IT-95-16-T. *Judgment*. 14 January 2000.

ICTY [Trial Chamber]. The Prosecutor v. Radoslav Brdjanin. Case No. IT-99-36-T. *Judgment*. 1 September 2004.

ICTY [Trial Chamber II]. The Prosecutor v. Blagoje Simic, Miroslav Tadic & Simo Zaric. Case No. IT-95-9-T. *Judgment*. 17 October 2003.

Doctrine

Aristóteles. (2001). *Ética a Nicómaco*. Madrid (Spain): Alianza Editorial.

Aristóteles. (2007). *Política*. Madrid (Spain): Espasa-Calpe.

Bailey, S. (2014). "Article 21(3) of the Rome Statute, A Plea for Clarity". *International Criminal Law Review*. Pp. 513-550.

Bentham, J. (1965). *Escritos económicos*. Buenos Aires (Argentina): Fondo de Cultura Económica.

Bentham, J. (1990). *Falacias políticas*. Madrid (Spain): Centro de Estudios Políticos y Constitucionales.

Carcano, L. (2019). "El genocidio político en Ibero-América: particular atención a su desarrollo legislativo y jurisprudencial en Colombia". In: Olasolo, H. & de Prada, P.E. (Eds). *La evolución de la definición y la aplicación del delito de genocidio: la contribución iberoamericana y el legado del Tribunal Penal Internacional para la ex Yugoslavia*. Perspectivas Iberoamericanas sobre la Justicia Book Collection. Vol. 9. Valencia (Spain): Tirant Lo Blanch, Instituto Iberoamericano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional y el Instituto Joaquín Herrera Flores. Pp. 289-303. https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-9-la-evolucion-de-la-definicion-y-la-aplicacion-del-delito-de-genocidio.

Chella, J. (2004). *Persecution: a crime against humanity in the Rome Statute of the International Criminal Court*. Gold Coast (Australia): Bond University.

Chinchón Álvarez, J. (2009). "Responsabilidad internacional del individuo y responsabilidad internacional del Estado: encuentros y desencuentros en torno a la figura de los "crímenes de derecho internacional". In: González Ibáñez, J. (Dir.). *Protección Internacional de los derechos humanos y Estado de Derecho. Studia in honorem Nelson Mandela*. Bogotá (Colombia): Editorial Ibáñez. Pp. 551-582.

Cranston, B. (1962). *What are human rights?* New York (USA): Basic Books.

Cranston, B. (1983). *Are There Any Human Rights*? New York (USA): Daedalus. Vol. 112. Pp. 1-17.

Cryer, R., Friman, H., Robinson, D. & Wilmshurst, E. (2014). *An Introduction to International Criminal Law and Procedure*. Cambridge (United Kingdom): Cambridge University Press.

Davidson, A. (2016). "Human Rights Protection before the International Criminal Court, Assessing the Scope and Application of Article 21(3) of the Rome Statute". *International Community Law Review*. Vol. 18. Pp. 72-101.

De Aquino, T. (1989). *Suma de Teología*. Madrid (Spain): Biblioteca de Autores Cristianos.

Dworkin, R. (1984). *Los derechos en serio*. Barcelona (Spain): Ariel.

Fabre, C. (1998). "Constitutionalising Social Rights". *The Journal of Political Philosophy*. Pp. 263-284.

Gargarella, R. (2013). "Sin lugar para la soberanía popular. Democracia, derechos y castigo en el caso Gelman". *SELA Seminario en Latinoamérica de Teoría Constitucional y Política Papers*. Vol. 125. Pp. 1-39. https://openyls.law.yale.edu/handle/20.500.13051/17481.

Gargarella, R. (2016). *Castigar al prójimo*. Buenos Aires (Argentina): Siglo Veintiuno Editores.

Hobbes, T. (2017). *Leviatán, o la materia, forma y poder de una república eclesiástica y civil*. México: Fondo de Cultura Económica.

Holmes, S. & Sunstein, C. (2011). *El costo de los derechos*. Buenos Aires (Argentina): Siglo Veintiuno Editores.

Irving, E. (2019). "The other side of the Article 21(3) coin: Human rights in the Rome Statute and the limits of Article 21(3)". *Leiden Journal of International Law*. Vol. 32. Pp. 837-850.

Kant, I. (2012). *Fundamentación para una metafísica de las costumbres*. Madrid (Spain): Alianza Editorial.

Kant, I. (1984). *Teoría y praxis*. Buenos Aires (Argentina): Editorial Leviatán.

Krever, T. (2013). "International Criminal Law: An Ideology Critique". *Leiden Journal of International Law*. Vol. 23. Pp. 701-723.

Liñán, A. (2019). "Similitudes y diferencias entre el delito de genocidio y el crimen contra la humanidad." In: Olasolo, H. & de Prada, P.E. (Eds.). *La evolución de la definición y la aplicación del delito de genocidio: la contribución iberoamericana y el legado del Tribunal Penal Internacional para la ex Yugoslavia*. Perspectivas Iberoamericanas sobre la Justicia Book Collection. Vol. 9. Valencia (Spain): Tirant Lo Blanch, Instituto Iberoamericano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional y el Instituto Joaquín Herrera Flores. Pp. 365-398. https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-9-la-evolucion-de-la-definicion-y-la-aplicacion-del-delito-de-genocidio.

Locke, J. (2002). *Segundo ensayo sobre el gobierno civil*. Buenos Aires (Argentina): Losada.

Marcus, D. (2003). "Famine Crimes in International Law". *The American Journal of International Law*. Vol. 97. Pp. 245-281.

Marshall, T. H. & Bottomore, T. (1998). *Ciudadanía y clase social*. Madrid (Spain): Alianza Editorial.

Marx, K. (1993). *Manuscritos*. Barcelona (Spain): Ediciones Altaya.

Moyn, S. (2018). *Not Enough. Human Rights in an Unequal World*. Cambridge (United Kingdom): The Belknap Press of Harvard University Press.

Moyn, S. (2014). "A powerless companion: human rights in the age of neoliberalism". *Law and Contemporary Problems*. Vol. 77. Pp. 147-169.

Mill, J.S. (1996). *Principios de Economía Política, con algunas de sus aplicaciones a la filosofía social*. México: Fondo de Cultura Económica.

O'Neill, O. (2002). *Towards Justice and Virtue a constructive account of practical reasoning*. Cambridge (United Kingdom): Cambridge University Press.

O'Neill, O. (2016). *Justice across boundaries: Whose obligations?* Cambridge (United Kingdom): Cambridge University Press.

Olasolo, H. & Hernández Cortés, C.E. (2021). "El Tratamiento de la Aporofobia en el Estatuto de la Corte Penal Internacional: Particular Atención a las Agresiones Discriminatorias contra los Habitantes de la Calle". *Revista Penal*. Vol. 47. Pp. 227-247.

Pogge, T. (2005). *La pobreza en el mundo y los derechos humanos*. Barcelona (Spain): Paidós.

Rawls, J. (1995). *Teoría de la justicia*. México: Fondo de Cultura Económica.

Rawls, J. (2001). *El derecho de gentes*. Barcelona (Spain): Paidós.

Rocha-Herrera, M. (2019). "Modalidades de comisión del delito de genocidio y otros actos genocidas como la conspiración, la instigación pública y directa, la tentativa y la complicidad." In: Olasolo, H: & de Prada, P.E. (Eds.). *La evolución de la definición y la aplicación del delito de genocidio: la contribución iberoamericana y el legado del Tribunal Penal Internacional para la ex Yugoslavia*. Perspectivas Iberoamericanas sobre la Justicia Book Collection. Vol. 9 Valencia (Spain): Tirant Lo Blanch, Instituto Iberoamericano de La Haya para la Paz, los Derechos Humanos y la Justicia Internacional y el Instituto Joaquín Herrera Flores. Pp. 399-424. https://www.iberoamericaninstituteofthehague.org/formacion-e-investigacion/coleccion-perspectiva-iberoamericana-sobre-la-justicia/volumen-9-la-evolucion-de-la-definicion-y-la-aplicacion-del-delito-de-genocidio.

Rousseau, J. (1998). *Contrato social*. Madrid (Spain): Espasa-Calpe.

Sander, B. (2015). "Addressing the Economic Dimensions of Mass Atrocities: International Criminal Law's Business or Blind Spot?" *Justice in Conflict*. https://justiceinconflict.org/2015/06/08/addressing-the-economic-dimensions-of-mass-atrocities-international-criminal-laws-business-or-blind-spot/.

Schmid, E. (2015). *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*. Cambridge (United Kingdom): Cambridge University Press.

Schmid, E. (2016). "Book Discussion: Introducing Taking Economic, Social and Cultural Rights Seriously in International Criminal Law". *EJIL:Talk!* https://www.ejiltalk.org/book-discussion-introducing-taking-economic-social-and-cultural-rights-seriously-in-international-criminal-law/.

Sen, A. (1982). "Poor, Relatively Speaking". *Oxford Economic Papers*. Vol. 35. Pp. 153-169.

Sen, A. (2000). *Desarrollo y Libertad*. Bogotá (Colombia): Planeta.

Sen, A. (2004). "Elements of a Theory of Human Rights". *Philosophy and Public Affairs*. Vol. 32. Pp. 315-356.

Sen, A. (2010). *La idea de la justicia*. Bogotá (Colombia): Taurus.

Sheppard, D. (2010). "The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 23(3) of the Rome Statute." *International Criminal Law Review*. Vol. 10. Pp. 43-71.

Smith, A. (1997). *La teoría de los sentimientos morales*. Madrid (Spain): Alianza.

Stark, R. (2010). "Holodomor, Famine in Ukraine 1932-1933: A Crime against Humanity or Genocide?" *Irish Journal of Applied Social Studies*. Vol. 10. No. 1. Pp. 10-30.

Tolbert, D. (2019). "Quo Vadis? Where does the Human Rights movement go from here?". *Georgia Journal of International and Comparative Law*. Vol. 47. No. 2. Pp. 479-490.

Van den Herik, L. (2013). "Economic, Social and Cultural Rights - International Criminal Law's Blind Spot?". In: Riedel, E., Golay, C., Mahon, C. & Giacca, G. (Eds.). *Economic, Social and Cultural Rights: Contemporary Issues and Challenges*. Oxford (United Kingdom): Oxford University Press.

Resolutions, Reports and Other Documents

Chinken, C. (1999). *Can International Law Provide Effective Sanctions for Violations of Economic and Social Rights? Lessons from the Creation of the International Criminal Court*. Overseas Development Institute. https://www.odi.org/events/2279-can-international-law-provide-effective-sanctions-violations-economic-social-rights-lessons-creation-international-criminal-court.

Coalition for the International Criminal Court. (n.d.). *Sexual and Gender-Based Crimes*. http://www.coalitionfortheicc.org/fight/strong-icc/sexual-and-gender-based-crimes.

International Criminal Court. Office of the Prosecutor. (2014). *Policy Paper on Sexual and Gender-Based Crimes*. June 2014.

United Nations. (1966). *International Covenant on Economic, Social and Cultural Rights*. https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en.

United Nations. (2013). *Declaración y `programa de acción de Viena. 20 años trabajando por tus derechos*. https://www.ohchr.org/Documents/Events/OHCHR20/VDPA_booklet_Spanish.pdf.

United Nations. Office of the High Commissioner for Human Rights. (2008). *Frequently Asked Questions on Economic, Social and Cultural Rights.* Fact sheet No. 33. https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-33-frequently-asked-questions-economic-social-and-cultural.

United Nations. Secretary General. (2010). *Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice. https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.*

United Nations. Security Council. (1993). *Resolution 827 on the Tribunal (former Yugoslavia).* 25 May 1993.

United Nations. Security Council. (1994). *Resolution 955 on the establishment of an international court and approval.* 8 November 1994.

World Association for Sexual Health. (2014). *Declaration of sexual rights.* https://www.worldsexualhealth.net/_files/ugd/793f03_779f193815894895b9d1480bde676c37.pdf?index=true.

Chapter 8
The Perspective of Global Constitutionalism[*]

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1. INTRODUCTION

The role of the ICC, seen through the lens of both its organizational structure and the law it generates through the ICC Statute, its procedures and decisions, can be analyzed from various perspectives of global constitutionalism, which is a recent movement of institutional legal analysis promoted by different international think-tanks (Peters & Armingeon, 2009: 385). This approach advocates the introduction of constitutional principles to the functioning of international society, especially regarding international legal institutions such as international organizations (IOs) and multilateral treaties. It also seeks to overcome the classic sovereignty-based approach (Brunkhorst, 2002) and to constitute an international legal society: (a) based on more hierarchical pillars; (b) comprised of structures functioning similar to constitutional powers but in a supranational scenario (and not in domestic law); and (c) characterized by providing IOs with "constitutional" powers and specific purposes regarding the application of international justice (IJ) (Peters, 2009: 397-411).

The ICC's role in international society and its position with respect to justice can be analyzed through global constitutionalism as long as the object, purpose and activities of the ICC have an impact on the main elements of the process of constitutionalizing international society: (a) the displacement of the principle of state sovereignty, through an expansion of international society with new pillars such as human rights, international justice (litigated in terms of victim-State-perpetrator in international tribunals) and the existence of IOs having powers that run beyond the limits of state sovereignty in both domestic law and international law (IL); (b) the relativization of the principle of state consent for the acquisition and fulfillment of international obligations; (c) the universalization of new legal principles such as human rights or the definition of international crimes, and the strengthening of the enforceability of certain multilateral treaties; and (d) the increase in international tribunals as a mechanism for the settlement of international disputes along with the effective acceptance of such procedures by States (Peters, 2008: 361).

Based on the foregoing, this chapter seeks to analyze the role that the ICC plays in international society through the lens of global constitutionalism.

First, the chapter examines whether the activities of the ICC imply functions and characteristics provided for by the model of global constitutionalism; in other words, whether, for both States and individuals in international society, the ICC constitutes an institution having hierarchical, organic and inherent powers of a constitutional character with respect to individual freedoms and the classic characteristics of state sovereignty —the ICC level of control over the actions of States, the ICC power to open judicial proceedings against them and the ICC superior position *vis-à-vis* States when fulfilling its role are core elements of this analysis (Birdsall & Lang, 2017).

During the time the ICC has existed, the application of these characteristics has been tested against the principle of immunity of Heads of State (especially, in relation to a number of the activities of the ICC Office of the Prosecutor (ICC OTP)). This is a matter that we shall analyze as a criterion of effectiveness of the ICC OTP, as viewed from a constitutional perspective of justice.

Second, the chapter briefly addresses the nature of the ICC as the single tribunal of a specialized regime that must internally reflect constitutional values. It is a central element under global constitutionalism that advocates the institutionalization of specific regimes.

These values include representativeness, checks and balances as between the organs of the ICC, the control of some organs by others and a functional structure that is representative of international society. Such values must also allow: (a) the application of criteria of constitutional regimes such as impartiality; and (b) the regulation of the exercise by the ICC of its powers and its respect for the rights of individuals. These internal characteristics of an organization that behaves "constitutionally" help to legitimize it before international society and to facilitate the acceptance by States and individuals of international dispute settlement mechanisms (Dunoff & Trachtman, 2008: 8-578).

This will be analyzed through specific cases in which tensions between different ICC bodies, such as the ICC OTP and the ICC Cham-

bers, have generated strong debates over: (a) who controls whom; (b) their submission to a model of checks and balances; and (c) how to legitimize the procedures for victims while respecting the rights of the accused (this is the result of ICC important organizational failures, as shown by the Lubanga case) (Vera Sánchez, 2018).

Thirdly, global constitutionalism requires international obligations of a universal nature which: (a) are considered binding obligations for all States; and (b) demonstrate that the most fundamental principles of international society can overcome the limitations resulting from state sovereignty and state consent.

Evidence of this process is the constitutionalizing of these kind of obligations and their incorporation as a criterion of legality in national constitutions (Arévalo-Ramírez, 2018: 48) and domestic law. This chapter analyzes, in a summarized fashion, whether the ICC and its statute, rules and procedures have managed (Reinold, 2012) to have "hierarchy" (Koskenniemi, 2006), "constitutional effect" or a "constitutional role" over national authorities (Aloyo, 2013) by means of: (a) the application of international standards (Elderkin, 2015); (b) the limitation of executive and legislative state powers; and (c) becoming a constitutionality criterion, due to their incorporation into national constitutions in different ways.

In this chapter, the contribution of the ICC to the construction and interpretation of international norms of a binding nature apart from consent (such as *ius cogens* norms (Abello-Galvis, 2011) and *erga omnes* obligations), will be briefly analyzed from the perspective of global constitutionalism. This indicates the need to establish an international *corpus iuris* that is: (a) not dependent upon the principle of state sovereignty; and (b) which constitutes a "constitution of international law" (Posner, 2009).

It is also of vital importance to explore whether the ICC, in the fulfillment of its conventional role, has provided international criminal law (ICL) with some of the characteristics of global constitutionalism. This is, for example, already the case with international humanitarian law (IHL), which has become a legal and constitutional criterion of domestic law, because it is referred to by the latter as

a norm whether *erga omnes*, *ius cogens* or supra-constitutional, as the case may be (Duffy, 2001: 5).

2. GLOBAL CONSTITUTIONALISM. THEORETICAL CHARACTERISTICS AND CRITERIA OF JUSTICE APPLICABLE TO THE INTERNATIONAL CRIMINAL COURT

Constitutionalism, whether local, international or global, has a close relationship with politics and justice, since its fundamental pillars are: (a) the regulated use of power for common purposes through institutions having predefined rules; and (b) the limitation of power through law. These principles, throughout history, have given rise to numerous written constitutions that seek justice through the exercise of power, under the presence of certain fundamental mechanisms. These mechanisms include the principle of legality (and, in general, the rule of law), the separation of powers along with mechanisms of checks and balances between the organs of the system, and the existence of normative hierarchies legitimized through constitutional powers (Peters, 2014: 1484-1487).

At the international level, global constitutionalism refers to an agenda of justice in which constitutional values permeate international institutions (Klabbers, 2011) to legitimize their purposes, but in which values and procedures of a constitutional nature have also been universalized thanks to a wave of domestic constitutionalism. This wave has displaced old principles of international society that rendered it static and which has limited the possibility of achieving some important elements of justice (such as the investigation of the gravest state crimes or the accountability of the most atrocious perpetrators), due to the imposition of state sovereignty (including immunity) (Peters et. al., 2014), territorial jurisdiction and non-interference. This has not allowed for modulation in the face of higher-ranking norms.

The justice agenda of global constitutionalism has been summarized by Peters (2009), who describes the characteristics and the goals of global constitutionalism in the following way:

> First, the principle of sovereignty is being ousted from its position as a Letztbegriindung (first principle) of international law. The normative status of sovereignty is derived from humanity, that is, the legal principle that human rights, interests, needs, and security must be respected and promoted. This normative status is also the *telos* of the international legal system […] Second, the principle of state consent is partly replaced by majoritarian decision-making. This is apt to improve the effectiveness of global governance, and thus contributes to output legitimacy of the system. However, the equality, inclusion, and representation of states in international organizations are in tension with the idea of equal representation of world citizens because states contain populations of vastly different sizes. Equality of more populated states results in the inequality and skewed representation of global citizens. Accepting the premise that the ultimate reference points of democracy are natural persons, state majoritarianism is, in a democratic perspective, ambiguous. […] Third, certain basic values, such as human rights protection, climate protection, and maybe even free trade, seem to have acquired universal acceptance, as manifested in the universal ratification of relevant multilateral treaties. An important caveat is that this interstate consensus is vague and general, whereas the real problems lie in the details. Another concern is that widespread ratification does not necessarily reflect genuine commitments, but is often the result of power imbalances and strategic maneuvers. The formal acceptance of universal treaties enshrining constitutional values is not the end, but rather the beginning, of the constitutionalization of international law. […] Fourth, the settlement of international disputes is increasingly legalized and juridified through the establishment of international courts and tribunals with quasi-compulsory jurisdiction. This juridification is in some regards merely a manifestation of the legalization of international relations.

The ICC represents the intersection of two models of justice and organization of international society which may be complementary in their purposes, but which are profoundly different in their methods: international constitutionalism and global constitutionalism. International constitutionalism, as heir to the Westphalian model of international society, seeks to provide States with constituent powers, so that they can build a supranational structure as an expression of a constituted power, in order to resolve different needs of international society as represented in such state interests as justice, cooperation, and the peaceful resolution of disputes.

On the other hand, global constitutionalism suggests that this state-centric model must be gradually revised so that the international

system finally manages to place the individual at the center of the action and normative production of the system (Fassbender, 1998: 529). For several authors, the ICC is rather an expression of a mixed model in which, although the institution is created by the good offices of international constitutionalism and the States, its ideals of justice lead it to fulfill its role through a model of global constitutionalism, which assigns greater relevance to individuals. This mix can be, on some occasions, a limitation on the ICC in providing adequate assistance to victims or in placing individuals fully at the center of its actions (Birdsall & Lang, 2017).

3. GLOBAL CONSTITUTIONALISM IN THE INTERNATIONAL CRIMINAL COURT

3.1. The treatment of state immunities in the Darfur situation and the Kenyatta case

Some of the characteristics of the transfer of functions from States to IOs in support of individuals, which are emblematic of global constitutionalism, can be identified in the ICC. An example is seen in the role of the ICC OTP, which, under pre-established legal criteria in relation to actions of high political impact (another element of global constitutionalism), is endowed with powers to act independently of States Parties, without intermediaries. Moreover, in exercising its power: (a) it is tied to principles of legality and impartiality and is bound by the gravity requirement; and (b) it shares its power with the Pre-Trial Chamber (PTC) (art. 15 of the ICC Statute).

Unfortunately, it must also be said that this model has received important backlash as a result of the powers of the UN Security Council (UNSC) under art. 16 of the ICC Statute. This brings the model back to a sovereignty model by allowing the UNSC to request the ICC to suspend an investigation or a prosecution for a renewable period of 12 months.

Although for global constitutionalism art. 13 of the ICC Statute may be a consequence of the quality of the "constituted" power vested in the UNSC (Follesdal, 2016), as a supranational body with

power to trigger investigations that go beyond the sovereignty of the States Parties, it is no less true that suspending investigations and/or prosecutions under art. 16 of the ICC Statute can seriously affect the expectations of justice of the victims.

Within the theoretical framework of global constitutionalism, the UNSC ability to refer situations to the ICC under art. 13 of the ICC Statute compensates for the need to decentralize international justice and require the granting of jurisdiction by the concerned States. As a consequence, this provision provides for a procedure that may achieve victims needs for justice (Arbour, 2014).

The overcoming of state sovereignty and its prerogatives within the international system is the main goal of global constitutionalism, with its focus on: (a) individuals and their rights; and (b) international rule of law through institutions with "constitutional" characteristics. One of its most paradigmatic examples can be found in one of the cases referred by the UNSC to the ICC: the situation in Darfur (Sudan).

The situation in Darfur was the first to be referred to the ICC by the UNSC. It was the first ICC investigation on the territory of a non-party State to the ICC Statute. It was also the first ICC investigation into allegations of genocide (ICC, Public Information Office, Darfur). Additionally, former Sudanese president Omar Al Bashir was the first sitting president sought by the ICC and the first person indicted by the ICC for genocide.

Although Sudan is not a State Party to the ICC Statute, the fact that the UNSC referred the situation in Darfur to the ICC in Resolution 1593 (2005) of 31 March 2005, allowed the ICC to exercise its jurisdiction over the crimes listed in the ICC Statute committed in the territory of Darfur (Sudan) or committed by its nationals from 1 July 2002 onwards (UNSC, Res. 1593 (2005)).

The UNSC determined at the time that the situation in Darfur continued to constitute a threat to international peace and security, and referred it to the ICC in March 2005, taking note of the report of the International Commission of Inquiry into violations of IHL and IHRL in Darfur (UNSG, S/2005/60). The UN Secretary General (UNSG) had established the Commission to investigate allegations

of violations of IHL and IHRL in Darfur by all parties, to determine whether or not acts of genocide had occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible were held accountable (UNSG, S/2005/60; UNSC, Res. 1593 (2005)).

Another recent case relating to Heads of State, in which the limitations imposed by the immunity from jurisdiction (a core feature of the state-centric model of IL) have been overcome, and the values of global constitutionalism and the interests of the victims have been upheld against state sovereignty, is the opening (and subsequent closure due to lack of evidence) of the case against (then) Kenyan Prime Minister Uhuru Muigai Kenyatta (Emmanuel, 2014: 133).

On 5 November 2009, the ICC OTP notified the President of the ICC of its intention to submit an application for authorization to initiate an investigation into the situation in Kenya pursuant to art. 15(3) of the ICC Statute The application was in relation to the post-election violence that took place in Kenya at the end of 2007 and in 2008, during which around 1.300 people allegedly died. On 6 November 2009, the Presidency of the Court assigned the case to PTC II, composed of Judge Ekaterina Trendafilova (presiding judge), Judge Hans-Peter Kaul and Judge Cuno Tarfusser. On 31 March 2010, PTC II agreed, by majority, to the request of the ICC OTP to open an investigation into alleged crimes against humanity in Kenya. The investigation covered crimes against humanity allegedly committed between 1 June 2005 (the date of entry into force of the ICC Statute for Kenya) and 26 November 2009 (the date the ICC OTP submitted its request for authorization to initiate an investigation). On 5 December 2014, the ICC OTP filed a notice to withdraw charges against Mr. Kenyatta. On 13 March 2015, Trial Chamber V (B) concluded the proceedings in this case and annulled the summons to appear issued against Mr. Kenyatta (ICC, Public Information Office, Kenyatta).

From the Darfur situation and the Kenyatta case, two essential elements emerge that global constitutionalism demands of the international system and that are reflected in the joint action of the UNSC and the ICC. First, it requires the action of an IO having supra-state powers (the UNSC), which, by making a referral to the ICC, acted above state sovereignty. Second, there is the value of the ICC deci-

sions against a sitting Head of State (Kenyatta), which undermines absolute conceptions of the principle of immunity and seeks to privilege the interests of IJ and victims, despite the legal and political reactions of the concerned States (Bower, 2019).

The Kenyatta case also manifests the existence of important challenges for building an international society focused on individuals and based on norms that protect and represent them. Among them, the following are worth mentioning: (a) the alleged practice of witness tampering engaged in by Kenyan authorities; and (b) the regional campaign launched by the Kenyan government against the ICC and its strong political criticism of the ICC procedures in regional forums in Africa (Hefler & Showalter, 2017).

3.2. The approach of the Lubanga case to constitutional powers, separation of powers, checks and balances and superior interests of justice

From the perspective of global constitutionalism, IL processes must adopt constitutional values such as representativeness and the division of powers, of which the ICC Statute provides a faithful reflection. The literature on the subject (Bohlander, 2009) has always highlighted that art. 36(8), which provides special criteria for the selection of judges, is a provision that reflects the diversity necessary to guarantee the political legitimacy of the ICC and its representativeness as a global institution of constitutional criminal justice.

The checks and balances that global constitutionalism seeks to implement in the institutions of international society are also reflected in other elements of the ICC Statute, including, for example, the division of powers, competencies and responsibilities amongst the ICC OTP, the States Parties and the Chambers. It is only through the cooperation of the States Parties, that the ICC OTP will be able to efficiently and without major obstacles conduct its investigations and present evidence before the Chambers. As Birdsall and Lang (2017) point out, no actor has absolute control over the evidence and its weight.

The first ICC case (the Lubanga case) was a paradigmatic example of the result of an internal debate on the division of powers, checks

and balances and the legitimacy of the functions of the ICC organs. It was a process in which the ICC OTP and the judges clashed strongly and revealed a collision that for other systems might have been seen as a fracture and a sign of weakness of the system. In the field of international criminal justice and for the purposes of the rule of law, however, the checks and balances in non-state international tribunals that are organized according to the values of global constitutionalism can well be considered a strength and a manifestation of effectiveness.

In the Lubanga case, the application of the principles of global constitutionalism within the ICC Statute and in the procedure before the Court was evident, denoting the constitutional role of the ICC. It was, thus, an expression of a model of IJ guided by constitutional parameters.

The proceedings of the Lubanga case faced ICC bodies with a sort of "confrontation". On the one hand, they had to assess matters of legality, separation of powers and the rights of the victims, as required from IOs, under global constitutionalism, while exercising their role. On the other hand, these organs had to deal with their own constitutive functions within the system of the ICC Statute.

The first occasion in which this conflict arose was in the collision between: (a) art. 54(3) on the confidentiality of evidence and the power of the ICC OTP to not disclose information which would allow it to access to new evidence, and; (b) art. 67(2), which obliges the ICC OTP to disclose evidence that may exonerate an accused of charges or of aggravating circumstances, or prove the innocence of an accused. This collision of norms (Ambos, 2009) was the perfect occasion to demonstrate the constitutional functioning of the ICC and for the result to foster the legitimacy of IOs and their supra-state character (which global constitutionalism propounds) (Birdsall & Lang, 2017).

The ICC OTP opened its first investigation in June 2004 regarding crimes allegedly committed in the Democratic Republic of the Congo (DRC) after the entry into force of the ICC Statute. The DRC became a party to the ICC Statute on July 2002 and referred the DRC situation on April 2004. By 2006, the DRC arrested Thomas Lubanga Dyilo, leader of the *Union des Patriots Congolais* (UPC) and its armed

wing, the *Forces Patriotiques pour la Libération du Congo* (FPLC). The accusations included recruitment of minors and other war crimes provided for in art. 8 of the ICC Statute. The literature explains how on several occasions the proceedings in the Lubanga case had to be stopped (Ambos, 2010; Olasolo, 2018) due to the constant tension between: (a) the secrecy of the information and the need for informants to obtain more information; and (b) the right of the accused to access all available information that could be of an exonerating nature.

The proceedings were first stopped in 2008, when Trial Chamber (TC) I brought them to a halt after considering that the ICC OTP had incorrectly used the ICC Statute so as to not disclose information that could be exonerating. The ICC OTP had covered the evidence under a broad, general confidentiality agreement and neglected large amounts of evidence obtained from UN agencies and NGOs in the field, without considering transmitting to the accused that which could be relevant to his right to a defence. The argument of the ICC OTP, which was insufficient according to the TC I, related to the confidentiality of the documents, and their alleged intention to protect victims and informants, to the detriment of the right to a defence (ICC, Lubanga, 06/13/2008).

TC I ordered the ICC OTP to deliver all information (more than 250 documents) that was exculpatory or had the potential to be vital for the preparation of the defence, maintaining that the essential principle of the right to a fair trial was as a fundamental right within the ICC Statute and in international case law (ICC, Lubanga, 06/13/2008: para. 77).

A number of supporters of global constitutionalism consider this decision as the one that, within the framework of the ICC, has applied the principles of a constitutional functioning of international society with the most clarity (Aksenova & Ulfstein, 2016). Moreover, it brought such principles into line with the ICC's role and with the constitutionalist movement (Ušacka, 2016).

In the first place, TC I had to weigh the legality of the procedure and its order, suspending the proceedings against the legitimacy of the ICC. As a result, it opted for a decision to suspend the procee-

dings which, although momentarily affecting the rights of the victims to a finding of responsibility, provided the ICC with an aura of legitimacy by acting in strict accordance with the principle of legality and the fundamental right to a defence. Although it would have been possible to not suspend the proceedings and adopt the dubious interpretation of the ICC OTP, TC I adopted global constitutionalism arguments to justify its decision.

In this way, TC I acted as a guardian for the division of powers in the international arena by limiting the discretion of the ICC OTP. This was a discretion that he had used in interpreting the articles of the ICC Statute relating to his role and actions. This is a circumstance which is common in IOs where each body interprets its own competence. Nevertheless, TC I, in defense of legality and of the coherence between the ICC Statute and its principles, such as due process and the right to a defence (Birdsall & Lang, 2017), decided to suspend the procedures to protect the highest ideals of IJ, although this left the impression of ineffectiveness (ICC, Lubanga, 06/13/2008).

Although the ICC OTP appealed the decision of TC I, the Appeals Chamber (AC) confirmed it in 2008 by ruling that the final decision on evidence and its exculpatory content is a matter for the jurisdictional bodies of the ICC and not for the discretion of the ICC OTP (Birdsall & Lang, 2017). It overruled the administrative justifications that the latter gave regarding its role, which included, *inter alia*, the need to guarantee the cooperation of the UN and other agencies in a more expeditious manner (general confidentiality agreements would have facilitated this) (ICC, Lubanga, 06/13/2008; Johnson, 2012)

These arguments continued and led to a new suspension of the proceedings in 2010, when the ICC OTP objected to handing over some particular data, arguing that the ICC OTP, and not TC I, was the body in charge of making the decision on witness protection. This challenged TC I hierarchy, and the binding nature of its decisions. This was a situation that led to the TC I reprimanding the ICC OTP for not respecting the organic and functional division of powers and the judicial independence in the matter (ICC, Lubanga, 07/08/2010).

The decisions of TC I and the AC during this second suspension of proceedings were once again guided by the principles of global constitutionalism imbued in the functioning of the ICC. These decisions protected due process and the separation of powers between the ICC organs, and reinforced the need for strict control of legality between such organs, as the best way to legitimize future decisions. They denoted a clear position about IJ that it is only legitimate if it is produced "constitutionally", that is to say, in full compliance with the law, the separation of powers, their checks and balances, and the fundamental rights of the accused and the victims (Birdsall & Lang, 2017). As a consequence, the Lubanga case legitimized the actions of the ICC, and ended with a fourteen-year sentence for war crimes (confirmed by the AC in 2014), which finally satisfied, to a certain extent, the need of the victims for justice.

4. THE IMPACT OF THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT ON THE ESTABLISHMENT OF AN INTERNATIONAL CONSTITUTION THAT ACTS AS A CRITERION OF CONSTITUTIONALITY IN NATIONAL LAW

Finally, it is important to analyse the contribution of the ICC to the establishment of an international *corpus iuris* of a constitutional nature, that is, one not dependent upon the principle of state sovereignty and that constitutes a sort of "constitution of international law".

In fulfilling its conventional role, the ICC has provided ICL with elements of global constitutionalism. It has done so by converting the ICC Statute into a criterion of legality and constitutionality for purposes of domestic law, and by contributing to the establishment of an international "rule of law". This has been incorporated by national constitutions because States either consider that the ICC Statute contains *ius cogens* obligations, or they understand its norms to have a supra-constitutional status, thereby denoting the hierarchical structure and global constitutionalism for which this theory argues.

The ICC Statute has a number of "constitutional" characteristics that differentiate it from the usual international treaties. Art. 120 of the ICC Statute on the limitation of reservations imposes or, at least, implies: (a) a specialty as to the content of the ICC Statute; (b) its supra-constitutional hierarchy as compared to national norms; and (c) its superior hierarchy as compared with other international norms (Odello, 2005). This is reinforced by the inclusion in the ICC Statute of: (a) crimes that have been considered as violations of *ius cogens* in international case law; (b) rules on the arrest and surrender to the ICC of citizens of States Parties, which could have generated conflict with some preexisting national constitutions; (c) norms depriving the immunity of Heads of State of any effect (Olasolo, Martínez Vargas & Quijano Ortiz, 2019); and (d) penalties, such as life imprisonment, that could have been previously prohibited by the national constitutions.

To make possible the ratification of the ICC Statute with these characteristics, not only were the usual processes of ratification by laws approving the treaty necessary but, in many cases, constitutional reforms were also required. This shows the supra-constitutional character of the ICC Statute. For instance, in France, to ratify the ICC Statute in the face of conflicts in matters such as the lack of Head of State immunity (which ran contrary to art. 68 of the French Constitution (1958)) or the ICC's role in relation to amnesty laws, the French Constitutional Council found it necessary to amend the Constitution (Van der Voort & Zwanenburg, 2001). This was done through article 53(2) of the French Constitution, in which the international constitutive function of the ICC Statute and its role as criterion of international legality were acknowledged. Only then did France, in June 2000, ratify the ICC Statute.

Other States have carried out this exercise through soft reforms or modulations in the relationship between the ICC Statute and the constitutional norms with which it could collide. This was the case of Spain. Although the Spanish Constitution requires a constitutional reform to ratify a treaty that contains provisions contrary to it (such as the lack of immunities and the penalty of life imprisonment, among others), the Constitutional Court decided that, because the ICC was a special jurisdiction, Spanish domestic law could be alig-

ned with the ICC Statute through an Organic Law (Díaz Pita, 2005). A similar situation occurred in Costa Rica and several other Latin American States (Ambos, Malarino & Woischnik, 2006). Moreover, a large number of countries have adapted their domestic legislation to reflect the crimes provided for in the ICC Statute, thereby alleviating or solving any contradiction between the ICC Statute and their national constitutions (Van der Wilt, 2008). Hence, the ICC Statute, through its international constitutional role, has inspired the introduction of substantive and procedural norms in the domestic legal systems (Bottini, 2003).

The reception of the ICC Statute in Colombia provides another paradigmatic example of the international constitutional role of the ICC. It also illustrates its dual role as: (a) a criterion of supra-constitutionality and international legality of IL; and (b) a source of a global constitutionalism framed by *ius cogens* recognized by national law, and a criterion for the international legality of hybrid experiences of national justice (Arévalo-Ramírez, 2019), such as the Special Jurisdiction for Peace (Arévalo-Ramírez & Holker, 2018: 48).

The incorporation of the ICC Statute into Colombian law faced an open collision with the Colombian Constitution of 1991, since the latter prohibited, *inter alia*, life sentences and double jeopardy. Colombia decided to treat the ICC Statute as a criterion of international legality, and to modify its own Constitution to give the ICC Statute constitutional status through legislative act 02/2001. In doing so, a special legal concept was created: the so-called "scope of application" of the ICC Statute.

This allowed the coexistence of the latter with preexisting norms applicable to Colombian criminal proceedings for the investigation and prosecution by the ICC of the most serious crimes of international concern (Congress of the Republic of Colombia, 2001).

As a result, there was no material control of the constitutionality of the ICC Statute since it was incorporated at the constitutional level and since it defined itself as a supra-legal instrument having a special scope of application.

Nevertheless, this demonstrates that, from the perspective of global constitutionalism, the normative role of the ICC Statute cames

successively (Idárraga & Chavarría, 2016). This occurred when, in subsequent rulings, the Constitutional Court began to identify the ICC Statute as a criterion of constitutionality of national laws and as an expression of *ius cogens* (see, for instance, decision C-240 (2009) in relation to the prohibition of genocide, and decision C-269 (2014) with regard to other norms contained in the ICC Statute). This last decision also endowed the ICC Statute with supra-constitutional status.

Thus, step by step, the Constitutional Court has underlined that the ICC Statute has the highest hierarchical level in national law, and has also a top hierarchical position in IL. Moreover, it has progressively considered different norms of the ICC Statute as part of the constitutional criteria for material control of other national norms (see decision C-1076 (2002) on crimes against humanity, decision C-291 (2007) on war crimes, decision C-488 (2009) on genocide and decision C-936 (2010) on the rights of victims).

5. CONCLUSION

In conclusion, these compared experiences point to a double consideration. On the one hand, there is a special effectiveness of justice arising out of the global constitutionalism of the ICC and of the ICC Statute. They build justice not only through the functional activity of the organization (through the investigation and prosecution of the most serious international crimes), but also through the construction of an international regulatory framework on the matter, which acts as a constitutional criterion of international legality for national law, regardless of the legislative will of States. In this way, the ICC Statute is part of the "constitution of international law".

On the other hand, one can observe the effective recognition of international norms of *ius cogens*, including a number of norms contained in the ICC Statute, which have a higher hierarchy than merely conventional treaties.

Furthermore, the elements of global constitutionalism that can be found in the activities of the ICC allow us to conclude that within it, there exist and have developed a number of features of global cons-

titutionalism that in themselves satisfy the model of justice proposed by this theory. This is the result of providing an IO such as the ICC with constitutional elements, such as checks and balances, the division of powers, the relativization of the principle of state sovereignty and the hierarchical construction of norms.

These elements, as identified in the ICC proceedings on the situation in Darfur (Sudan) and the Kenyatta and Lubanga cases, as well as in national legislation, do not eliminate the challenges facing the ICC in other areas or posed by other approaches to justice. However, they confirm the existence of a guiding principle of global constitutionalism in the role and activities of the ICC and in its interaction with the States Parties, the accused persons, and the victims.

REFERENCES

Case Law

International Case Law

International Criminal Court

ICC [Trial Chamber I]. The Prosecutor v. Thomas Lubanga Dyilo. Case No. ICC-01/04-01/06. *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*. 13 June 2008.

ICC [Trial Chamber I]. The Prosecutor v. Thomas Lubanga Dyilo. Case No. ICC-01/04-01/06. *Redacted Decision on the Prosecution's Urgent Request for Variation of the TimeLimit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU*. 8 July 2010.

National Case Law

Colombia

Colombian Constitutional Court. (2002). Decision C-578 (2002). *Revisión de la Ley 742 del 5 de junio de 2002 "Por medio de la cual se aprueba el ESTATUTO DE ROMA DE LA CORTE PENAL INTERNACIONAL, hecho en Roma el día diecisiete (17) de julio de mil novecientos noventa y ocho (1998)"*. Reporting Judge: Dr. Manuel José Cepeda Espinosa. 30 July 2002.

Colombian Constitutional Court. (2009). Decision C-240 (2009). *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" y del artículo 162 de la Ley 599 de 2000, "Por la cual se expide el Código Penal"*. Reporting Judge: Dr. Mauricio González Cuervo. 1 April 2009.

Colombian Constitutional Court. (2014). Decision C-269 (2014). *Demanda de inconstitucionalidad contra los artículos II, V (parciales), XXXI y L, y los capítulos Cuarto y Quinto de la Ley 37 de 1961 "Por la cual se aprueba el Tratado Americano de Soluciones Pacíficas" (Pacto de Bogotá).* Reporting Judge: Dr. Mauricio González Cuervo. 2 May 2014.

Colombian Constitutional Court. (2002). Decision C-1076 (2002). *Demanda de inconstitucionalidad contra los artículos 39 numeral 1º; 46 inciso 1º y 2º; 47 numeral 1º, literal i) y numeral 2º literal e); 48, numerales 4º, 5º literal a), 6º, 7º, 9º, 19 y parágrafo 2º; 49; 51; 53, incisos 1º y 2º; 54 numeral 3º, inciso 2º; 55, parágrafo 1º, 61, numeral 4º; 88; 93; 108; 119 inciso 2º; 124; 143 numeral 1º; 150, inciso 5º y parágrafo 2º; 158; 159; 160; 165; 171, inciso 1º; 173; 175 incisos 2º y 4º; 177 inciso 1º; 194; 206 y 213, todos parciales de la Ley 734 de 2002 "Por la cual se expide el Código Disciplinario Único"*. Reporting Judge: Dr. Clara Inés Vargas Hernández. 5 December 2002.

Colombian Constitutional Court. (2007). Decision C-291/07. *Demanda de inconstitucionalidad contra los artículos 135, 156 y 157 (parciales) de la Ley 599 de 2000, y 174, 175, 178 y 179 de la Ley 522 de 1999.* Reporting Judge: Dr. Manuel José Cepeda Espinosa. 25 April 2007.

Colombian Constitutional Court. (2009). Decision C-488/09. *Demanda de inconstitucionalidad contra el artículo 101 (parcial) de la Ley 599 de 2000, "Por la cual se expide el Código Penal*". Reporting Judge: Dr. Jorge Iván Palacio Palacio. 22 July 2009.

Colombian Constitutional Court. (2010). Decision C-936/10. *Demanda de inconstitucionalidad contra el numeral 17 y el parágrafo 3º del artículo 2 de la Ley 1312 de 2009, "Por medio de la cual se reforma la Ley 906 de 2004, en lo relacionado con el principio de oportunidad"*. Reporting Judge: Dr. Luis Ernesto Vargas Silva. 23 November 2010.

Doctrine

Abello-Galvis, R. (2011). "Introducción al estudio de las normas de *ius cogens* en el seno de la Comisión de Derecho Internacional, CDI". *Vniversitas.* Vol. 60. No. 123. Pp. 75-104.

Aksenova, M. & Ulfstein, G. (2016). "The task of regional and international courts in guarding constitutionalism and human rights". In: Scheinin, M., Krunke, H. & Aksenova, M. (Eds). *Judges as Guardians of Constitutionalism and Human Rights*. Cheltenham (United Kingdom): Edward Elgar Publishing. Pp. 352-369.

Aloyo, E. (2013). "Improving global accountability: The ICC and nonviolent crimes against humanity". *Global Constitutionalism*. Vol. 2. No. 3. Pp. 498-530.

Ambos, K., Malarino, E. & Woischnik, J. (2006). *Dificultades jurídicas y políticas para la ratificación o implementación del Estatuto de la CPI de la Corte Penal Internacional. Aportaciones de América Latina y Alemania*. Montevideo (Uruguay): Konrad-Adenauer-Stiftung.

Ambos, K. (2009). "Confidential Investigations (Article 54 (3)(E) ICC Statute) vs. Disclosure obligations: the Lubanga case and national law". *New Criminal Law Review*. Vol. 12. No. 4. Pp. 543-568.

Ambos, K. (2010). "The First Confirmation Decision of the International Criminal Court: Prosecutor v. Thomas Lubanga Dyilo". In: Kotsalis, L., Courakis, N. & Mylonopoulos, C. (Eds.). *Essays in Honour of Argyrios Karras*. Athens (Greece): Ant. N. Sakkoulas. Pp. 979-1003.

Arbour, L. (2014). "The Relationship between the ICC and the UN Security Council". *Global Governance: A Review of Multilateralism and International Organizations*. Vol. 20. No. 2. Pp. 195-201.

Arevalo Ramirez, W. (2019). "La responsabilidad internacional y la Jurisdicción Especial para la Paz en Colombia frente a la Corte Penal Internacional. In: Escobar, C. (Ed.). *Gobernanza Global y responsabilidad internacional del Estado. Experiencias en América Latina"*. Bogotá (Colombia): Universidad El Bosque. Pp. 165-180.

Arévalo-Ramírez, W. & Holker, V. (2018). "La jurisdicción especial para la paz y la Corte Penal Internacional: concurrencias y desaciertos frente al derecho penal internacional, el estatuto de la CPI y otras experiencias de justicia". *Revista de la Asociación Diplomática y Consular de Colombia*. Vol. 22. Pp. 48.

Birdsall, A., & Lang, Jr., A.F. (2017). "The International Criminal Court and Global Constitutionalism". In Lang Jr, A.F., & Wiener, A. (Eds.). *Handbook on Global Constitutionalism*. Cheltenham (United Kingdom): Edward Elgar Publishing. Pp. 383-394.

Bohlander, M. (2009). "Pride and prejudice or sense and sensibility? A pragmatic proposal for the recruitment of judges at the ICC and other international criminal courts". *New Criminal Law Review*. Vol. 12. No. 4. Pp. 529-542.

Bottini, G. (2003). "Universal Jurisdiction After the Creation of the International Criminal Court". *New York University Journal of International Law and Politics*. Vol. 36. No. 2. Pp. 503.

Bower, A. (2019). "Contesting the international criminal court: Bashir, Kenyatta, and the Status of the non-impunity norm in world politics". *Journal of Global Security Studies*. Vol. 4. No. 1. Pp. 88-104.

Brunkhorst, H. (2002). "Globalising democracy without a state: Weak public, strong public, global constitutionalism". *Millennium*. Vol. 31. No. 3. Pp. 675-690.

Díaz Pita, M.P. (2005). "Concurrencia de jurisdicciones entre los tribunales penales españoles y la Corte Penal Internacional: los arts. 8 y 9 de la Ley orgánica 18/2003, de 10 de diciembre, de cooperación con la Corte Penal Internacional". *Revista Electrónica de Estudios Internacionales*. Vol. 9. Pp. 1-10.

Duffy, H. (2001). "National Constitutional Compatibility and the International Criminal Court". *Duke Journal of Comparative & International Law*. Vol. 11. No. 5. Pp. 5-38.

Dunoff, J.L. & Trachtman, J.P. (2008). "A Functional Approach to Global Constitutionalism". *Harvard Public Law Working Paper*. Vol. 8. No. 57. Pp. 1-31.

Elderkin, R. (2015). "The Impact of International Criminal Law and the ICC on National Constitutional Arrangements". *Global Constitutionalism*. Vol. 4. No. 2. Pp. 227-253.

Emmanuel, J. (2014). "The International Criminal Court and Sovereignty: What Does Kenyatta Mean for the Future of the ICC". *Transnational Law & Contemporary Problems*. Vol. 24. No. 1. Pp. 133.

Fassbender, B. (1998). *The United Nations Charter as Constitution of the International Community*. Leiden (The Netherlands) & Boston (USA): Martinus Nijhoff Publishers.

Follesdal, A. (2016). "Implications of contested multilateralism for global constitutionalism". *Global Constitutionalism*. Vol. 5. No. 3. Pp. 297-308.

Helfer, L.R. & Showalter, A.E. (2017). "Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC". *International Criminal Law Review*. Vol. 17. No. 1. Pp. 1-46.

Idárraga, A.M. & Chavarría, J. (2016). "Derecho penal internacional en la jurisprudencia de la Corte Constitucional colombiana". *Serie documentos de trabajo, Sociedad Latinoamericana de Derecho Internacional (SLADI)*. No. 8. Pp. 1-25.

Johnson, L.D. (2012). "The Lubanga Case and Cooperation between the UN and the ICC: Disclosure Obligation v. Confidentiality Obligation". *Journal of International Criminal Justice*. Vol. 10. No. 4. Pp. 887-903.

Klabbers, J., Peters, A. & Ulfstein, G. (2011). *The Constitutionalization of International Law*. Oxford (United Kingdom): Oxford University Press.

Koskenniemi, M. (2006). "Constitutionalism as mindset: Reflections on Kantian themes about international law and globalization". *Theoretical Inquiries in Law*. Vol. 8. No. 1. Pp. 9-36.

Odello, M. (2005). "La Corte Penal Internacional y las legislaciones nacionales: Relación entre derecho internacional y derechos nacionales". *Revista Foro Nueva Época*. Vol. 1. Pp. 295-329.

Olasolo, H., Martínez Vargas, J.R. & Quijano Ortiz, L. (2019). "The Tension between State Duties to Investigate and Prosecute *ius Cogens* Crimes and Immunity of the Highest State Representatives from Foreign Criminal Jurisdiction". *International Criminal Law Review*. Vol. 1. Pp. 1-21.

Olasolo, H. (2018). "The Scope of Criminal Proceedings in International and Hybrid Criminal Tribunals". In: Olasolo, H. (Ed.). *International Criminal Law, Transnational Criminal Organizations and Transitional Justice*. Leiden (The Netherlands): Brill Nijhoff. Pp. 37-58.

Peters, A. et. al. (Ed.). (2014). *Immunities in the age of global constitutionalism*. Leiden (The Nethelands): Martinus Nijhoff Publishers.

Peters, A. & Armingeon, K. (2014). "Introduction-Global Constitutionalism from an Interdisciplinary Perspective". *Indiana Journal of Global Legal Studies*. Vol. 16. No. 2. Pp. 385-395.

Peters, A. (2015). "Global constitutionalism". In: Gibbons, M.T. (Ed.). *The encyclopedia of political thought*. Hoboken (USA): John Wiley & Sons, Ltd. Pp. 184-1487.

Peters, A. (2008). "Reconstruction constitutionnaliste du Droit international: Arguments pour et contre". In: Ruiz Fabri, H., Wolfrum, R. & Gogolin, J. (Eds.). *Select Proceedings of the European Society of International Law*. Vol. 2. Hart Publishing. Pp. 361-375.

Peters, A. (2009). "The merits of global constitutionalism". *Indiana Journal of Global Legal Studies*. Vol. 16. No. 2. Pp. 397-411.

Posner, E.A. (2009). "Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law". *Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft*. Vol. 165. No. 1. Pp. 5-23.

Reinold, T. (2012). "Constitutionalization? Whose constitutionalization? Africa's Ambivalent Engagement with the International Criminal Court". *International Journal of Constitutional Law*. Vol. 10. No. 4. Pp. 1076-1105.

Ušacka, A. (2016). "Constitutionalism and Human Rights at the International Criminal Court". In: Scheinin, M., Krunke, H. & Aksenova, M. (Eds.). *Judges as Guardians of Constitutionalism and Human Rights*. Cheltenham (United Kingdom): Edward Elgar Publishing. Pp. 281-294.

Van der Voort, K. & Zwanenburg, M. (2001). "From 'raison d'État'to 'état de droit international'–Amnesties and the French implementation of the Rome Statute". *International Criminal Law Review*. Vol. 1. No. 3-4. Pp. 315-342.

Van der Wilt, H. (2008). "Equal standards? On the dialectics between national jurisdictions and the International Criminal Court". *International Criminal Law Review*. Vol. 8. No. 1-2. Pp. 229-272.

Vera Sánchez, J.S. (2018). "¿Por qué es importante que la Corte Penal Internacional condene más allá de toda duda razonable?". *Anuario Colombiano de Derecho Internacional (ACDI)*. Vol. 11. Pp. 101-130.

Reports, Resolutions and Other Documents

Colombia. Congress. (2001). *Acto legislativo 02 de 2001 por medio del cual se adiciona el artículo 93 de la constitución*. https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4575.

International Criminal Court. Office of Public Information. (2015). *Case Information Sheet: Uhuru Muigai Kenyatta*. 13 March 2015. https://www.icc-cpi.int/CaseInformationSheets/KenyattaEng.pdf.

International Criminal Court. Office of Public Information. (n.d.). *Darfur, Sudan*. https://www.icc-cpi.int/darfur.

United Nations Secretary General. (2005). *Security Council Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council*. Doc. No. S/2005/60 (2005). 1 February 2005.

United Nations. Security Council. (2005). *Resolution 1593*. Doc. No. S/RES/1593 (2005). 31 March 2005.

PART IV
CONCLUSIONS

Chapter 9
Conclusions

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1. INTRODUCTION

As indicated in chapter 1, this volume has analyzed the ICC's role from analytical perspectives based on modernity and its subjectivities, distinguishing between positivist approaches (part II: chapters 2 and 3) and non-positivist approaches (part III: chapters 4 to 8). This last chapter on conclusions follows a three-fold structure. First, it presents the main conclusions reached in each chapter from the relevant theoretical approach. Second, it looks for continuities and discontinuities between the views on the role of the ICC advanced by the analytical perspectives that comprise each part. Finally, it reflects on how the comparison between parts II and III shows a desire to redefine the way in which the ICC's role is usually understood.

2. THE ROLE OF THE INTERNATIONAL CRIMINAL COURT FROM POSITIVISTS APPROACHES

As analyzed in part I of this volume (chapter 1), the study of the role of the ICC from traditional analytical perspectives is characterized by the following four assumptions of international law (IL) (also applicable to international criminal law (ICL)), which are accepted as fully proven and cannot be questioned: (a) its essence is the willing consent of the States that define the production of international legal norms (thus condemning sub-state or social actors to irrelevance) (state-centrism); (b) its object of study is limited to the normative

(substantive), procedural and institutional interactions amongst the actors of international society (excluding reflections on their duties and on their moral conduct); (c) its method of study is analytical and it is based upon the traditional concepts and categories of international legal analysis; and (d) the study of contradictions in the behaviour of actors in international society must be framed within clearly defined limits, which requires that they be addressed through the lens of the aforementioned concepts and categories of analysis (Olasolo, Urueña-Sánchez & Arévalo-Ramírez, 2023).

Based on the foregoing, Quesada and Rocha begin part II by presenting in chapter 2 an initial analysis of the ICC's role from a legal positivist perspective, in which they conclude that, for ICL and the ICC Statute, the main ICC's role is the fight against impunity; the fulfilment of which goes hand in hand with the achievement of a whole series of goals that include retribution, prevention, the protection and reparation of victims and the maintenance of international peace and security.

Together with the retributive aspect of criminal punishment, Quesada and Rocha emphasize the ICC's preventive role, which aims at: (a) generating a universal legal conscience by reaffirming the values protected by the crimes provided for in the ICC Statute (positive general prevention); and (b) deterring leaders of state and non-state entities (the most responsible persons) who may be tempted to eventually commit said crimes in the future (negative general prevention). Furthermore, if one looks at the values protected by these crimes (genocide, crimes against humanity, war crimes and aggression), one observes that they have both an individual and a collective dimension (the latter is characterized by the maintenance of international peace and security and the preservation of human groups).

Embracing a soft or ethical positivism (which, in addition to "good" norms, requires the commitment of international and hybrid tribunals to apply them), Quesada and Rocha consider that in order to effectively fulfil its role, the ICC needs the full commitment of its organs (Presidency, Chambers, Office of the Prosecutor, Registry and Trust Fund for Victims) to the consolidation and application of the norms designed to fight against impunity. Otherwise, it is not possible to conduct this fight effectively.

Furthermore, the authors stress that the ICC, through the principle of complementarity, must seek to encourage States Parties to the ICC Statute to fulfil their primary responsibility to investigate and prosecute the crimes under the ICC jurisdiction. To this end, the ICC, through the ICC Office of the Prosecutor (ICC OTP), must foster the strengthening of the capacities of national judicial institutions, providing them with proactive assistance and technical support (positive complementarity).

In chapter 3, Gálvez and Bazaco complement chapter 2 by placing particular emphasis on how impunity is consolidated through obstacles to accessing archives and the systematic destruction of large documentary collections. Therefore, as they state, in order for the ICC to be able to fight impunity effectively, it is essential to consolidate and reinforce in international criminal justice (ICJ), ICL and the ICC Statute, the recommendations and principles on archival policies that aim to guarantee the rights of victims. This is with the aim of fostering their reception and application in national jurisdictions.

In the view of the author, this would also allow the building of channels of communication and dialogue between two professional communities (jurists and archivists) that have lived with their backs turned to each other for decades despite sharing a common goal (as a result, they have not yet been able to share their experiences on the contribution of archives to the fight against impunity). Examining how this complex relationship has evolved could help answer many of the questions about the steps forward and setbacks in ICJ and ICL.

For Gálvez and Bazaco, this strategy is already bearing fruit in the archive of the International Residual Mechanism for Criminal Tribunals (IRMCT), which has become the first major global archive against impunity. This is why, in their opinion, the next step is to turn it into a "Registry of the Memory of the World as Documentary Heritage of Humanity", because one of the best safeguards against denialism, historical revisionism and hate speech in societies such as that of the former Yugoslavia, is the permanent conservation and access to documents that bear witness to the brutality and lack of humanity of numerous state regimes in the 20th and 21st centuries.

Based on the foregoing, Gálvez and Bazaco conclude that a central aspect of the ICC's role, as the first permanent international criminal tribunal, is to carry out proper document management (in the absence of which it is not possible to effectively investigate and prosecute those most responsible for the crimes under the ICC jurisdiction), leaving as little room as possible for interpretation of its main elements. This explains the importance of the interest that the ICC has shown in this matter in recent years, which has led it to manage documents through administrative instructions and to create a specific unit to ensure an adequate application of the rules.

When observing the content and the main elements on which the two chapters that make up part II are based, a series of continuities and discontinuities can be observed between them. On the one hand, they share a rationalist claim in their approach to the ICC's role. This is a claim that favors the proliferation of institutions and rules for the most effective and efficient operation of the ICC. In this context, the provision of information to the actors involved not only facilitates the fulfillment of the ICC's role, but also guarantees the expression of their intentions, thereby strengthening a scheme of cooperation and multilateralism capable of partially covering some of the gaps in the current cooperation regime of the ICC Statute.

On the other hand, although both chapters are developed on the basis of positivism and take the ICC as the unit and level of analysis, they adopt different approaches when it comes to reporting on the different organs of the ICC, its performance and its guiding principles in fulfilling its role. These differences show the existence of multiple rationalities in the positivist analysis of the ICC's role and offer a broader overview of the ICC integration into the current liberal international order.

3. THE ROLE OF THE INTERNATIONAL CRIMINAL COURT FROM NON-POSITIVIST APPROACHES THAT ADOPT MODERNITY AND ITS SUBJECTIVITIES

As it has been pointed out in chapter 1, there is an interest in understanding the ICC's role through theoretical frameworks that extend beyond studies based on legal positivism. This is due to two

main reasons. Firstly, the importance of studying the goals of ICJ and ICL and the role of the ICC from analytical perspectives that surmount the following problems presented by the conception of IL and ICL as simple sets of norms or rules: (a) favoring the instrumentalization of IL and ICL by the political and legal elites of States (considering the latter as the exclusive unit of analysis and thus significantly reducing the heterogeneity characteristic of contemporary IL and ICL); (b) fostering the lack of knowledge of the normative construction of IL and ICL (thereby depriving IL and ICL of their dynamic character and their capacity to effectively address the growing challenges of international society); and (c) prioritizing the vertical analysis of IL and ICL (which fosters an encompassing Westernism and underestimates the role of particular cultural norms and domestic interactions in their production, application and evolution).

Secondly, the increasingly closer relationship between the goals of ICJ and ICL and the role of the ICC, on the one hand, and various areas of research in other disciplines such as philosophy, theology and international relations (IR), on the other.

The decision to detach from legal positivism provokes the need to look for other theoretical approaches that can be divided into two main groups. On one side, there are those that build their analytical frameworks from modernity and its subjectivities (analyzed in part III of this volume), as is the case with the theories of rational choice (TRC), global governance, global justice and global constitutionalism (chapters 4 to 8).

On the other side, there are those that denounce modernity and its subjectivities in order to, based upon their own perceptions of international society and IL, build alternative worlds that promote change (the critical theory of the Frankfurt School and post-structuralist, postmodern and postcolonial perspectives, as well as Marxism and neo-Gramscianism, constitute the guiding axes of this second group of theoretical approaches, which will be addressed in volumes 2 and 3 of the trilogy).

They all have in common the following critique of modernity (especially modernization) and of the national and social subjectivities that it has left in its wake: the production of binary identities

by some communities that have developed a discourse of superiority and a position of economic, political, military and cultural dominance, compared to other communities with which they have established asymmetrical relations and which they pejoratively describe as undeveloped, uncivilized and uncultured. This is also applicable to emancipatory legal pluralism that contrasts state legal and political elites with social movements. According to the different analytical perspectives presented, the relevance of said discourse for a long period of time and its projection into practices of domination have contributed to the establishment of an inequitable, unjust and antidemocratic international system.

Concerning the analysis of the ICC's role from non-positivist perspectives that adopt modernity and its subjectivities, López Velásquez, Vargas and Garzón begin part II of this volume by dedicating chapter 4 to the study of the ICC's role from the economic rationality of the TRC. The TRC is based on the fundamental idea that actors, in light of the restrictions under which they operate, seek to maximize their profits and reduce their losses. Consequently, for the TRC, States behave rationally when they identify what their interests are and act in accordance with them. This means, in turn, that they only comply with IL when it is in their interest (IL cannot therefore assume that States have a preference for complying with their international obligations but, on the contrary, must offer them reasons for complying with them). In addition, international organizations (IOs), such as the ICC, constitute a manifestation of the power of States, so the interests of member States are reflected in their institutional design and in the activities of their organs in fulfilling their roles, as set forth in their constituent instruments. This allows us to explain the conditions under which States decide to act to directly satisfy their interests or adopt alternative measures to establish IOs.

Based on the foregoing, the authors highlight that for the TRC, IOs, such as the ICC, frequently seek to satisfy Global Public Goods (GPGs), which are characterized by their non-rivalry (the enjoyment of GPGs by one State does not affect the levels of enjoyment by others) and non-exclusion (it is not possible to prevent a State from enjoying GPGs without cost). Moreover, the main GPGs included in the ICC Statute (the maintenance of international peace and

security by fighting impunity and holding accountable those most responsible for the crimes provided for in the ICC Statute) belong to the category of GPGs of aggregated effort because: (a) to achieve their satisfaction, it is necessary to put together the contributions of States Parties in terms of the arrest and surrender of suspects, cooperation in obtaining evidence, payment of budgetary contributions for the ICC financial support and legitimization of the ICC; (b) not all contributions are of equal relevance, with contributions from the two States Parties which are also permanent members of the UN Security Council (UNSC) being of special relevance; and (c) some of the weaker States Parties do not make contributions (in particular those whose highest representatives are being investigated and prosecuted by the ICC).

In this context, López Velásquez, Vargas and Garzón consider that incentives are generated for some States Parties, that operate in a rational manner, in that they consider the possibility of taking advantage of its benefits without having to assume any cost, thus becoming free-riding States. This occurs, for example, with respect to state contributions to the Trust Fund for Victims (ICC TFV). As a result, depending on the circumstances, States Parties may decide to contribute to the achievement of the GPGs provided for in the ICC Statute and thereby promote the effectiveness of the ICC's preventive role, or they may choose to become free-riding States.

Likewise, with respect to the preventive effectiveness of the ICC, the authors remind us that there are two kinds of potentially most responsible persons for the crimes provided for in the ICC Statute: (a) the leaders who order their commission; and (b) those who are derelict in their duty to prevent and punish the commission of such crimes by their subordinates. Since those who belong to the first group obtain a greater benefit from their commission, it is the members of the second group who are in a position to carry out a more balanced cost-benefit analysis, and who, therefore, represent a more likely scenario for effective deterrence by the ICC. This is why the fact that the first convictions by the ICC have been limited to individuals belonging to non-state organized armed groups (despite the multiple allegations of international crimes committed by state officials), has generated a disincentive among senior state representatives in

the Sub-Saharan African region, who have understood that they can rationally choose to engage in this type of conduct, since its cost (understood as the risk of being investigated, prosecuted and punished by the ICC) can be ruled out.

Within this context, López Velásquez, Vargas and Garzón highlight that the ICC should design strategies to try to minimize these types of situations, given that the States Parties and the persons criminally responsible are rational subjects who act according to a cost-benefit analysis.

In chapter 5, Cuenca and Lages analyze the role of the ICC from the perspective of global governance, understood as a complex decision-making process, which is carried out through the continuous interaction between the different levels of governance existing in international society (local, regional, national and international). It entails a weakening of the power of States (thus limiting state sovereignty) and is manifested though the participation of new public and private actors in joint decision-making on the management of matters of common interest. Among these new actors, IOs stand out. They have contributed to the process of global governance by creating normative systems functionally interconnected with national law. The have also promoted important transformations towards less formalized and centralized models in the adoption and implementation of international decisions.

In this context, the authors underline the ICC aspiration to play an important role in global governance to end the impunity of those most responsible for the crimes included in the ICC Statute. In this way the ICC contributes to the prevention of these crimes, and to the safeguarding of essential values for international society, such as international peace and security. Thus, the ICC's role is not limited to the investigation and prosecution of said crimes, but also includes the promotion of processes at the national level through its complementary regime and cooperation mechanisms with States Parties and other IOs (in particular, the UN). As a result, the ICC has the potential to trigger important political and legal changes at the national level and provide incentives and support to States Parties to advance compliance with their obligations to investigate and prosecute crimes provided for in the ICC Statute. This allows its success or failure

to be measured beyond the cases processed before the ICC, based upon the effects that the application of the complementarity regime may have had on national governance processes, on the institutional strengthening of national judicial systems and on the promotion of the rule of law at national and international levels.

Nevertheless, in practice, the impact of the ICC has been limited by the many difficulties and obstacles it has faced since its creation, and which, according to Cuenca and Lages, do not seem likely to disappear in the short term (its credibility and consolidation as a relevant actor in global governance depends on its ability to confront them). Among these obstacles, the authors highlight three factors. The first is the limited number of States that have ratified the ICC Statute. This can generate the perception that the ICC is not a truly global actor or lacks the capacity to have a global impact (the actions of the UN Security Council (UNSC), as provided for in the ICC Statute, have not alleviated this situation). The second is the lack of cooperation from States Parties, which has significantly limited the ability of the ICC to carry out its investigations and prosecutions. The situation in Kenya is a good example of how the highest national authorities have tried to instrumentalize the ICC to favor political interests. This has called into question the ICC ability to investigate and prosecute the highest state officials while they remain in office or in power. The last one is the criticism received by the ICC OTP in relation to its strategy of selecting and prioritizing cases, which has led to almost all of the cases that the ICC has concluded to date being directed against leaders of non-state armed groups operating on the African continent.

Notwithstanding the foregoing, however, the authors stress that one cannot ignore that the ICC intervention has also generated positive effects in some situations and cases. This was initially the case with the opening of the investigation in the DRC in 2004 (which encouraged national authorities to adopt measures to strengthen the capacity of its national judicial system). Likewise, the preliminary examination of the situation in Colombia (2004-2021) has also shown the potential of preliminary examinations to encourage action by national authorities and to strengthen the rule of law and domestic judicial institutions.

Furthermore, for Cuenca and Lages, this must be combined with the contribution of civil society to the activities of the ICC, with each conviction representing a victory for the global rule of law against impunity while generating among state and non-state leaders the perception that they assume a certain risk of ending up before the ICC if the crimes provided for in the ICC Statute are committed.

In chapter 6, Izquierdo and Ugalde analyze the ICC's role from the perspective of the global justice theory (GJT), which, based on a cosmopolitan vision of international society and IL, and considering that international society is comprised of a plurality of actors (beyond States) that make up an authentic global community of human beings, analyzes the structure of the institutional global order and its capacity to satisfy human needs and interests.

In this way, the GJT adopts a concept of justice that places human beings and their well-being at the center of its considerations (thus shifting the emphasis from States to human beings as actors, and not just objects, of global events). As a result, the latter are responsible for the consequences that their conduct has on other human beings around the world (international individual responsibility). Moreover, they are, at the same time, holders of fundamental human rights having universal validity that are enforceable before the institutions of the global justice system.

As Izquierdo and Ugalde emphasize, the difference between IJ and global justice lies in that IJ focuses on relations between States, while global justice has its focus on relations between human beings in different States. Therefore, issues relating to national justice and global justice must be treated together (rather than separately as classical approaches to IJ do). This is also justified for two other reasons. First, in a globalized world, the decisions taken by each State have important consequences for the others. Second, a global perspective necessarily affects the way in which national justice is administered, because it questions the moral beliefs and idiosyncratic policies that exist within each State.

Based on the foregoing, Izquierdo and Ugalde on the one hand, and López, Olano Azpiroz and Sánchez Sarmiento on the other, analyze in chapters 6 and 7 the role of the ICC from two of the main manifestations of the GJT. The former explains how, with the birth of

ICL, IL has seen an expansion of its object and scope of application. This is because, although ICL is still mainly created and applied by States as the main protagonists of IR, a system of attribution of international individual responsibility for the commission of atrocious crimes that affect humanity has been developed. This constitutes a fundamental step forward both with respect to the relevance of human beings when making moral assessments about justice, and of victims' actions (even when their own States have facilitated, consented to or encouraged the commission of crimes against their own population).

Within this analytical framework, Izquierdo and Ugalde consider that the ICC, as the first permanent international criminal tribunal having a potentially universal scope, represents the consolidation of a system of ICL focused on human beings as subjects of rights and obligations. Thus, it is a firm step towards a global justice system. Furthermore, the ICC complementary jurisdiction represents the possibility of both reducing impunity for atrocious crimes and providing reparations to victims when the States having jurisdiction over them are unable or unwilling to genuinely investigate and prosecute those most responsible for their commission.

However, as the authors emphasize, the ICC acts within an international system in which States remain the main protagonists. This means that the role that the ICC is called upon to play is affected because States not only maintain control over whether their citizens have access to the ICC complementary jurisdiction but, even when they decide to accept ICC jurisdiction by ratifying the ICC Statute, they maintain control over issues which are of great importance for the ability of the ICC to fulfill its role effectively, independently, and impartially. From the approval of the ICC budget to cooperation in the execution of arrest and surrender orders, States remain key players in the activities of ICC. Consequently, given the geopolitical dynamics that revolve around the ICC, Izquierdo and Ugalde conclude that the ICC is not yet an institution of global scope. This hinders its ability to provide for a response of this nature to the global problem of impunity of those most responsible for the commission of the most serious crimes of international concern. Furthermore, in their opinion, the current political climate facing the ICC eliminates any possibility of progress in this regard in the short term.

In chapter 7, López, Olano Azpiroz and Sánchez Sarmiento address the ICC's role through the lens of a second manifestation of the GJT, which emphasizes the universality of economic rights. According to this approach, there is a need to: (a) recognize certain duties of promotion and protection of economic rights in the international legal order in order to guarantee the real freedom of human beings; and (b) identify the problems that may derive from giving absolute priority to civil and political rights.

Even though this approach has been assumed for decades by international human rights law (IHRL), and despite the close relationship between IHRL and ICL, until the approval of the ICC Statute, the relevance for ICL of serious violations of human rights was focused mainly on civil and political rights. Serious violations of economic rights had traditionally been outside the scope of international crimes. According to López López, Olano Azpiroz and Sánchez Sarmiento, the omission of the economic dimension of international crimes in the statutes and case law of the international criminal tribunals that preceded the ICC generated a dearth of attention to: (a) the different economic actors and their interests in armed conflicts and other situations of systematic or generalized violence; and (b) the impact of socioeconomic conditions and economic rights violations in armed conflicts.

To a large extent, this has impeded the ICC from effectively addressing the economic realities that foster and intensify conflict and violence. Consequently, to address this situation, the authors affirm the need to overcome, in the application of ICL, and in fulfilling the ICC's role, those approaches that give absolute priority to civil and political rights.

For López López, Olano Azpiroz and Sánchez Sarmiento, this view is implicit in the ICC Statute and in the rest of the norms applicable to the ICC for two main reasons. First, certain serious violations of economic rights may constitute genocide, crimes against humanity and war crimes. Second, economic rights are part of internationally recognized human rights standards, which, according to art. 21(3) of the ICC Statute, constitute a central criterion for the interpretation of the ICC Statute and its complementary instruments. This means that a central aspect of the ICC's role is to promote: (a) a proper in-

depth approach to the economic realities that foster and intensify armed conflicts and the crimes that most seriously affect international society; (b) awareness that serious violations of IHRL related to economic rights constitute crimes within the material jurisdiction of the ICC; and (c) the investigation, prosecution and punishment of those most responsible. Furthermore, while the authors acknowledge that neither the content of art. 21(3) of the ICC Statute nor the role of human rights (including economic rights) in the fulfilment of the ICC's role has yet been clarified by its case law, they also believe that this situation should change in the coming years if the ICC aspires to fully fulfill its mandate.

Abello-Galvis, Arévalo-Ramírez and García-Matamoros conclude part III of this volume with their analysis in chapter 8 of the ICC's role from the analytical perspective of global constitutionalism, which advocates the introduction of constitutional principles in the organization and functioning of international society. According to the authors, there are two main manifestations of this type of constitutionalism: international constitutionalism and global constitutionalism.

The first, inherited from the Westphalian model of international society, seeks to provide States with "constituent" powers so that they can construct a supra-state structure as an expression of a "constituted" power that addresses issues such as justice, inter-state cooperation and the peaceful resolution of disputes (needs of international society that correspond to interests of states). The second, closely related to the GJT, considers that the state-centric model of international society must be gradually overcome to place human beings at the center of the production and application of norms in the global legal system.

The authors emphasize that it is possible to observe certain elements in the current international legal system that reflect a growing tendency towards global constitutionalism: (a) the relativization of the principle of state consent for the acquisition and fulfillment of international obligations; (b) the universalization of new legal principles, such as human rights and international criminal responsibility; (c) the strengthening of the enforceability of certain multilateral treaties; and (d) the increase of IOs and international tribunals as mechanisms for the resolution of international disputes and the ac-

ceptance of their procedures by States. All this, the authors affirm, is evidence of a progressive displacement of the principle of state sovereignty by these new pillars of the international legal order that limit its content and relevance.

It is within this context that Abello-Galvis, Arévalo-Ramírez and García-Matamoros consider that the ICC is an expression of a mixed model. This is because, although it has been created by the good offices of international constitutionalism through the action of the States Parties, the conception of justice that it embodies and its aspiration for universality lead it to fulfill its role through the model of global constitutionalism.

In particular, the authors identify in the ICC Statute, in the national legislation adopted for its implementation, and in the activities of the ICC in relation to the situation in Darfur (Sudan) and the Kenyatta and Lubanga cases, three aspects of global constitutionalism that allow them to conclude that global constitutionalism constitutes a guiding principle of the ICC's role, and of its interaction with States Parties, the accused persons and the victims (this does not mean that the efforts of the ICC to assist victims, or to place human beings at the center of its role, cannot sometimes be limited due to the mixed model in which it operates).

First, the ICC is an institution with which both States and individuals interact vertically, which is reflected especially in the lack of application of the principle of immunity of Heads of State under the case law of the ICC. Second, the ICC, as an IO and as a permanent international criminal tribunal of a specialized regime, embodies central values of global constitutionalism such as: (a) representation; (b) a system of checks and balances between its organs; (c) a system of control of some organs over others; and (d) a functional structure that allows the application of principles that are characteristic of constitutional regimes (such as impartiality and regulated action). Third, the ICC Statute and ICC case law have provided ICL with core characteristics of global constitutionalism because it has contributed to building a normative framework that has become a criterion of constitutionality of domestic law, even beyond the legislative will of States.

When analyzing the five chapters that make up part III, it can be observed that they share a network vision of the role and agency of the

ICC in a globalized international society. It is a network that combines in its shaping both actors and rules and principles of IL and ICL.

In respect to the actors, it can be observed that while the TRC emphasizes how the acts of States Parties to the ICC are motivated by a rational assessment of how best to achieve their own interests, global constitutionalism emphasizes the relationship of the ICC with both States and human beings (in both approaches the participation of other actors is relegated). In contrast, the perspectives of global governance and justice aim to open the range of options to less conventional actors with whom the ICC can also establish a relationship.

Likewise, together with actors, the five chapters address: (a) a whole series of rules and principles of the international legal order (including the close relationship between ICL, on the one hand, and IHRL and the rest of the constitutional principles that inform IL, on the other); and (b) the criteria for their interpretation (including economic rationality and the relevance of economic, social and cultural rights). These rules, principles and interpretative criteria must be taken into consideration by the ICC in order to carry out its role more effectively.

Finally, it can also be seen how the five chapters, while maintaining certain nuances regarding the actors, norms and principles involved, coincide in offering an analytical perspective of the ICC from the bottom up, both in the analysis of the myriad of actors involved in current international society and in the construction of the different contemporary international legal regimes, and especially ICL. In this way, all of them, while moving away from the aspirations of legal positivism, do not definitively break with its epistemological assumptions.

4. CONTINUITIES AND DISCONTINUITIES ON THE ROLE OF THE INTERNATIONAL CRIMINAL COURT BETWEEN POSITIVIST AND NON-POSITIVIST APPROACHES THAT ADOPT MODERNITY AND ITS SUBJECTIVITIES

The establishment of the ICC can be considered as part of the understanding of IL, its regimes and organs, as a project of enlightened

liberalism and its derived universalist claim. It is a rationalist and, at the same time, utopian project of seeking IJ through the investigation and punishment of the worst crimes committed against humanity as a whole. It is an idea with which both positivist and non-positivist visions of IL and other social disciplines are in agreement.

Therefore, the core questions revolve around how these visions are to be achieved, what the ICC represents and what the ICC reflects about contemporary international order.

A first relevant issue beyond epistemological approaches is that of the levels of analysis. While it is true that the State is one of the points of reference of positivist visions of IL and related social sciences (which in many cases makes the latter somewhat state-centric), studying an international permanent tribunal with universal aspirations forces scholars to be more open to other perspectives.

For a positivist perspective and its related approaches, this opening is more modest, as it privileges the articulation between the States and the jurisdiction of the ICC. Issues such as the principles of complementarity and cooperation draw attention to how state sovereignty, as part of the Westphalian model of the international system, must adapt to the new reality of supranational bodies and disputes over the administration of justice.

In contrast to legal positivism, non-positivist approaches add a second articulation: that between the State and civil society. They do so because they also recognize the agency of social actors in building ICJ from the social base to the universal.

As a result, research on the units of analysis varies between: (a) the positivist perspective, which focuses on political leaders and legal scholars whose actions and ideas have led to the establishment of the ICC, its ideals and its regulations; and (b) non-positivist approaches that fosters examining diversification, as civil society should no longer be thought of as an object, but as an agent of ICJ.

The question then arises as to what extent the ICC's role reflects the tension between effectiveness and representation. This is because although, in principle, it is possible to aspire to achieving a balance between both notions as the best possible scenario, the difficulty of

encompassing this task has led to different preferences between diverse analytical approaches.

Consequently, positivist views focus on the treatment of cases and the procedural speed with which the ICC acts. Furthermore, by claiming the ICC vocation to investigate each situation with the aim of finding those most responsible for international crimes, positivist approaches foresee that national mechanisms of administration of ordinary and community justice will be replicated in ICC initiatives and will complement its mission of enforcing ICJ and imposing sanctions on those responsible for international crimes. In this framework, the proper constitution and functioning of the different ICC organs and the fulfillment of each one's tasks becomes crucial.

In contrast, non-positivists perspectives are especially concerned with: (a) how the ICC operates; (b) the interests, ideas and values that drive the ICC to act; and (c) what its discourses and its position in the international system represent for global governance. Moreover, they better reflect the tension between: (a) the discourses of ICC officials and those who support the ICC; and (b) the voices and experiences that call into question the attempts to consolidate a narrative that exalts the ICC.

Finally, the differences between positivist and non-positivist approaches are also notable in relation to the categories that govern the ICC guidelines. Thus, for the former, precision in the use of categories is a distinctive aspect of the ICC work, which facilitates an increasing understanding of the legal framework of international crimes and the ICC's role. In contrast, non-positivist views are more akin to problematizing these categories by conceiving them as a sort of limitation for understanding the multiplicity of universes of meaning intertwined in each community of each ICC State Party.

5. FINAL REMARKS

The present volume has analyzed the role of the ICC from analytical perspectives that adopt modernity and its subjectivities, regardless of whether they are built on the basis of legal positivism or depart from it (leaving for the next two volumes the analysis of the ICC's

role from approaches that denounce modernity to develop proposals for the transformation of international society and IL).

Each one of the perspectives from which the ICC's role has been approached in this work presents its own scenario, which reflects the plurality of visions that currently exist on this issue and renders useless any attempt to seek a certain uniformity in the way of understanding the ICC's role in its triple condition of IO, the first and only permanent international criminal tribunal that applies ICL and the central institution of the current system of ICJ.

Given this situation, an effort has been made to facilitate the comparison between the different understandings of the ICC's role in order to determine the common elements and the differences between them. To this end, the presentation of the various analytical perspectives addressed has been organized according to their conceptual assumptions and methods of analysis. The work has been divided into two well-defined parts, depending on whether the relevant approaches are based on legal positivism or separate from it. Moreover, in this last chapter of conclusions an attempt has been made to identify the continuities and discontinuities between the analytical perspectives addressed in both parts.

Assuming an authentic commitment to dialogue among the multiple and heterogeneous ways of understanding the ICC's role, the aim has been to provide the reader with the opportunity to compare alternative interpretations of the content and elements of the ICC's role and its fulfillment in the situations and cases open to date, thereby offering a broad analytical panorama for those interested in its comprehensive study.

This reflects the strong commitment of the authors who have carried out the research presented in this work over a five-years period (2019-2023) to redefine the limits on how to understand a relatively young and novel international actor such as the ICC, which has undeniable aspirations for universality. Undertaking this task has undoubtedly been favored by the support provided by the IIH and the Research Networks on Ibero-American Perspectives on Justice, and on Responses to corruption associated to Transnational Organized Crime.