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

PART II

Analytical perspectives that denounce modernity and its subjectivities: approaches from disciplinary analytical frameworks coming from Philosophy, Theology, International Law and International Relations

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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tirant lo blanch
Valencia, 2026

Colección Perspectivas Iberoamericanas sobre la Justicia

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TELFS.: 96/361 00 48 - 50
FAX: 96/369 41 51
Email: tlb@tirant.com
www.tirant.com
Librería virtual: www.tirant.es
ISBN: 979-13-7010-842-7
MAQUETA: Tink Factoría de Color

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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

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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.

the Research Networks Ibero-American Perspectives on Justice and Responses to 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.

Acknowledgments

To the members of the International Legal 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.

To Tirant lo Blanch Publishing House (Spain), the IIH (The Netherlands) and the Joaquín Herrera Flores Institute (Spain/Brazil), for having made possible the creation of the Collection "Ibero-American perspectives on justice", in which the works of the Research Networks coordinated by the IIH are published.

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 Chamber
AFRC	Armed Forces Revolutionary Council
AP	Additional Protocol
ASP	Assembly of States Parties
AU	African Union
CAR	Central African Republic
CDF	Civil Defence Forces
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIA	Central Intelligence Agency
CICC	Coalition for the International Criminal Court
DRC	Democratic Republic of the Congo
EAL	Economic Analysis of Law
ECCC	Extraordinary Chambers of the Courts of Cambodia
ECtHR	European Court of Human Rights
ECLAC	United Nations Economic Commission for Latin America and the Caribbean
EU	European Union
FARC-EP	*Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo*
FIC	First Instance Chamber
FNI	*Front des Nationalistes et Intégrationnistes*
FPLC	*Forces Patriotiques pour la Libération du Congo*
FRPI	*Forces de Résistance Patriotique en Ituri*
GBV	Gender-Based Violence
GCs	Geneva Conventions
HRCom	Human Rights Committee
HRC	Human Rights Council
HRGJ	Human Rights and Gender Justice
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights

ICC	International Criminal Court
ICC ASP	Assembly of States Parties to the Statute of the International Criminal Court
ICC EC	ICC Elements of the Crimes
ICC OTP	ICC Office of the Prosecutor
ICC RPE	ICC Rules of Procedure and Evidence
ICJ	International Criminal Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY/R	International Criminal Tribunals for the former Yugoslavia and Rwanda
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IJ	International Justice
IL	International Law
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IOs	International Organizations
IR	International Relations
IS-K	Islamic State-Khorasan Province
LRA	Lord's Resistance Army
MLC	*Mouvement de Libération du Congo*
OAS	Organization of the American States
OECD	Organization for Economic Cooperation and Development
OPCD	Office of Public Counsel for the Defence of the International Criminal Court
OPCV	Office of Public Counsel for Victims of the International Criminal Court
PTC	Pre Trial Chamber
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon

SxV	Sexual Violence
SxV/GBV	Sexual Violence and/or Gender Based Violence
TC	Trial Chamber
TCL	Transnational Criminal Law
TFV	Trust Fund for Victims
TRC	Theory of Rational Choice
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNICEF	United Nations Children's Fund
UPC	*Union des Patriots Congolais*
US/USA	United States of America
VPRS	Victim Participation and Reparation Unit of the Registry of the International Criminal Court
WCGJ	Women's Caucus for Gender Justice
WIGJ	Women's Initiative for Gender Justice

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 J.R. Blaise 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 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 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 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,
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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 (Spain): 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: Hector 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; (b) constitutional and electoral law; (c) administrative law; (d)

disciplinary law in the justice and security areas; (e) private law; (f) financial and tax law and international non-judicial cooperation; (g) criminal law; (h) criminal procedural law; (i) international judicial cooperation; (j) international criminal law; (k) international human rights law; and (l) 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. Hector 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. Blaise 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 were 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 & 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 (SCSL) (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 a 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 theoret-

ical 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 in 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 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 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).

These 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 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.

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PART II
APPROACHES FROM PHILOSOPHY AND THEOLOGY

Chapter 2
The Perspectives of Ethics, Praxis and the Symbolic[*]

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1. INTRODUCTION

There are multiple approaches that can be taken to the concept of "justice", ranging from those that approach it from a foundation anchored in legal theory, to those that analyze it from a pragmatic perspective. Moreover, interdisciplinary approaches complement and question both the discursive and the pragmatic approaches.

This chapter demonstrates the need for dialogue between the theoretical and pragmatic positions without falling into extremes or ignoring the intellectual wealth of each other's counterparts (Seleme, 2003: 192). It takes an approach which is articulated through a philosophical and theological analysis that links ethics, praxis and the symbolic as regards justice. Using these elements as a starting point, the chapter examines international criminal justice (ICJ) and the role of the International Criminal Court (ICC), highlighting their tension with expectations of justice in different national contexts.

Through dialogue and the construction of knowledge, an opportunity is opened up for reflecting on the interaction of different aspects related to the theory and practice of justice. This provides a different perspective on the needs, potentialities and elements that are essential for the implementation of justice at both the national and international levels. Likewise, it provides the possibility of cooperation based on the vital recognition of the other as a partner (Lévinas, 2000).

Given the foregoing, the present chapter articulates in section 2 the theoretical aspects of ethics, *praxis* and the symbolic. It then addresses in sections 3, 4 and 5 their relationship with justice, ICJ and the ICC's role. It concludes with some final remarks in section 6.

2. ETHICS, *PRAXIS* AND THE SYMBOLIC

The horizon of reflection from which this chapter is approached must be clarified. To do this, the ethical approach and how it generates a possibility of analysis around justice are first addressed. Following that, the analysis turns to the questions as to how *praxis*: (a) constitutes an element of concretion of reality; and (b) is directly

related to ethics, thereby accounting for the need to strive for a contextualized and operative justice, in line with its episteme. Finally, the symbolic dimension of justice is developed.

2.1. Ethics

The origins of the term "ethics" can be traced back to the term "*ethos*" in Greek philosophy, which refers to character or custom (Cortina, 1997), including the life, decisions, and customs of human beings as a result of their particularities as individuals and of life in society. Placed in in its original context, "*ethos*" is understood as the predilection for the exercise of reason, reflection, and the search for principles that allow a representation of a contextualized world (Jaeger, 1962). Thus, questioning and a contemplative attitude are inherent elements of human nature and, for that reason, can be perceived in a pragmatic way dating from the very origins of humanity (López, 2002).

Ethics has also been defined as a branch of philosophy, which is elaborated through a practical methodology and purpose, and whose object of study is human behavior (Rodríguez, 2010: 21). The association of ethics with philosophy is an opportunity to acknowledge some of the foundations that underlie the episteme of ethics: the ongoing search for what is good and what is true.

Reflection and reason are aspects that give ethics its identity and foundation. Thus, references to ethics cannot be equated with references to norms, nor with the application of such norms by science. This is because ethics is part of the reflective and self-referential level of philosophical discourse (Cortina, 2002: 29-30).

Although ethics is associated with philosophy due to its conceptual and argumentative criteria (Cortina, 2000), this does not exclude it having its own repercussions or practical concretions. Accordingly, there are strong contemporary movements that seek to furnish ethics with a more practical meaning, being elaborated through such areas as bioethics, applied ethics or business ethics among others (Pérez, Silva, Quintero, Rodríguez & Niño, 2019).

Ethics is also characterized as the aspiration to a life fulfilled by actions considered to be good (Ricoeur, 2002: 241). As a result, ethics draws inferences, puts variables under consideration, assesses consequences and defines those actions that can be operationalized according to the demands of the context, the opportunities and the possibilities for individual choice.

Hence, ethics cannot be separated from the person, given that it comprises a rational act of one who, in his/her autonomy, freedom and deliberation, seeks to guide his/her action for what is good and relevant in relation to the existing possibilities. In this sense, ethics becomes a search that is associated with a path that all human beings travel, and which, based upon vicissitudes, traditions, cultures and other vital elements, shapes their way of understanding the world and living in it. It is in this task of living that the operational part of ethics is concretized.

2.2. Praxis

The roots of the term "*praxis*" can be traced back to the Greek verb *prattein*, which in its origins and context meant the human act itself (Vigo, 2008). Thus, *praxis* is associated with human action.

Praxis possesses various characteristics, such as a link with ethical actions and an impact on reality. As a result, "*praxis*" is "practice" which combines knowledge, moral assessment and action. Furthermore, *praxis* is necessarily critical of unjust social reality and therefore tends to reject all forms of domination (Yurén, 2013: 12).

The Australian author Shirley Grundy (1987) considers that *praxis* is characterized by the following five elements: (a) the two constitutive elements of *praxis* are action and reflection; (b) *praxis* is developed in the real, and not in an imaginary or hypothetical world; (c) the reality in which *praxis* takes place is the social or cultural world (the world of interaction); (d) the world of *praxis* is the constructed world, not the natural world; and (e) *praxis* assumes a process of constructing a meaning to things, acknowledging that meaning is socially constructed, and is not absolute (146-148).

Under this approach, it is possible to infer the necessity that human action must be preceded and enhanced by reflection. This results in *praxis* being a premeditated practice. Moreover, it is determined by reality, which marks the context and specific place of human action. It also has various dynamics marked by social and cultural logics, which provide sense and meaning to such action.

All these characteristics complement and strengthen the most basic notion of *praxis* around acting and action. They also show a tension with respect to theory, insofar as theory: (a) constitutes an essential element in the understanding of social, cultural, political and economic phenomena; and (b) is characterized by logical and deductive reasoning in a constant search for understanding the inputs, elements and aspects that make it possible to comprehend reality at an exclusively rational level (Wiggershaus, 2009).

The greatest challenge presented by this tension revolves around the balance between theory and practice (Rawls, 1995). In this area there is a clear conflict because there are opposing realities which, nevertheless, could well be mutually complementary and enriching (Pérez, 2019). To address this challenge, various authors propose an exercise of conciliation based upon the acknowledgement that human actions can be illuminated by rationality. This approach is known as "practical rationality", and it is understood as a principle that guides human actions. It is based on the premise of "theoretical rationality", but transcends it so as to construct a belief system that emerges from human actions (Fernández, 2014).

Practical rationality gains strength when it is understood that practical issues linked to reality can frequently not be approached or understood from the sole perspective of theoretical rationality (Martínez, 2007: 316). Thus, practical rationality accentuates new and diverse dynamics of understanding and acting within the surrounding reality. As a result, *praxis* becomes a research scenario which gives birth to a contextualized rationality (Nieto & Santamaría-Rodríguez, 2020).

Paul Ricoeur (2002: 252) relates practical rationality to practical wisdom, which is referred to as contextualized moral judgment, and for which conviction is more decisive than the rule itself. With these

elements, it is possible to have an idea of the relevance of praxis to shape the reality that surrounds human beings.

With regard to the articulation between ethics and *praxis*, it is necessary to address their interrelation and complementarity. In this sense, ethics reflects the intention underlying human action, which is characterized by its rationality. Thus, ethics accounts for the foundation that enables the unleashing of human action, based upon a deliberative exercise that determines what is good and what is wrong. *Praxis* is an element essential to ethics for, without it, ethics, understood as theoretical rationality, would lack any link with reality. It would remain as speculative precepts or orientations, decontextualized or without any meaning associated with reality. For this reason, the Australian philosopher Peter Singer (2017: 206) states that ethics is practical, or it is not truly ethical. If it is not good in practice, neither is it good in theory.

2.3. The symbolic

Symbols are a type of mediation that falls between human beings and the reality that surrounds them. It constitutes a system that characterizes the way the human intellect "knows", moving from the physical observation of reality to the construction of a symbolic universe (Cassirer, 1967). For Ludwig Wittgenstein (1973), there is a clear difference between stating and showing. Thus, while stating is the result of a positivist rationality (for instance, the statement of science), showing: (a) supposes the presentation of the mystery, which is revealed through the symbol (it is not thus possible to say, but only to show); and (b) has greater relevance in relation to ethics, the aesthetic and the just.

The role of the symbolic takes on a special relevance insofar as it enables the generation of hope. According to Umberto Eco (1988), this transcends biological and physical frontiers, so as to open up to a world of utopia mediated by religious practice, philosophical thought, artistic manifestations or institutional practice aimed to bring about a symbolic order. Thus, the symbol imprints its own character as it represents and realizes a reality external to it.

Hans-Georg Gadamer (2005) employs the image of the *tessera hospitalis*. This was a tablet which innkeepers would divide into halves in order to recognize guests who had previously visited them by joining the fragments when they returned at a later time. This practice allowed a material object, such as a tablet, to symbolize an intangible moment that had occurred in the past, but which was projected into the present when the guest returned to the inn. In this way, the *tessera hospitalis* allows the past to become present and so be recognized as valid (Gadamer, 2005: 205). In this way, the symbol realizes that immaterial reality which it represents. Consequently, the identification of a symbolic dimension in ethical *praxis* means transcending a simple reference to justice, by making justice present in its actions (*repraesentatio*).

As understood by Ricoeur (1995), the symbol has a double intention, since it unveils a reality that can be interpreted literally, but which also hides an analogical dimension which requires a hermeneutical process of interpretation, understanding and constitution of meaning. For this reason, symbols are opaque, because the literal and original sense points to another analogical sense, which is not communicated to us through it. This opacity constitutes the real depth of the symbol itself, which is inexhaustible (Ricoeur, 1969: 252). In consequence, from a semantic perspective, symbology transits between two dimensions, one primary or literal and the other latent; in order to pass from the first one to the second one, it is necessary to resort to the analogy.

The aforementioned allows us to identify two levels from which a symbol can be approached. The first is literally, that is, something which is structured theoretically and objectively. The second is through the analogy of the symbol. This is understood as that point of equilibrium which makes it possible to place the first level in a dialogue with the voices and hopes that emerge from the experience of *praxis*. It is therefore in this way that that which is symbolized is made operational.

In order to understand the symbolic dimension, one begins with the literal (the objectivity of the symbol), in order to facilitate a dialogue with its opacity (the subjectivity of the symbol). This analogical exercise seeks to identify the relationship between the univocal and

the equivocal, which is constituted in ways of generating meaning. This dialectic recognizes, in the first place, the meanings that arise from the theoretical and objective construct. Nevertheless, it also requires signifiers that are provided by subjectivities, social representations and hopes. It is due to the dialogue between meaning and signifiers that symbolic meaning is consolidated (Nieto, 2017;2019).

3. THE PERSPECTIVES OF ETHICS, PRAXIS AND THE SYMBOLIC ON JUSTICE

Once the epistemological perspective of analysis has been set out, it is time to identify its relationship with justice. To do this, a scenario of recognition of justice is initially presented. Justice is then addressed from the perspectives of ethics and *praxis* as complementary aspects. Finally, the connection with the symbolic is established.

Justice is not exhausted in the construction of the legal systems in which it arises (Ricoeur, 2002: 245) because, in its social sense, it is considered the basic structure of all society (Rawls, 1995: 20). In this way, an understanding of justice solely based on institutions or philosophical theories on what is good or bad is not sought. On the contrary, the idea is to also analyze justice from the *praxis*, since some moral philosophers treat the problems of ethics in an abstruse way because they raise the principles of justice to the sphere of the ideal so as in the end to provide no guidance applicable to reality (Linde, 2010: 44). Hence, the greatest challenge is precisely to bring together theory and reality.

In this context, Martha Nussbaum (2007) points out that theories of social justice must articulate two horizons. The first, abstract, which allows a certain degree of generality and grants a theoretical force that is not reduced to casuistic or minor matters, but which can serve as a guide for diverse situations. The second is focused on the principle of reality, which allows a certain sensitivity to the current and urgent problems of the world, in such a way that the theoretical foundation allows for adaptation so as to provide effective answers to these problems (Santamaría, Nieto & Pérez, 2020).

As a result, proposing an approach to justice founded upon the exclusivity of theory or practice, can lead to absolutisms that are not adapted to particular needs, or do not recognize the guiding principles of the notion of justice. This is why, for the purposes of this chapter, justice is understood as a construction of social order anchored in the principles of cooperation and relationality. This means, ultimately, that it is not possible to speak of justice without referring to some aspects in which it can be operationalized. In this way, justice is situated on a level in which ethics, *praxis* and the symbolic acquire meaning (Rahner, 1962).

By recognizing the other human being with whom the act of coexistence is shared, cooperation and association can be carried out, which makes coexistence much more tolerable (Walzer, 1998). In this way, it is possible to pass from a state of conflictive and chaotic nature, as described by Hobbes (1980), to a state in which cooperation and social agreements can guarantee an order on which coexistence is founded.

In this regard, contractualism provides an important contribution when it is understood from an ethical or moral perspective, because it: (a) offers various elements that can promote relationships and coexistence within societies; and (b) does not grant exclusive responsibility for their management to the State (or to any specific institution). It thus enables different dynamics at the personal, inter-relational and community levels (Nieto & Rodríguez, 2017; Scanlon, 2003; Sandel, 2011).

From this perspective, members of a society, in exercising their liberty, autonomy and co-responsibility, assume the role of actors because they can take actions not conditioned or regulated by institutions, norms or precepts. As a result, the possibility of self-government, understood as the empowerment to assume a position and a role with respect to oneself, is acknowledged. This does not exclude the possibility of being able to think and take care of others.

Accordingly, the dialogues and constructions that can be taken on as members of a society with respect to each other (Habermas, 2000) are essential to cementing our mutual responsibilities. It is within this scenario where ethics and *praxis* must have a deep influence on the

individual who assumes his responsibility reflexively as he acts (Pérez, 2018). Nevertheless, it cannot be ignored that, in terms of human freedom, there are those who do not assume their role as actors or participate in social cooperation exercises.

In this context, institutions, which are characterized by their ability to bring about a symbolic order and to form actors linked to this order (Dubet, 2007: 40), become relevant. In this way, justice becomes an institution insofar as it portrays ideals and human pursuits which, by not being achieved through cooperation and personal and social empowerment, acquire a symbolic role. As Dubet (2007) affirms, the church, the school, the family or justice are institutions which are part of a symbolic order because they foster a social link inside the individual nature.

In this way, justice links the perspectives of ethics, *praxis* and the symbolic because, although they are founded upon the individual, they are also projected in such a way that they surrender responsibility to the institutions. Ethics and *praxis* demand that justice itself be characterized by the reflexivity and operability that justifies human action. The symbolic, for its part, includes the burden that human beings impose on justice, as it is always expected but only sometimes happens.

Inherent to the symbolic, "hope", which is understood as part of a utopia associated with the representation of that which is awaited, emerges (Bloch, 2007). This is because hope is itself characterized by awaiting that which is longed for and dreamed of to happen, until it arrives. As Cullen (2004: 197) points out, this happens because: (a) there are alternatives; (b) we are constituted by the possible; and (c) good and justice transform utopia into a commitment.

Seen this way, the symbolic is what is expected; it is what guarantees that, despite the fact that individuals are consistent neither with their sense of co-responsibility anchored in ethics, nor with concreteness in their actions, there is a conviction that there is something that can reestablish order. This breaks in a certain way with the state of conflict and selfishness. In this scenario, justice, in its social sense, alludes to the importance of institutions as contributors to the reestablishment of the expected order.

Thus, the symbolic takes on a meaning that is associated, not so much with individual responsibility, but with what is expected of those who can restore order or correct or mediate in the face of wrong or unjust actions. As a result, justice is linked in a real and contextualized way with human action, assuming principles of ethics and *praxis* in order to be able to guide and orient decisions and the search for justice. In this way, justice feels itself co-responsible and permeated by that which it symbolizes and that which the individual expects from it.

4. THE PERSPECTIVES OF ETHICS, *PRAXIS* AND THE SYMBOLIC ON INTERNATIONAL CRIMINAL JUSTICE

Regarding justice as an institution (Dubet, 2007), the perspectives of ethics, *praxis* and the symbolic run beyond the individual level and acquire a collective meaning that frames the ideals and acts of justice within the framework of societies. This implies that social institutions, not only symbolize something, but also expect an effective and coherent *praxis* having social principles in conformity with ethics.

Nevertheless, due to various circumstances, justice, as an institution, is not always operative within the framework of social order and in representation of the State. In many cases this implies, in one way or another, an effect upon: (a) ethics and *praxis*, insofar as there are times when such institutions as justice do not perform well, either due to lack of will or due to flawed actions; and (b) the symbolic, because institutional *praxis* requires the realization of what is symbolized, in this case justice.

Faced with this situation, the ICJ finds its place by contributing to processes of justice that in one way or another are affected by the inaction, unwillingness or unavailability of national justice (Olasolo, 2012). In this way, justice becomes more than what States can provide to their citizens, since there is a much broader international society that can contribute and mediate on the reestablishment of social order.

The support that international society provides to the different States on issues of justice is manifold. This is reflected in the multiple antecedents of ICJ institutions and organizations that have been born to support various processes, which cannot be fully addressed by States alone. This leads to an institutional order, which seeks guarantees of basic rights and duties regardless of nationality (Diez, 1994), and which signifies the possibility of strategic association with national justice to achieve the ends of justice.

An example of the above can be found in the ICC Statute, which stipulates in its preamble that it is the duty of every State to exercise its criminal jurisdiction against those responsible for crimes within the jurisdiction of the ICC. Thus, the ICC Statute reaffirms the importance of domestic jurisdictions in the search for justice, even if there are international instances that can back-up their investigative and prosecutorial efforts, or that can, to some extent, contribute to the clarification of the international crimes that have occurred.

The preamble of the ICC Statute also establishes that the ICC is complementary to national jurisdictions, which implies that the creation and existence of the ICC does not interfere with national justice but, instead, complements it in particular situations under different circumstances.

As a result of the foregoing, national jurisdictions have international allies or supporters of processes that are being carried out in the domestic sphere. In this context, it would seem that a potential for action is being nurtured which will make justice something operative and real, and which will reflect in one way or another a *praxis* (that is, a reasoned practice, consistent with an ethical action, based upon supreme principles functioning as guides as to what is correct and plausible in the ordering of human behavior).

Having these elements, IJ can become a beacon of hope emerging from the desolation and hopelessness generated by an environment in which national justice does not achieve the hoped for results, and where the inaction, the unwillingness or the unavailability of States is evident. This allows IJ to become a new institution, which allows for the revitalization of the expected, bringing with it comfort and hope for those who have been victims.

5. THE SYMBOLIC CONSTITUTION OF THE INTERNATIONAL CRIMINAL COURT

The creation in 1998 of a permanent ICC was the culmination of a process that lasted more than a century, since it was first proposed in 1872 with the goal of investigating, prosecuting and punishing serious infractions of the newly born rules on armed conflict (Hall, 1998). Its creation resuscitated the wavering hopes of victims who viewed with deep skepticism the inaction of national justice systems, which were inoperative when faced with those most responsible for the most serious crimes of international concern.

Since then, to think of a permanent international criminal tribunal that responds to a call for universality and has the commitment to investigate and prosecute those most responsible for international crimes, is not utopic, but constitutes an operating reality that represents in one way or another an ethical responsibility and a concrete *praxis*. Despite the numerous challenges the ICC has faced since its establishment, it represents a significant step towards achieving the post-World War II ambition of creating a permanent international criminal court. This court enforces accountability for leaders who exploit state and non-state structures to carry out systemic or widespread violence against minorities or even broad sectors of civilian populations.

It also completes the process of recognizing a dual normativity. On the one hand, there is a substantive normativity that prohibits human beings from engaging in certain behaviors that especially affect the core values upon which post-World War II international society has been built (it thereby consolidates an ethical perspective or understanding that underlies this historical event). On the other hand, an adjective normativity, which declares and enforces the consequences for not respecting the primary norms, has also been created, making it possible to recognize the responsibilities for the crimes committed.

Nevertheless, although the approval of the ICC Statute benefitted from a large majority of States participating in the 1998 Diplomatic Conference in Rome, in the very process of establishing the ICC, there were significant differences among States in matters as important as the legal nature of the instrument creating the ICC, the scope

and triggering of its jurisdiction and the relationship between the ICC and national jurisdictions (Olasolo, Carnero, Seoane & Carcano, 2018: 396). These differences led to the distancing of most of the Great Powers (including three of the five members of the United Nations Security Council (UNSC) (China, the USA and Russia), all the nuclear powers (except France and the United Kingdom) and a significant number of regional powers (Saudi Arabia, Indonesia, Iran, Turkey or Egypt) from the ICC.

As a result, it was not possible to adopt a truly universal multilateral agreement that fully guaranteed the independence of the ICC in terms of jurisdiction, financial resources and permanent action. Accordingly, from its first steps, its capacity for action has been found not so much in the relevance of its founding mandate, as in the endorsement provided by the States Parties (art. 13 (a) and 14 of the ICC Statute), and even on certain occasions (such as those relating to the situations in Darfur (Sudan) and Libya) by the UNSC itself (art. 13 (b) of the ICC Statute). As a consequence, it is not surprising that the activities of the ICC have not, so far, had the impact hoped for by international society (Cassese, 2006; Escobar Hernández, 2000; Jiménez García, 1998; Olasolo, Carnero, Seoane & Carcano, 2018).

This is due to the lack of political will to create an international criminal tribunal that, together with its impact on the symbolic domain, would have a greater capacity for action in practice to effectively investigate, prosecute and punish those most responsible for heinous crimes (Olasolo, 2003). The significant impact that this can have on the interests of those who enjoy a hegemonic position in international society and those who exercise a high level of influence in, or even control over, national judicial systems is the main reason for this situation. This is why, as Peskin (2008) emphasizes, it is more than only a few States that carry great weight in international society, which have created structures that limit the mandate of the ICC. This is due to the role that the ICC plays as a central component in shaping a social imaginary focused on ending impunity for those most responsible for atrocious crimes.

For many authors, the problem is particularly serious in relation to those top officials who still continue to exercise some kind of control over States which are Parties to the ICC Statute and which finance

the ICC activities. This poses a greater risk of impunity, as a result of the control and pressure mechanisms exerted on the ICC (Ambos, 2013), which creates an obvious tension between what is expected of these States (ethics) and the way they behave in practice (*praxis*).

Furthermore, as has been observed with the repeated non-compliance by several African States Parties (including Chad, Malawi and South Africa, among others) with their obligations to cooperate with the ICC in the arrest and surrender of Omar al Bashir (President of Sudan until the beginning of 2019), this tension between ethics and *praxis* can also be extended to the actions of third-party States due to the influence of those implicated. In fact, the situation regarding Al Bashir (who, a decade after ICC Pre Trial Chamber (PTC) I issued two arrest warrants against him, has still not been surrendered to the ICC), along with the challenges presented by the ICC indictment of Urumu Kenyatta and William Ruto (former and current Presidents of Kenya), have caused significant tensions between the ICC and the African Union (AU).

This has been decisive in the creation of a Specialized Penal Chamber within the African Court of Human Rights through the Malabo Protocol (2014) for the investigation and prosecution of international crimes within the material jurisdiction of the ICC.

Given the foregoing, it is particularly important to understand the scope and limitations of criminal proceedings carried out by national jurisdictions in relation to international crimes. As Olasolo & Galain (2018) point out, since the 1990s there has been a broad variety of national investigations and prosecutions of those responsible for international crimes (Olasolo, 2017b). In particular, the experience of Rwanda has demonstrated the autonomy of national justice, which brought forward more than 1,300 cases that were not taken up by the International Criminal Tribunal for Rwanda (ICTR) (Tirrell, 2014). Furthermore, different processes have also been developed in Latin America, especially in relation to the top leaders of some military dictatorships, who, as is the case of Augusto Pinochet in Chile, Jorge Videla in Argentina and Alberto Fujimori in Peru, have been convicted in their respective countries.

Likewise, in the case of Colombia, hundreds of members of the army and the police have been convicted, and several thousand are being investigated, for the extrajudicial executions (known as false positives) of thousands of civilians, who were later passed off as members of the FARC-EP (Olasolo & Galain, 2018). To this must be added the investigations, prosecutions and convictions entered by the Colombian ordinary jurisdiction, by the Special Jurisdiction of Justice and Peace (created in 2005) and by the Special Jurisdiction for Peace against congressmen and governors backed by narco-terrorist paramilitary money (Olasolo & Galain, 2018). This is in addition to cases against members and top officials of the paramilitary groups, the *Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo* (FARC-EP) (today a political party) and the *Ejército de Liberación Nacional* (ELN) (which continues a non-international armed conflict against the Colombian government) (Olasolo, 2017).

As a consequence of the foregoing, Olasolo & Galain (2018: 103) emphasize that the number of criminal proceedings for international crimes carried out in any of the aforementioned national jurisdictions is greater than those that have taken place in the array of international and hybrid criminal tribunals established since 1990. Nevertheless, most of the national criminal proceedings have faced a common problem, which has to do with the guarantee of immunity that the highest representatives of the State receive.

A paradigmatic example of this common problem is the Colombian situation, in which, to date, there has been (neither in the ordinary jurisdiction, nor under the Special Jurisdiction for Peace created at the end of 2016 by the Peace Agreement between the Government of Colombia and the FARC-EP) no investigation or prosecution against the political leaders who approved the result-oriented criteria for internal promotion within the Colombian security forces, that lay at the roots of the aforementioned extrajudicial killings.

In the end, this has meant that national jurisdictions have only been able to try those leaders who have lost power because they have been defeated politically or militarily. Hence, those who are in the exercise of their office, or are shielded by the political parties that represent them, remain immune from criminal responsibility for the accusations that have been laid against them. This leaves national ju-

dicial institutions subject to intense political and economic pressure, which, in turn, has also caused a delay in the ICC judicial proceedings.

The same happens with national proceedings carried out under the principle of universal jurisdiction, which turns out to be practically inoperative in national jurisdictions. The reason for this situation is that said national proceedings are politically conditioned by state actions which protect those who hold power (Olasolo & Galain, 2018; Olasolo, Martínez Vargas & Fernández Polania, 2016).

It is for this reason that, given the lack of effectiveness of national jurisdictions vis-a-vis those most responsible for international crimes but who preserve their power or influence through state structures, the symbolic dimension of the ICC would appear to provide the main hope for the realization of justice (even despite its aforementioned limitations in its capacity to act).

The ICC symbolic dimension is the result of: (a) being a jurisdiction of last resort that can only be activated and exercised in the face of inaction, unwillingness or unavailability of national jurisdictions (Olasolo, 2012: 28); (b) having the mandate to end the impunity of those most responsible for most serious crimes of international concern (genocide, crimes against humanity, war crimes and aggression) (Olasolo, 2012: 27); and (c) rejecting, in accordance with article 27 of the ICC Statute, any claim of immunity by current or past state leaders.

Notwithstanding the views of those who highlight with skepticism the ineffectiveness of the ICC, it is worth remembering that, in reality, the ICC turns out to be the most important and practically the only alternative for opening a door to justice when it is closed at the national level. Thus, the ICC constitutes a true road map towards rendering the possibility of declaring and enforcing the criminal responsibility of those most responsible for international crimes who find protection in the domestic sphere (Cassese, 2008; Cryer, Friman, Robinson, & Wilmshurts, 2014; Gaeta, 2009; Schabas, 2010; Olasolo & Galain, 2018).

In this context, each ICC case can be understood as an authentic symbol of justice from two perspectives: (a) the realization of justice

that represents hope; and (b) the analog scenario subject to hermeneutics and discussion.

In regard to the first perspective, it is necessary to reinforce a bottom-up analysis of the ICC. Thus, in specialized literature on ICL and the ICC, there is a constant concern about the meaning that the ICC has for those States that abstained from voting, voted in the negative or abandoned the ICC Statute (and, in particular, those that are part of the UNSC). This promotes a top-down analysis that focuses on the many obstacles that the lack of support for the ICC has generated in its actions. As a consequence, a bottom-up analysis of the ICC, which is based upon the hope of those who, from below, see in it the only possible way to achieve justice in the midst of the ineffectiveness (and even the paralysis) of the national jurisdictions, has been left in second place.

In this sense, the symbolic transcends national borders, which on many occasions seem to determine the destiny of the peoples who live there and the problems they confront. The symbolic assumes ethical practices from which hope is maintained and establishes legal channels which, as Gadamer (2005) explains via the *tessera hospitalis*, show through their existence that to which they refer: in the case of the ICC, the possibility of investigating and prosecuting the most responsible persons for the most serious crimes of international concern that have seriously harmed human dignity.

The second perspective is built upon the dual intention of the symbol as expressed by Ricoeur (1995). According to this, it is propounded, first, that a literal reading of the ICC actions reflects the concerns of different academic sectors in the face of the danger of its ineffectiveness and the obstacles created by international society itself. This perspective allows us to consider the ICC actions in another way, by favoring the transition from practice as a *tecné* to the reflective dimension of *praxis*. This, in addition to exposing the challenges faced by the ICC, constitutes an ethical event because it includes a commitment to the ICC founding principles.

This second perspective (which is the one that includes the analogical dimension of the symbol) reveals the deep meaning that the ICC has for victims, for vulnerable communities and for all sectors

that recognize that justice with a human face happens at the ICC (the human face of both those most responsible for international crimes and those who have suffered their consequences) (Nieto, 2020).

Finally, it is important to highlight the dimensions of ethics and *praxis* that the ICC takes on. Insofar as it is considered an institution of justice, the ICC is a symbol for many communities and individuals who have seen their rights violated and their humanity suffocated by injustice. As a result, they demand from the ICC actions consistent with its principles and foundations, which cannot be separated from its responsibility regarding ethics and *praxis* concerning what the ICC itself symbolizes: a light of hope to claim that injustice be revealed and those most responsible be punished.

6. CONCLUSIONS

Ethical reflection does not exclude *praxis* but is interrelated with it through its guidance of those human actions that respond to local or global needs. This dialectic between ethics and *praxis* enables actions, guided by reason, in which theory and practice are part of a whole.

The symbolic links ethics and *praxis* by fostering a dialogue between a theoretical (objective) construct of the meaning of the symbol and the subjective experiences of those who have experienced it (which also include their social representations and hopes).

Justice constitutes a social construct which is developed upon principles of cooperation and relationality. Justice places particular emphasis on the principle of responsibility for one's own well-being and for the well-being of others, both at the individual and the institutional levels. Institutions are, therefore, guarantors of compliance with those primary agreements that make life in common and human dignity possible, while requiring ethics to make *praxis* reflective.

National jurisdictions are far from fulfilling this function with regard to the investigation, prosecution and punishment of international crimes committed in their territories. This generates great skepticism towards them.

Faced with this situation, the ICC, as an institution, assumes the symbolic responsibility of maintaining the hope of peoples, communities and individuals that it will be possible to put an end to the impunity of those most responsible for the crimes they have suffered.

The symbolic dimension of the ICC is embodied in a universal vocation committed to the investigation and prosecution of those most responsible for the most serious crimes of international concern. Nevertheless, the political will of certain hegemonic States and of state leaders who engage in this type of behavior have limited the scope of action of the ICC. This has not, however, prevented the ICC from fulfilling its symbolic role, which seeks to promote the construction of a social imaginary aimed at ending impunity for those most responsible for atrocious crimes.

Consequently, the force of the symbolic *praxis* of the ICC transcends the structures of the political interests of certain States and their leaders, to promote a practice consistent with ethical rationality, by maintaining the hope of the victims, who recognize in the ICC the only real alternative to promoting the realization of justice, by making it real for themselves and for others. As a result, they demand from the ICC actions consistent with its principles and foundations, which cannot be separated from its responsibility regarding ethics and *praxis* in relation to what the ICC symbolizes: a light of hope to claim that injustice be revealed and those most responsible be punished.

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Chapter 3
The Notion of Justice as Memory[*]

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1. INTRODUCTION

History has shown that the human species has committed violence since the beginning of time; this violence has, inevitably, reproduced itself and in the process left innumerable accounts of enormous suffering and oppression. In the face of this fundamental condition, authors such as Friedrich Nietzsche propounded the idea that justice should be directed mainly towards satisfying the need of every society to maintain social peace (Nietzsche, 2015). Thus, priority should be placed upon overcoming the memory of a past which generates more pain and resentment, even if this means leaving unsatisfied the demands of individuals and communities victimized by violence (ibid). As a consequence, even when faced by the demands for justice of such communities, this view affirms the need that the renunciation of such demands be imposed, implicitly or explicitly.

In contrast, for Walter Benjamin (2005), the suffering and meaninglessness of the victims' lives becomes the central point of justice. For this reason, justice should seek to put an end to the oblivion to which they have been condemned by official histories written by winners. By doing so, victims can rebuild themselves from the harm suffered, and thereby overcome, without forgetting (Adorno, 2006; Levi, 2005), their own condition as victims, a condition in which history has placed them.

The roots of this latter approach can be found in the work of authors such as Cohen, Buber and Rosenzweig who, from the end of the 19th century and the beginning of the 20th century, became authentic precursors of the so-called Frankfurt School. Nevertheless, it is Benjamin, who has left us through his allegory of the fallen angel of history, the most elaborated notion of justice as memory (Berón Ospina, 2019). For Benjamin, this notion means a view of the past that endeavors to attribute meaning to what has been, until then, considered as dispossession and oblivion, through a review of what the victor's memory hides and justifies to the detriment of the victims (Benjamin, 2005).

Based on the work of Benjamin, Manuel Reyes Mate elaborates the three basic elements of the notion of justice as memory: (a) the institutional and social recognition of the victims; (b) the reparation

of the personal harm suffered by the victims and the preservation of the memory of the materially irreparable harm; and (c) reconciliation (Reyes Mate (2011)). Moreover, the theoretical elaboration of Jon Sobrino provides for a better understanding of the ultimate meaning of these three elements (Sobrino, 2006).

The scope for the application in international criminal justice (ICJ) of the notion of "justice as memory" depends ultimately on the realization of some particularly controversial ICJ purposes. This is because an important part of the doctrine places into question the suitability of ICJ enforcement mechanisms for carrying out that objective. The International Criminal Court (ICC) is not alien to this debate, as can be seen in relation to the Lubanga, Ntaganda, Ngudjolo, Katanga, Bemba, Al-Mahdi and Ongwen cases (the first cases at the ICC in which trials have been completed).

In light of the foregoing, this chapter addresses the notion of justice as memory and its three basic elements (section 2), and then analyzes whether ICJ in general (section 3) or the ICC in particular (section 4) are suitable mechanisms for the provision of justice when justice is understood as memory. A short concluding section ends this chapter.

2. THE NOTION OF JUSTICE AS MEMORY

Benjamin elaborates his proposal of justice as memory upon a foundation that shows how the voices of the most disadvantaged have been repeatedly and systematically silenced by the narratives of the victors. This is commonly understood as history (Benjamin, 2005). For the author, historians have been charged with collecting facts and understanding them as a succession of events that have brought us to the present (ibid). What has happened in the past and what happens in the present are seen as the pathway to the achievement of progress, which is understood as the ultimate goal of society. In this way, past and present are valued in terms of achieving progress in the future. But what is hidden in this vision of history?

In his theses on the philosophy of history, Benjamin (2005) shows the other side of reality: that of the pain, oppression and hopeless-

ness of the victims of history and of progress. In our search for constant and continuous progress, humanity has found justification for the sacrifices of billions of human beings who have buried and forgotten. The defeated have been silenced by the voices of the victors, who have written history as they pleased and have defined and determined what should be understood as progress. History, in this order of ideas, is a heap of ruins that hides the voices of the fallen and the injustices that were committed against them. Oblivion becomes, in this way, a political project. This is how power manipulates information and hides the truth in order to exercise social and political control and institutionalize its own version of the "truth". This political project, moreover, allows not only the material extermination of the vanquished, but also generates their metaphysical disappearance because, in the end, nothing is left of them (Reyes Mate, 2009).

Faced with this situation, memory is the salvation of the past and of the present. It is the salvation of the past due to the new light we can shine in the present upon unknown aspects of the past. The memory of the defeated accounts for a part of reality that history omits; that which could have been but never was. To listen to the voices and yearnings for change that did not materialize is the only way to guarantee justice through the recognition of the injustice committed against those who have been forgotten by history (Benjamin, 2005). It cannot be said that an end to impunity is sought when the injustices of the past are relegated to oblivion (Reyes Mate, 2009; 2011). If injustices are forgotten, impunity prevails, because there is no way to compensate for the harm caused or to honor those who suffered from it. Without memory, injustice is forgotten, as is the ability to face it and overcome it.

Memory is also the salvation of the present because, thanks to its existence, the present can leap over its own shadow. In other words, memory can free itself from the causal chain that brought it into the world, understood as a reiteration of the version of the truth written by those who have systematically imposed their vision of history. It should not be forgotten that the injustices of the present are the consequence of the injustices of the past. Memory allows us to address the underlying problem by: (a) granting visibility to that sector of society that tends to be victimized; and (b) taking actions to prevent

members of that sector from continuing to be overrun. In this way, victims cease to be collateral damage and, instead, become a cornerstone of politics. By becoming visible they tell us upon what suffering, injustice and debts the present is built, and force us to take charge. This is the only way to overcome the structural injustice that has accompanied us throughout the history of humanity (Reyes Mate, 2009; 2011).

As a result, the only way to ensure the achievement of true and universal justice is through the memory of the fallen, that being those who have experienced suffering and oppression firsthand. Furthermore, bringing memory to our present allows us to modify it in such a way that we can avoid the repetition of unjust acts. This is not, therefore, about restoring the past, but about building a present based upon the teachings that can be found in the past (ibid).

For Reyes Mate, the only way to achieve universal justice is through the reconstruction of the memory of the victims of history through the individual accounts of those who have experienced suffering and oppression. This is because it is solely in this way that one can measure the seriousness of the inhuman acts that have afflicted humanity. These are acts which have been rendered invisible by political and economic forces in order to satisfy and protect those benefitting from those forces. It is only when the horrors to which humanity has been subjected throughout history are understood that memory steps up to allow us to take political actions that will lead us to transform the reality in which we live, and thus enter a path towards a true search for justice (ibid).

Based on the foregoing, Reyes Mate considers that the notion of justice as memory is comprised of the three main elements noted. The first two refer to the duty of institutions and society to recognize the victims as part of that society, to publicly accept the harm that has been caused to the victims, to repair what can be repaired and to preserve the memory of what is materially irreparable. The third, reconciliation, is the process that makes it possible to overcome the harm suffered by the victims through the recognition of it by the perpetrators, their repentance and the forgiveness of the victims (ibid).

Like Benjamin and Reyes Mate, Sobrino stresses that, in order to build a more supportive and just society, it is necessary to clarify the truth of those who are systematically and repeatedly silenced (those who are referred to by the expression, "the crucified people"). As a consequence of silencing their "truth", we live in a culture of concealment, of misrepresentation and, through this, effectively live a lie (Sobrino, 2006). For the author, therefore, it is not only structural injustice and institutionalized violence that exist, but also cover-up, misrepresentation and institutionalized lies (ibid). And many resources are invested in this. This reflects how victors and historicists tell the version of reality that serves their own interests, while most of the victims and their versions are not considered.

In light of this, Sobrino considers that giving way to the narrative of the oppressed is to allow them to have visibility, which in turn leads to their vindication and promotes structural changes that combat the suffering to which they have traditionally been subjected (ibid). It is, therefore, a matter of remembering to "return reality to the victims" and not to condemn them to an ultimate unreality. For Sobrino, as for Benjamin and Reyes Mate, it is only in this way that salvation, understood as true universal justice, can be achieved (ibid).

3. THE SCOPE OF APPLICATION IN INTERNATIONAL CRIMINAL JUSTICE OF THE NOTION OF JUSTICE AS MEMORY

The scope of application in ICJ of the notion of justice as memory depends ultimately upon particular ICJ purposes, especially the following: (a) the establishment of a historical narrative of the systematic and/or widespread violence that has occurred; (b) general deterrence embodied in the maxim "to put an end to the impunity", in particular, of those most responsible for international crimes; (c) bringing justice to the victims through their participation in the proceedings and their reparation; and (d) promoting social reconciliation.

The establishment of a historical narrative as to what occurred that resists the passage of time is seen by several authors as one of the purposes of ICJ. On the one hand, it offers States adequate processes to strengthen justice and to implement measures against repetition. On the other hand, it promotes international justice that endures over time, both for those who have already been victims and for those whom it is intended to safeguard in the future (Cassese, 1998; Drumbl, 2007; Osiel, 1997).

For some authors, ICJ enforcement mechanisms, and especially international criminal proceedings, are an ideal tool for historical reconstruction because the evidence presented is subjected to scrutiny by bodies exercising international jurisdiction within a framework of an adversarial process that provides for all evidentiary and procedural guarantees (ibid). This includes the application of strict rules on the admission of evidence in judicial proceedings, the rights of the defense, the principle of the presumption of innocence and the "beyond all reasonable doubt" standard of proof (Boon, Hafner, Huston & Rübesame, 1999). As Osiel (1997) points out, it would even be possible, if necessary, to restructure trials to facilitate the creation of a historical narrative as to what occurred that would be useful for society in the post-conflict period.

Furthermore, the contextual elements of international crimes require that the parties to the criminal proceedings present elements of evidence about the patterns of violence or the situation of armed conflict in which they have taken place (Cryer, Friman, Robinson & Wilmhurst, 2014). This has played a very relevant role to date in combating denialism. For Mark Drumbl (2007), the ICTY trial judgment in the Krstic case (ICTY, Krstic, 2001), which sought to create a historical record of what actually happened so as to counter attempts to deny the Srebrenica massacre, and the characterization by ICTR case law of the violence in Rwanda as genocide, are two good examples of this impact.

Secondly, preventing leaders of state institutions and organizations having the capacity to commit international crimes from violating international criminal norms due to the high cost that their infringement has had for other convicted leaders is, for some authors, another ICJ purpose (deterrence) (Tadros, 2011).

In this sense, the ICTY case law has expressly accepted in the Tadic case that deterrence constitutes one of ICJ purposes[1]. Likewise, the fifth preambular paragraph of the ICC Statute affirms that the States Parties are determined to put an end to the impunity of the perpetrators of international crimes and thereby contribute to the prevention of new crimes (Akhavan, 2001). Similarly, ICC Trial Chamber II in the Katanga case has affirmed the importance of deterring those who may potentially consider committing international crimes (ICC, Katanga, 2014: para. 38). Consequently, if it were possible to strengthen a culture of responsibility for those most responsible, and if national jurisdictions fulfilled their obligations to investigate, prosecute and punish international crimes as the drafters of the ICC Statute expected, then it would be possible to overcome the criticisms about the ineffectiveness of ICJ preventive role (Harhoff, 2008).

Thirdly, one part of the doctrine considers that doing justice for the victims is also an ICJ purpose. According to some authors, criminal proceedings can generate in victims the feeling that justice has been served by seeing their aggressors sitting in the defendant's dock and being sentenced to penalties proportional to the seriousness of the harm they have suffered (the ICTY trial judgment in the Nikolic case has emphasized that the punishment must therefore reflect the requests for justice of the people who —directly or indirectly— have been victims of the crime) (ICTY, Nikolic, 2003). Furthermore, the appearance as a witness in the criminal proceedings against their aggressors can also help to generate in the victims the feeling that they have been done justice, or at least it can make it easier for them to heal the open wounds as a result of the violence they have suffered (Cryer, Friman, Robinson & Wilmhurst, 2014).

In this sense, the degree to which criminal proceedings help to restore the dignity of victims depends, among other factors, upon the extent of their participation in them (Harhoff, 2008). Nevertheless,

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1 The ICTY Appeals Chamber has highlighted that deterrence is a consideration that can legitimately be taken into account when determining the penalty. Nevertheless, at the same time, it has warned that it should not be given excessive relevance. See: (ICTY, Tadic, 2000: para 48; ICTY, Nikolic, 2003: paras 89-90).

it is to be remembered that the ICTY and the ICTR have not always been exemplary in their treatment of victims and witnesses. Regardless, rendering justice to victims through their participation in proceedings and through fair reparation is undoubtedly an important aspect of the role of the ICC (Dwertmann, 2010).

Fourthly, the promotion of social reconciliation in a post-conflict period through the provision of a certain sense of justice in criminal proceedings is for some authors, another purpose of ICJ, insofar as it contributes to establishing the preconditions for a stable and lasting peace (Cassese, 1998; Burke-White, W. 2005). In this regard, Mark Harmon (2009) and Jens Ohlin (2009) emphasize that there is a broad belief that impunity tends to inspire the commission of international crimes in the medium and long term, thus presenting obstacles to peace processes[2].

The four above-mentioned ICJ purposes provide for a significant scope of application in ICJ of the notion of justice as memory, as its three main elements (institutional and social recognition, material and immaterial reparation and reconciliation) could be largely satisfied if it were possible to achieve the establishment of a historical narrative, the elimination of impunity for those most responsible, the recognition and reparation of the victims and the promotion of social reconciliation.

Nevertheless, the application, even partial, of the notion of justice as memory through the achievement of ICJ aforementioned purposes is deeply questioned by an important part of the doctrine that denies that ICJ aims at achieving such purposes. This is due to the alleged unsuitability of ICJ enforcement mechanisms for the satisfaction of these goals.

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[2] The UN Security Council (UNSC) has supported the connection between justice and peace by creating the ICTY and the ICTR with the aim of promoting reconciliation and a return to peace in the former Yugoslavia and Rwanda. See: UNSC, Resolution 827 (1993); UNSC, Resolution 955. This connection has been reinforced in the following ICTY cases: ICTY, Nikolic, 2003: para 60; ICTY, Plavsic, 2003: para 80. In this last decision, it was stressed that the recognition and full disclosure of serious crimes is very important to establish the truth about them. This, along with accepting responsibility for mistakes made, promote reconciliation.

These authors first reject that one of ICJ purposes is the creation of a historical narrative because, in their opinion, criminal proceedings are designed not to determine historical memory, but to account for the criminal responsibility of the accused. Thus, they emphasize that criminal proceedings are not suitable for the clarification of all the victimizing facts, but only those that are necessary in order to achieve a conviction (Alvarez, 1999). For this reason, it is difficult to approach the history of certain time periods without going beyond the limits imposed by criminal proceedings. Moreover, the material, temporal and territorial jurisdiction of the international criminal tribunals mean, in any case, that the historical accounts they present in their judgments can never be complete, even if evidence relating to events that occurred outside of the temporal or territorial framework over which they exercise their jurisdiction is admitted (ICTR, Nahimana, Barayawiza & Ngeze, 2003: paras. 100-104).

Furthermore, not only is a faithful reconstruction of all the facts constituting international crimes and the circumstances surrounding the harm suffered by each victim not possible, but, for some authors, it is inadvisable as well. In this sense, Koskenniemi (2002) considers it strange that a jurisdictional body would act as an arbitrator between the different historical versions about long-term conflicts in which many international crimes have been committed, since these conflicts are not easily interpreted through ICJ enforcement mechanisms. In fact, for criminal proceedings, it can even be counterproductive that they become a sort of political debate on the validity of the different historical narratives that may be presented. This is what seems to have happened in the International Military Tribunal for the Far East, if one takes regard of what was stated by Judge Röling in his dissenting opinion to the judgment, in which he stated that, on occasions, history had been distorted for political reasons (Röling, 2008; Minears, 1971; Bloxham, 2001).

Deterrence as an ICJ purpose is not without criticism either. Thus, in relation to the ICTY for example, it has been stated that the creation of the tribunal could not put an end to the international crimes committed in the former Yugoslavia between 1993 and 1995. Moreover, more generally, an important part of the doctrine affirms the following: (a) human beings do not rationally evaluate the costs and

benefits of committing international crimes (ICTY, Kunarac, Kovac & Vukovic, 2002: paras. 840, 843; Wipmann, 1999); (b) the preventive function of criminal law has less impact within a macro-crime framework, due to the particularities of the historical context in which international crimes are committed and the characteristics of those members of state institutions and non-state organizations that plan, order and execute them; (c) deterrence is ineffective against those who act from within an institutional setting, since they are protected by "an organic façade" that inevitably leads to the failure of prevention and rehabilitation measures (in this way, the effectiveness of deterrence in these cases does not depend so much on ICJ enforcement, but upon the necessary institutional reforms that must take place); and (d) ICJ has no deterrent effect in practice (Farer, 2000; Fisher, 2013; Golash, 2010; Stahn, 2012), due to the fact that for ICJ to have such an effect it would be necessary for the jurisdictional bodies that apply it to be quick and effective in bringing those most responsible to justice (Ambos, 2013; Francis & Francis, 2010).

Authors such as Gerard O'Connor (1999) also question whether granting justice to victims may constitute an ICJ purpose, considering that the emphasis of international criminal tribunals being placed on accountability for those most responsible, makes it unlikely that many of the victims will have the opportunity to see the prosecution and conviction of their oppressors. Likewise, victims' experiences as witnesses are not uniform because, while for some it has been something positive that has helped them, for others the experience has clearly been negative (Stover, 2004). Furthermore, reparation to victims through their restitution, compensation and rehabilitation is a characteristic of the ICC Statute itself, which is not shared by the other international criminal tribunals.

Finally, the promotion of social reconciliation is also rejected as an ICJ purpose by those authors who affirm that there is no empirical evidence that fully demonstrates the intuition outlined by those who propound it (Hayner, 2001). Furthermore, some national societies such as in the cases of Spain, Northern Ireland and Mozambique seem to have overcome the violence of the past without criminal proceedings, although a number of authors affirm that in these societies an authentic reconciliation has not occurred (Wilson, 2001).

Some authors emphasize that the practice of the ICTY has not been consistent in terms of considering social reconciliation as an ICJ purpose (Drumbl, 2007), while others have expressed serious doubts about the suitability of ICJ to promote peace and reconciliation. Moreover, some authors even suggest that criminal proceedings do nothing but promote the parties continuing with the conflict until one of the two is defeated (D'Amato,1994).

As seen in the next section, the controversy over the above-mentioned purposes, and over the related issue of the scope of application in ICJ of the notion of justice as memory, also extends to one of ICJ main enforcement mechanisms: the ICC.

4. THE SCOPE OF APPLICATION IN THE INTERNATIONAL CRIMINAL COURT OF THE NOTION OF JUSTICE AS MEMORY

To address the question as to whether the ICC may be a suitable mechanism to provide justice when it is understood as memory, it is necessary to first note that only two of the four ICJ purposes dealt with in the previous section (deterrence and participation and reparation of victims) are expressly included as core purposes of the ICC in its founding instrument, the ICC Statute, which entered into force on July 1, 2002. The other two (reconstruction of a historical narrative and reconciliation) are not referred to in the ICC Statute.

4.1. Reconstruction of a historical narrative of the events

The Assembly of States Parties to the ICC (ASP), in its eleventh session held in November 2012, emphasized that the participation of victims throughout the different stages of the ICC proceedings should allow them, among other things, to contribute to the reconstruction of the historical narrative of the situation under analysis and the clarification of the truth (ICC ASP, 2012). Consequently, although the ICC case law has not yet comprehensively addressed the participation of victims in the historical reconstruction of the events and their right to clarify the truth, this does not mean that in the

future these issues will not be approached in a more comprehensive way. Indeed, victims' rights have to be developed gradually through ICC case law (ibid).

Furthermore, some authors present several additional arguments to maintain that, despite the silence of ICC case law, the reconstruction of a historical narrative should be considered as an important part of the ICC's role (Vera, 2018). Thus, in conformity with arts. 54 (1) (a) and 66 (3) of the ICC Statute, the ICC Office of the Prosecutor (ICC OTP) must seek in an impartial and comprehensive manner the veracity of the facts under analysis by investigating all the circumstances that may incriminate, exonerate or attenuate the responsibility of those under suspicion. Likewise, the ICC Trial Chambers (TCs) must analyze, prior to issuing a decision of conviction or acquittal, whether or not the crimes charged and the accused's responsibility have been proven "beyond a reasonable doubt" (ibid). Therefore, the joint application of these two provisions implies that the ICC must endeavor to find the truth about the events that occurred, so that what is considered proven at the end of the trial will be the closest to the truth of the events. This ultimately represents a true exercise in historical reconstruction (ibid).

Although the foregoing arguments must be taken into consideration, they cannot ignore the fact that neither the ICC Statute, nor ICC case law, have so far understood that the reconstruction of a historical narrative constitutes a purpose of the ICC. Moreover, there are several additional elements that need to be considered when addressing this issue.

In the first place, it is important to bear in mind that the practical fulfillment of the ICC OTP's aforementioned duty, as provided for in art. 54 (1) (a) of the ICC Statute, is not without controversy. Indeed, the scope and the proper fulfillment of the obligations of disclosure of evidence to the defense deriving from it are two of the most recurring motives for controversy in the ICC proceedings (ICC Chambers, 2019)[3].

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[3] See, as an example, the request of the Defence of Alfred Yekatom to declare that the ICC OTP had violated its obligations to disclose evidence in the confirmation of charges proceedings.

Second, the application of the principle of presumption of innocence and of the beyond reasonable doubt standard of proof is not specific to the ICC, but is common to other international criminal jurisdictions, as well as to numerous national systems. Furthermore, the guarantees derived from them for the defense make the adversarial evidentiary debate on the material facts that constitute the crimes and the forms of responsibility imputed to the accused the epicenter of the trial. This relegates to the background the other factual issues that are the object of ICC proceedings, including the contextual elements of the crimes charged.

Third, it is important to bear in mind that in most of the cases in which a final judgment has issued so far (the Bemba and Ntaganda cases are the main exceptions), the acts of violence charged by the ICC OTP, confirmed by the Pre-Trial Chamber (PTC) and subject to the trial, are only a small fraction of the crimes within the jurisdiction of the ICC allegedly committed by the armed groups led by the accused persons[4].

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[4] See the following cases: (a) the Lubanga case is focused on the recruitment, enlistment and use of child soldiers in hostilities by the *Forces Patriotiques pour la Libération du Congo* (FPLC), the armed wing of the *Union des Patriots Congolais* (UPC), during the armed conflict that took place between August 2002 and December 2003 in the district of Ituri (DRC) —this conflict pitted the UPC/FPLC against other groups such as the *Front des Nationalistes et Intégrationnistes* (FNI) and the *Forces de résistance patriotique en Ituri* (FRPI) (all of them supported and financed by Uganda, Rwanda and/or the DRC in their fight for control of resources in the Ituri district); (b) the Ngudjulo and Katanga cases relate to the massacre in the town of Bogoro on February 23rd, 2003— this occurred within the framework of the campaign of violence against the civilian population carried out by the FNI and FRPI between February and March 2003 in numerous villages of the Ituri district; (c) the Al-Mahdi case is based upon the destruction of ten mausoleums and a mosque that were part of UNESCO's World Heritage Sites —this destruction took place during the occupation of Timbuktu (Mali) in 2012 by the Ansar Eddine group (a movement associated with Al Qaeda in the Maghreb) and other related groups; and (d) the Ongwen case focuses on the attack on four refugee camps (Pajule, Odek, Lukodi and Abok) among the many carried out in Northern Uganda by the LRA between July 2002 and December 2005.

Finally, the cases mentioned relate to leaders of organized armed groups who either clashed with the government forces of the country in which they operated (Al-Mahdi and Ongwen)[5] or entered into conflict with other organized armed groups (Lubanga, Ntaganda, Ngudjolo, Katanga and Bemba)[6]. Consequently, and without prejudice to what will be elaborated upon in the following subsections, this in itself constitutes a very relevant indication of the great difficulties that the ICC seems to experience in effectively investigating and prosecuting those who act from within state institutions while remaining in power.

4.2. Ending impunity for those most responsible for crimes within the jurisdiction of the International Criminal Court

The preamble of the ICC Statute expressly states that the ICC was established as a result of the firm conviction of the States Parties that the offences contained in the ICC Statute are the most serious crimes

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5 Al Mahdi was the director of the "hisbah" (a kind of religious police) when the Ansar Eddine group and other related groups took control of Timbuktu (Mali) in 2012. Ongwen was one of the main commanders of the Lord's Resistance Army between July 2002 and December 2005.

6 Thomas Lubanga was president and founder of the UPC and commander-in-chief of its armed wing, the FPLC, in the period between July 2002 and December 2003. Bosco Ntaganda was the deputy commander of operations of the FPLC. Mathieu Ngudjolo and Germain Katanga were respectively leaders of the FNI and FRPI. Jean Pierre Bemba was president and commander in chief of the *Mouvement de Libération du Congo* (MLC) —from which position in mid-2003, as a result of the distribution of power foreseen in the peace agreements signed with the DRC government, he would attain the vice-presidency of the DRC; this would be followed by his exile four years later in Portugal in 2007 and his subsequent surrender to the ICC by Belgium in 2008. In October 2002, Bemba ordered armed MLC units from the DRC to enter the Central African Republic (CAR) in support of the then president of the CAR, Ange-Felix Patasse. Their object, between October 2002 and March 2003, was to confront rebel forces led by his former head of state Major General Bozize, who had risen up against him (and who would eventually overthrow him after the MLC forces returned to the DRC in March 2003). See: ICC, Office of Public Information (n.d.). CICC, Bemba (n.d.); Human Rights Watch (2003a; 2003b; 2003c).

of international concern, constituting a threat to the peace, the security and the well-being of humanity. Therefore, it is necessary to put an end to the impunity of the perpetrators and thus contribute to the prevention of new crimes.

As a result of the foregoing, according to the preamble of the ICC Statute, the States Parties decided to take the following actions: (a) to adopt measures at the national level to investigate and prosecute the crimes within the jurisdiction of the ICC; (b) to intensify international cooperation to ensure that those responsible are effectively brought to justice; and (c) to establish a permanent and independent ICC, linked to the United Nations (UN) system and complementary to national jurisdictions, with jurisdiction over the most serious crimes of international concern. The aim of these actions was to guarantee that ICJ is respected and put into practice in an enduring way.

In light of the foregoing, it is evident that one of the main purposes of the ICC is the prevention of new crimes falling under the ICC jurisdiction through the adoption of the measures necessary to end impunity for such crimes through: (a) establishing the international criminal responsibility of those who have committed them; and (b) imposing penalties that are proportional to their contribution to the commission of the crimes (Olasolo, 2016: 93-146).

In this same sense, ICC TC II, in its sentencing decision in the Katanga case (2014), expressly indicated that deterrence (understood as dissuading those who could commit similar crimes) is one of the purposes of the penalty. This has been subsequently reiterated, inter alia, in the sentencing decisions in the Bemba (2016: paras 10-11), Al Mahdi (2016: paras 66-67.) and Ntaganda (2019: paras 9-10) cases.

Furthermore, considering that the ICC has repeatedly stated that its activities must focus on those most responsible for the crimes under ICC jurisdiction (ICC, Kenya, 2010; ICC, *Côte d'Ivoire*, 2011; ICC OTP, 2010; 2013; 2016a; 2016b), it can only be concluded that deterrence, as a core purpose of the ICC, seeks especially to prevent the leaders of state institutions and non-state organizations having the capacity to carry out campaigns of systematic and/or widespread violence, from committing new crimes, due to the high cost paid by other leaders convicted by the ICC (Akhavan, 2001; Harhoff, 2008; Tadros, 2011).

Despite the foregoing, however, the actions of the ICC since 2002 would appear to provide little reason to question those who argue that the ICC Statute does not provide the ICC the necessary tools to effectively carry out its role of deterrence. This is mainly due to its deep dependence on funding and cooperation from States Parties (especially by those States whose situations and cases are the subject of investigation and prosecution by the ICC) (Farer, 2000; Francis & Francis 2010; Golash, 2010; Mullins & Rothe, 2010; Stahn, 2012).

In this way, in its more than 20 years of operation, the ICC has barely been able to finalize a handful of trials against leaders of non-state armed groups at the local or regional level, for crimes within the ICC jurisdiction which, in most cases, represent only a small fraction of the international crimes committed by these groups. Only the armed group led by Jean Pierre Bemba (the *Mouvement de Libération du Congo* (MLC)) can be said to have had a national sphere of action in the Democratic Republic of the Congo (DRC) (BBC, 2018); its president also having held the position of vice president of the DRC.

Furthermore, of the approximately 25 remaining cases by the end of November 2023, more than half of them have been unable to proceed due to the fact that the accused have not been arrested and surrendered to the ICC. Among these are cases against important state leaders such as Vladimir Putin (current president of Russia), Omar Al Bashir (former President of Sudan) and Said Gaddafi (former de facto Prime Minister of Libya).

Likewise, although the ICC has been able to bring forward proceedings against other state leaders, such as Urumu Kenyatta (former president of Kenya), William Ruto (current president of Kenya) and Laurent Gbagbo (former president of Ivory Coast), the reality is that in none of these cases has it been possible to bring the trial to a conclusion. Thus, in the case against Kenyatta (2015), the ICC OTP ended up dropping the charges before the start of the trial due to, among other reasons, the difficulties encountered arising from the refusal of several witnesses to travel to The Hague to testify (Coalition for the ICC, 2021).

In the cases against Ruto (Coalition for the ICC, 2021) and Gbagbo (Coalition for the ICC, 2021), the respective TCs accepted the

applications of the defence for termination of the trial due to the lack of a case to respond to (these applications were made at the end of the presentation of the evidence by the ICC OTP)[7]. While the parties did not appeal the decision in the case against Ruto, in the case against Gbagbo and Blé Goudé the decision was appealed by the ICC OTP (ICC, Gbagbo & Goudé, 2019) and subsequently confirmed by the Appeals Chamber (AC) (ICC, Gbagbo & Goudé, 2021).

Consequently, the only case against a high representative of a State for which a final judgment has been issued so far is that of Jean Pierre Bemba (he was arrested and surrendered to the ICC by the Belgian authorities in 2008), in his capacity as president of a political movement (MLC), commander in chief of its military wing and vice-president of the transitional government of the DRC during the period between July 1, 2003, and December 31, 2006[8].

Nevertheless, not even this case has been without difficulties in that the accused and several members of the defense team have been convicted of obstruction of justice as a result of the preparation of the testimony of various witnesses (ibid). To this must be added the controversy generated by the AC which, in a controversial decision of 3 votes to 2, decided to revoke the conviction handed down by TC III. This revocation was due to alleged procedural errors committed at trial by considering as part of the campaign of pillage, sexual violence and murder, allegedly carried out by members of the MLC in the Central African Republic (CAR) between October 2002 and March 2003, specific acts of that nature that had not been expressly included in the decision to confirm charges (ICC, Bemba, 2018). As a result of this, Bemba returned to the DRC in 2018 to continue his professional life as a recognized national politician[9].

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7 To accept this type of Defence's request, it is necessary for the competent Trial Chamber to consider that, even when all the evidence presented by the ICC OTP is considered credible, no reasonable judge could find the accused responsible beyond a reasonable doubt. Thus, given the weakness of the case presented by the ICC OTP, it is considered that there is no case to which the Defence has to respond, and the trial ends.

8 See supra n. 6.

9 Upon his return to the DRC, Bemba tried to run for the position of President of the DRC, but his candidacy was rejected by national courts (BBC,

Faced with this situation, one cannot but conclude that the difficulties experienced by the ICC in effectively investigating and prosecuting those who act from within state institutions while they remain in power are patent. As some authors point out, this also calls into question the suitability of the ICC to generate an authentic deterrent against senior state leaders. In this sense, in more than twenty years of operation of the ICC, the absence of a single conviction against senior state leaders, makes it virtually impossible to affirm the existence of an effective deterrent against those who instrumentalize the state structures that they direct to have crimes within the ICC jurisdiction committed.

4.3. Justice for victims through their participation in the proceedings and their reparation

The provisions for the participation of victims in ICC proceedings and for their reparation through restitution, compensation and rehabilitation are two of the main features of the ICC Statute. This has led some authors to affirm that the provision of justice for victims is a core purpose of the ICC (Dwertmann, 2010; Pena, 2013; Vega, 2006).

For these authors, the establishment of the ICC has led to the transition from a purely retributive system of ICJ to a restorative one, aimed at: (a) recognizing the extent of the harm caused to victims; and (b) achieving a recognition of their human dignity through their sense of being heard and being taken into account[10]. For this, it has been necessary to overcome the traditional conception that the conviction of those responsible for international crimes is sufficient to

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2018). Nevertheless, in March 2023, he was appointed as Minister of Defence of the DRC (France 24: 2003)

[10] Other authors have also described the experiences witnessed in the encounters between victims and perpetrators outside the ICC framework. According to them, these encounters favour: (a) the strengthening of social relationships; (b) the personal and community transformation; and (c) the learning and achievement of common understandings. Nevertheless, these authors do not explain the reasons why this happens. See: Van Ness & Strong (2002); Raye & Roberts, 2007; Maxwell (2007).

satisfy victims' interests, in order to recognize the importance of their participation in: (a) the proceedings prior to conviction; and (b) the determination of their reparation following the conviction (Vega, 2006).

Together with the establishment of the ICC, two independent bodies have also been established whose essential purpose is to ensure the rights of the victims throughout the proceedings and their reparation and assistance, namely, the Office of Public Counsel for Victims (OPCV)[11] and the Trust Fund for Victims (TFV)[12]. The OPCV is an entity created to "provide support and assistance to victims and legal representatives of victims" (ICC, OPCV, 2019). Since its establishment, it has represented a large number of victims and has assisted victims' external legal representatives (ibid). The TFV is an independent body whose mandate consists of two main elements: (a) to make reparation to victims who have participated in those ICC proceedings that have ended with a conviction for the crimes they suffered; and (b) to provide assistance to victims of crimes under the ICC jurisdiction committed in the situations under ICC OTP investigation (regardless of whether there are open cases, ongoing criminal proceedings or final convictions regarding them) (Coalition for the ICC, Trust Fund for Victims, n.d.; Peschke, 2013).

Given its novelty in ICJ, the issue regarding the participation of victims in the proceedings was one of the most critical topics of discussion during the negotiations of the ICC Statute, since not all national legal systems attribute a procedural position to victims in their criminal proceedings. As a result of this debate, it was agreed that, in accordance with article 68 (3) of the ICC Statute, victims would be allowed to intervene in all procedural stages by presenting their "views and concerns", as long as: (a) they showed a legitimate interest for these purposes; and (b) the competent Chamber, in addition to ensuring that this would not affect the rights of the accused or a fair and impartial trial, deemed such intervention in the proceedings in question to be appropriate. In this way, it was guaranteed, at least for-

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11 Articles 43 and 68 of the ICC Statute, rules 87 and 88 of the ICC RPE and norms 8 and 81 of the ICC Regulations of Court.

12 Article 79 of the ICC Statute and rule 98 of the ICC RPE.

mally, that those who met the definition of victim provided for in rule 85 of the ICC Rules of Procedure and Evidence (ICC RPE) would have the possibility of participating in all stages of ICC proceedings (Vega, 2006).

Reparation and assistance to victims also form part of the justice component that the ICC Statute recognizes (ICC, ASP, 2012). The right of the victims to request reparation is enshrined in art. 75 of the ICC Statute and is independent of their right to participate in ICC proceedings. Thus, victims can decide not to participate throughout ICC criminal proceedings but may still request a reparation when they end with a conviction in relation to the crimes they have suffered.

As Balta, Bax & Letschert (2019) explain, to implement the reparation granted to victims (which, according to art. 75 of the ICC Statute, may take the form of restitution, compensation and rehabilitation and may have an individual, collective or mixed nature), it is necessary that the competent TC acts in coordination with the TFV[13], which shall design a plan through which reparation measures are proposed to be carried out. Once the Chamber has approved the TFV plan, the latter will proceed to implement that plan to make a direct reparation to victims.

For this, the TFV applies resources obtained through the judicial seizure of the assets of the convicted person (which can be decreed through a precautionary measure following the issuance of an arrest warrant, or a summons to appear, as provided for in art. 57 (3) (e) of the ICC Statute and rule 99 of the ICC RPE). The TFV may also use, if it considers it appropriate: (a) the voluntary contributions of governments or third parties; (b) the resources assigned by the ICC ASP specifically for the implementation of reparation measures; and (c) the resources obtained through fines and confiscations, previously transferred by the ICC to the TFV, in compliance with rule 98 of the ICC RRP and chapters II, III, IV and V of the Regulations of the TFV (ICC, ASP, 2005).

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[13] These principles were included in two rulings issued in the Lubanga case: ICC, Lubanga, 2008; 2015.

Finally, it is important to keep in mind that, according to rule 98 of the ICC RPE, there may only be direct reparation for the victims of those crimes for which the accused is convicted. Consequently, victims of other crimes within the jurisdiction of the ICC, including the cases in which the accused is acquitted (such as the Bemba case as a result of the June 8th, 2018 Appeals Judgement), can only benefit from the victim assistance projects sponsored by the TFV in accordance with its assistance mandate, and whose financing comes exclusively from voluntary contributions from States Parties or third parties. These assistance projects, which are comprised of general measures of physical rehabilitation, psychological support and material support for the populations affected by crimes contained in the ICC Statute, seek to contribute to overcoming the conflict and improving the living conditions of the victimized communities (Peschke, 2013).

Nevertheless, despite what has been said, the mechanisms provided in the ICC Statute and the ICC RPE for victims' participation in ICC proceedings and for their reparation, suffer from very significant limitations.

In relation to participation, therefore, it is important to underline that the right of the victims to intervene in ICC proceedings is neither absolute nor comparable to the procedural position of the ICC OTP and the Defense. As a result, the qualification as "parties" to the proceedings is reserved to these last mentioned, in contrast to the consideration of victims as mere "participants" (Human Rights Watch, 2021).

Furthermore, victims' participation, which must be carried out through their legal representatives, is subject to the approval by the competent ICC Chamber of their written requests for participation. For this approval, according to rule 89 of the ICC RPE, it is necessary to first complete, the form for the recognition of victim status, designed by the Victim Participation and Reparation Unit of the ICC Registry (VPRS). Only once the condition of victim has been recognized by the competent Chamber, will the Chamber proceed to assess the request of the relevant victim for participation and determine the scope of the "views and concerns" that he/she may present in accordance with the procedure established in rules 86 to 92 of the ICC

RPE. Consequently, the scope and modalities of victim participation ultimately depend upon the criteria of each Chamber, which can either extend it or significantly limit it (Vega, 2006). This generates a significant legal uncertainty for victims, and affects their procedural strategy, since they cannot know in advance the scope and modalities of the participation that will be permitted to them (Olasolo & Kiss, 2010).

This situation becomes more complicated due to the reluctance of the majority of the ICC Chambers (PTC I in the cases of Lubanga (2006) and Ngudjolo & Katanga (2008) being the main exception) to establish in a systematic way, and with sufficient advance notice, the modalities of participation of victims in the proceedings (ICC, Chambers, 2019). For their legal representatives, this complicates their ability to facilitate the design of their procedural strategy in terms of the scope of their intervention. Faced with this reluctance, the legal representatives have no choice but to submit a request for participation each time they wish to intervene in the proceedings which, in addition to delaying the proceedings, fragments the participation of the victims. It reduces their capacity to have an impact on the final result of ICC proceedings and on the narrative resulting from the facts considered as proven in the judgment (Olasolo & Kiss, 2010).

To this must also be added the difficulties, in terms of participation, that are generated by the distinction between victims of a situation, victims of a case and victims of the crimes for which the accused persons are convicted. Thus, the first group includes those affected by the commission of crimes within the ICC jurisdiction within the framework of a situation under investigation by the ICC. The second group is comprised of those who suffered harm as a consequence of the specific crimes which the accused persons are charged with. Finally, the last group corresponds to the victims of the crimes for which the accused persons are in the end convicted (Vega, 2006). This division means that each group of victims has a different form of recognition and has different possibilities for intervention throughout the different stages of ICC proceedings (ICC, Chambers, 2019).

As regards the possibility of testifying in the trial, although it is true that the participation of victims in the proceedings may also include

this modality, which allows them to directly narrate the suffering they have gone through (Vega, 2006), there is no certainty of testifying, given the impossibility of hearing all victims as witnesses. It is up to the ICC OTP to decide which testimonies will be presented before the competent Chamber (some TCs have exceptionally allowed the legal representatives of victims to propose additional witnesses, who have been summoned to testify as if they were witnesses called by the TC itself in accordance with art. 69 (3) of the ICC Statute) (ICC, Chambers, 2019). As a consequence of the foregoing, and by way of example, of the 5.229 victims who were recognized as such by TC III in the Bemba case (2016: para. 16), only 5 had the opportunity to testify in the trial. Furthermore, only 2 of the 5 accounts provided by the victims were taken as evidence, while the other 3 only expressed their views and concerns, without this being considered evidence (ibid, 20).

The legal representation of the victims also raises important difficulties in relation to how they can undertake their participation in ICC proceedings. Thus, the first contingency that the ICC faces in this area is the lack of funding, or budget deficit, for the payment of the victims' legal representatives. As Human Rights Watch has pointed out, the ICC does not have extensive financial support for the representation of victims, which has led to the limitation of the number of lawyers able to take on their representation. Furthermore, since the ICC is not in a position to finance an individual legal representative for each victim, a common representation system has had to be designed under rules 90 to 92 of the ICC RPE, according to which broad groups of individuals are grouped together so that victims can be represented by the same legal representative. This is the source of a significant number of problems when it comes to listening to and transmitting the needs of hundreds, or even thousands, of victims through a single legal representative that has been jointly appointed by the ICC (Human Rights Watch, 2021).

Moreover, given that it is impossible to transport all victims of a case to The Hague, the legal representatives must be constantly moving between the area where the victims reside and the ICC headquarters, which makes their work challenging. Judge Van den Wyngaert (2011) has expressly manifested her concern regarding this situation, underlining that, although common legal representation is impera-

tive in order to guarantee the representation of a high number of victims for crimes within the ICC jurisdiction, the fact that there are so many victims represented by the same lawyer and that they are in different regions, or even States, renders the communication of their needs and interests inefficient.

Finally, with regard to the right of the victims to reparation, the main practical limitation is the fact that the implementation of individual and collective reparation measures granted after the conviction of the accused, as well as of assistance projects, depends upon the existence of sufficient resources for their financing. Accordingly, one of the main difficulties facing the TFV in fulfilling its dual mandate is its limited capacity to raise funds, especially considering the large number of victims (Evans, 2012). In this same sense, the financing necessary to carry out the implementation of the reparation plans has been a challenge due to the fact that TFV resources are limited, the convicted persons allege to be in a state of indigence and there is insufficient international cooperation in obtaining additional resources (Moffett, 2021).

Furthermore, given that the vast majority of ICC cases refer to but a fraction of the crimes committed by the organized armed groups led by the accused persons, it is possible to state that the vast majority of victims of crimes within the ICC jurisdiction will never receive direct reparation. Furthermore, the first ICC cases for which a final judgment of conviction was entered (Lubanga[14], Katanga[15] and Al

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[14] Following the AC judgment of December 1st, 2014 (in which the conviction against Lubanga of March 14th, 2012 was confirmed), the AC itself ruled on March 3rd, 2015, on the principles of reparation that had been elaborated by TC I on August 10th, 2012. In its decision, the AC considered that the TC should be responsible for calculating the total amount for which the convicted person should respond and requested permanent monitoring of the implementation of the reparation. On December 15th, 2017, TC I determined that Lubanga was liable for USD 10,000,000 for the crimes for which he was convicted. This decision was confirmed by the AC on July 18th, 2019. See: ICC, Office of Public Information, Lubanga, n.d; Brodney and Regué (2019); ICC, Lubanga Reparations Order.

[15] Germain Katanga was convicted by the TC on March 14th, 2014. Upon the withdrawal of his appeal by the defence the conviction was final. On March

Mahdi[16] cases) show that it takes several years from the point at which convictions become final until the reparation plans proposed by the TFV are approved and begin to be implemented (Balta, Bax and Letschert, 2019).

Lastly, it is important to underline that TFV assistance projects also suffer from extremely limited funding for their implementation. Thus, according to rule 98 (5) of the ICC RPE, the only resources which can be used to finance these TFV assistance projects are from voluntary contributions. Moreover, the implementation process is as slow as that of direct reparation, as shown in the Bemba case. In that case, after the conviction was overturned in June 2018, the TFV affirmed that it would implement an assistance project to benefit the communities affected by the crimes committed by the MLC in CAR (ICC, Public Information Office, 2018). The implementation of said assistance project only started in April 2021, three years later (ICC, TFV, 2021).

4.4. Social reconciliation

As seen above, the preamble of the ICC Statute emphasizes that crimes within the jurisdiction of the ICC pose a threat to the peace, the security, and the well-being of mankind. This is in line with the consideration of the preservation of international peace and security

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24th, 2017, TC I issued the Reparation Order, which was appealed by the defence. The AC reviewed the decision in question and confirmed it on March 8th, 2018. See: ICC, Office of Public Information, Katanga, n.d.; ICC, Katanga Reparations Order.

16 Al Mahdi was convicted by TC VIII on September 27th, 2016. There was no appeal. On August 17th, 2017, TC VIII issued the Reparations Order. This decision was appealed by the legal representation of the victims. On March 8th, 2018, the AC confirmed, to a large extent, the Reparations Order of TC VIII, assigning to the convicted person liability for an approximate amount of 2.7 million euros. On April 10th, 2018, the TFV presented a draft plan for the implementation of the reparations. On July 12th, 2018, TC VIII requested a new draft, which was subsequently presented. See: ICC, Office of Public Information, Al Mahdi, n.d.; ICC, Al-Mahdi Reparations Order.

as the main value protected through the prosecution of crimes under ICC jurisdiction (Luban, 2011; Werle, 2010; Olasolo, 2017).

Antonio Cassese (1998), William Burke-White (2005) and Fatou Bensouda (2008) point out that social reconciliation is a necessary preliminary step to guaranteeing a stable and lasting peace. Furthermore, for these authors, without an effective justice that allows for the prosecution of, and which puts an end to impunity for, those most responsible for the crimes contained in the ICC Statute it is not possible to guarantee that the communities, peoples and/or nations in conflict can truly reach that reconciliation, which is a basic premise for the achievement of peace.

Thus, for Bensouda, who has served as ICC Deputy Prosecutor (2003-2012) and ICC Prosecutor (2012-2021) for almost two decades, the achievement of social reconciliation depends upon the following factors: (a) the prosecution of those most responsible for international crimes; (b) their neutralization through judicial action in order to prevent future crimes and conflicts; and (c) the restoration of the victims' trust in justice, in the sense that they can feel that they have been recognized and vindicated if their perpetrators are brought to justice. Nonetheless, one cannot ignore the fact that neither the ICC Statute, nor the case law of the ICC, has so far affirmed that social reconciliation constitutes one of the purposes of the ICC (Bensouda, 2008).

Moreover, there are two additional elements that need to be considered when addressing this issue. In the first place, the practice of the ICC reinforces the view of those authors who argue that there is no empirical evidence proving that the investigation, prosecution and punishment of international crimes leads to social reconciliation as a preliminary step towards the achievement of a stable and lasting peace. Although it is true that the ICC investigation in Uganda and its preliminary examination in Colombia may have initially encouraged the leaders of the organized armed groups which confronted state forces in both conflicts to take a seat at the negotiation table, it is no less true that most of the ICC actions in the last two decades have not led to verifiable processes of social reconciliation between victims and perpetrators, or to peace processes between the armed actors in conflict. Furthermore, occasionally, as in the case of Ugan-

da, ICC investigations have ended up making peace processes more difficult (Kresten, 2016; Lanz, 2007; Reilly, 2019).

Thus, in situations other than that of Colombia, the preliminary examinations of the ICC OTP (including the ones regarding Bolivia, Gabon, Guinea, Honduras, the Humanitarian Flotilla, Iraq/United Kingdom, Nigeria, North Korea/South Korea and Venezuela II) do not support the argument that they have generated a significant reconciliation effect.

This is likewise the case in relation to the investigations of the ICC OTP regarding situations, other than the situation in Uganda, regardless of whether they are the result of: (a) self-referrals by the States Parties where the crimes have been committed (DRC, CAR I and II, Mali and Palestine); (b) referrals by States Parties concerning crimes committed in other States Parties (Venezuela I); (c) referrals by the Security Council (Darfur (Sudan) and Libya); or (d) the p*ropio motu* initiative of the ICC OTP (Afghanistan, Burundi, Georgia, Kenya, Ivory Coast, Myanmar, The Philippines and Ukraine).

The same observation may be made in relation to the currently open cases. Thus, in the numerous cases in which ICC arrest and surrender orders have not been executed, the ICC has been unable to advance in its proceedings due to insufficient international cooperation for the capture of senior political and military leaders, who maintain, for the most part, their positions of power (although some of them, such as Al Bashir have, in the end, lost their position of power after years of ICC pressure).

Finally, in relation to the cases in which a final judgment has been issued, three of them can hardly be said to have led to social reconciliation because ICC proceedings have been limited to the leaders of one of the parties to the conflict (Al Mahdi (Ansar Eddine), Bemba (MLC) and Ongwen (Lord's Resistance Army)). Moreover, the revocation by the AC of Bemba's conviction has meant that this case has not only failed to promote social reconciliation but has also generated discredit for the ICC (Hibbert, 2020). As a result, it has placed the ICC in an even more difficult position for the promotion of social reconciliation in the future.

Consequently, it remains to be analyzed whether the ICC has substantively promoted processes of social reconciliation between victims and perpetrators, or peace processes between armed actors in conflict, in the only situation with respect to which the ICC has so far issued convictions against leaders of different parties to a conflict: the situation in the Ituri district (DRC) between July 2002 and the end of 2003, in which, *inter alia,* organized armed groups led by Lubanga and Ntaganda on the one hand, and by Katanga and Ngudjolo Chui on the other clashed.

Nevertheless, not even within the framework of this situation has it been possible to verify a significant reconciliation effect among the affected communities as a consequence of the actions of the ICC (Murithi & Ngari, 2011). Undoubtedly, the possible reconciliatory impact of the ICC proceedings has not been favored by the fact that it has taken around 15 years since the initiation of ICC proceedings (and several years since the convictions became final) for the reparation programs approved in the Lubanga and Katanga cases started to be implemented.

Secondly, there are many authors who have, in light of the ICC impact on the peace processes in Uganda and Colombia, seriously questioned whether the investigation, prosecution and punishment by the ICC of those most responsible for ICC crimes is an appropriate mechanism to promote reconciliation and peace (Nnabuike Malu, 2019; Keller, 2017; Souaré, 2009; Radosavljevic, 2008). There have even been some authors who go a step further to assert that both ICC proceedings and national proceedings promoted by the ICC, only encourage the parties to continue with the conflict and the violence until one of them is defeated (Krcmaric, 2018).

Consequently, as we saw at the beginning of this section, while a first group of authors emphasizes the means by which the ICC can help the leaders of the parties to a conflict to sit down to negotiate a way out, there is a second group which emphasizes the difficulties that the ICC poses for the conclusion and implementation of any peace agreement that seeks to end the conflict.

5. CONCLUSIONS

This chapter has sought to answer the question as to whether ICJ and the ICC are suitable mechanisms to provide justice when it is understood as memory. To do so, it has first addressed the notion of what justice as memory is, and its basic elements. As a result, it has explained how the notion of justice as memory views the suffering and meaninglessness of the lives of the victims as the core element of justice. It seeks, therefore, to look to the past to try to make sense of what is considered dispossession and oblivion. It reviews what the memory of the victors hides and justifies to the detriment of the victims. To do this effectively requires that both institutions and society as a whole, integrate victims into the social fabric by recognizing them, publicly admitting the harm that has been caused to them, repairing what is repairable, preserving the memory of the materially irreparable and promoting reconciliation.

Subsequently, the chapter has analyzed the question as to whether ICJ is a suitable mechanism for the provision of justice when it is understood as memory. This is a very controversial and highly divisive issue. For a number of authors and case law, the purposes of ICJ include: (a) the establishment of a historical narrative of events that occurred; (b) the deterrence resulting from declaring the international criminal responsibility of those who, through the instrumentalization of the state structures and the organizations they lead, commit international crimes; (c) the recognition of victims through their participation in international criminal proceedings and the reparation of the harm that they have suffered; and (d) the promotion of social reconciliation between victims and perpetrators as a preliminary step towards a stable and lasting peace. These ICJ purposes provide for a significant scope of application in ICJ of the notion of justice as memory, as its main elements (institutional and social recognition, material and immaterial reparation and reconciliation) could be largely satisfied if it were possible to achieve the establishment of a historical narrative, the elimination of impunity for those most responsible, the recognition and reparation of the victims and the promotion of social reconciliation.

Nevertheless, the application of the notion of justice as memory through the achievement of the ICJ aforementioned purposes is deeply questioned by an important part of the doctrine that denies that ICJ aims at achieving such purposes. This is due to the unsuitability of ICJ enforcement mechanisms for their satisfaction.

The same controversy is observed in relation to the ICC. Thus, despite the fact that deterrence and the participation and reparation of victims are expressly included in the ICC Statute as core ICC purposes, ICC proceedings in the last two decades appear to have largely verified as correct the views of those who affirm that the ICC Statute does not provide the ICC the necessary tools for their effective achievement.

The strong dependence on funding and cooperation from States Parties (especially by those States whose situations and cases are under investigation and prosecution by the ICC), prevents an effective deterrence with respect to the highest state representatives. Likewise, the mechanisms provided for in the ICC Statute and in the ICC RPE regarding the participation and reparation of victims suffer from notable limitations, which: (a) prevent the latter from having a significant impact on the final result of ICC proceedings and on the narrative resulting from the facts considered as proven in the judgment; and (b) extend the design, approval and implementation of TFV reparation plans (whose implementation is also affected by the lack of resources for their financing) for many years.

Furthermore, as regards the reconstruction of a historical narrative of the events and the promotion of social reconciliation, not only are they not mentioned in either the ICC Statute or the ICC case law, as purposes of the ICC, but there are also important arguments that seriously question the suitability of the ICC for its achievement.

As a result, the real scope of application of the notion of justice as memory through ICJ or the ICC is, at best, certainly limited, and faces very serious structural problems. Consequently, if what is intended is to increase the level of application of such notion, it seems necessary to resort (either in a complementary or even an alternative way) to other types of extrajudicial mechanisms.

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Chapter 4
The Perspective Of The Theory Of Emotions[*]

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1. INTRODUCTION

This chapter seeks to apply the neuro-psychological framework of the theory of emotions to better understand the behaviour of the actors involved in proceedings before international criminal tribunals. After examining the emotions that influenced the creation and enforcement of international criminal justice (ICJ), this chapter analyses how emotions have an impact on the proceedings at the International Criminal Court (ICC). The three case studies (Lubanga, Ongwen and Al-Mahdi) that are analysed below show how there are strong emotional imprints that condition the prosecution and defence teams, the victims, the witnesses and the judges themselves.

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The analysis of the emotional level allows for the determination of the emotional agenda which helps to explain a certain view of the commission of serious crimes, such as occurs with judges' emotional bias. It can also favour the identification of an emotional construction of the "other" based on a misunderstanding of social patterns and a perceived need to apply universal parameters to bring justice to a local context (this is especially the case when mass atrocities occur in places that are geographically and culturally distant from the ICC, such as the situations of mass violence investigated by the ICC in Africa). Furthermore, emotions also play a role in the assessment by judges of defendants' statements of repentance, remorse or apology.

As a result, a view through the lens of studies on cognitive psychology, such as the one briefly described in section 2, allows for the recognition of how emotions: (a) play a significant part when determining the scope and purposes of ICJ (section 3); and (b) are manipulated (more or less consciously) for specific purposes at trial (section 4). As a result, the chapter concludes (section 5) by highlighting the relevance of studying the impact of emotions within the behaviour of the actors involved in international criminal proceedings so as to understand better how ICJ and the ICC operate.

2. THEORETICAL FRAMEWORK: THEORY OF EMOTIONS AND LAW

In recent years, there have been numerous works on emotions and emotional background that have provided interesting reflections from the perspectives of human and social sciences. Leaving aside the *biologicist* position of Darwin (1872) and others, who supported an organic and universalist vision that perceived emotions as natural (Ekman, 1982; Buss, 1994), the so-called "cultural" or "relativist" theories have affirmed the existence of an ideological construction of emotions, that varies according to time, place and a series of other variables that condition them (Stearns, 2000: 16-29). As a result, gestures and expressions that render emotions visible do not carry the same meaning from one time to another, or from one place to

another, since they only have meaning *in context* and are symbolically conditioned by surrounding circumstances.

According to most recent cognitivist theories, emotions provide value judgments about a perceived external "object". They are not just caused by spontaneity, as they are also the result of cultural, social and collective processes (Hochshild, 1983; 2003; Nussbaum,2001; 2006; Lutz, 1988: 5). Emotions are thus constituted by mutually transformative interactions between biological, physical and socio-cultural systems, since an initial, more intuitive, automatic, preconscious and unthinking system of human experience is followed by a second one, which is slower, reflective and rule-governed (Arias Maldonado, 2016: 55; Damasio, 1994, 127-163; Fattah & Fierke, 2009: 70; Khaneman, 2011: 211; McDermott, 2004: 692; Shouse, 2005; Thompson & Hoggett, 2012: 2-3).

As a result, emotions and cognition are complementary phenomena, to the extent that emotions denote rationality, as they are unconscious processes that become conscious and socially regulated, affecting the beliefs and perceptions of individuals (Clore, 1992: 133-163; Flückiger, 2009: 77; Frijda,1986).

Faced with the traditional view that law is rational and devoid of emotions it has, nevertheless, been demonstrated how it is replete with emotional considerations, which imbue its sources (most times without being perceived) (Bandes, 1999; Bandes & Blumenthal, 2012; Maroney, 2006). Consequently, the argumentative background of law always has an emotional imprint. The so-called "theory of emotions" accounts for an interdisciplinary conceptual framework that focuses on analysing how emotions, often invisibly, play a dominant role in: (a) defining the content of the rules of a system of norms; (b) applying the rules to the facts of a case; and (c) determining the scope of legal responsibility.

International law (IL) is not alien to this phenomenon, but its state-centric nature and the secondary role played by individuals in IL has made the impact of emotions less visible in the negotiation process, as well as in the approval and application of its norms (Hall, 2015; Jones & Clark, 2019; Markwica, 2018).

Nevertheless, as the analysis of emotions is now more relevant in IL studies, it is more plausible to argue that developments in IL are more shaped by the emotions of individuals involved in their negotiation, interpretation and application (such as diplomats, judges or academics), than by the application of a universal reason (Ariffin, Coicaud & Popovski. 2016; Bleiker & Hutchinson, 2008; Crawford, 2000; Fattah & Fierke, 2009; Moïsi, 2010; Sasley, 2001).

From this perspective, the following two sections seek to apply the theoretical framework of the theory of emotions to the role of the ICC. This is done by analysing: (a) the ICC's role in the evolution of ICJ (macro-level); and (b) the emotions involved in the specific cases before the ICC (micro-level). Both levels are interrelated and provide a broader image regarding the need to further study of ICJ and the ICC from an emotional perspective.

3. THE MACRO-LEVEL: EMOTIONS IN INTERNATIONAL CRIMINAL JUSTICE

The theory of emotions provides a useful tool to explain the evolution of ICJ and the establishment of the ICC. For instance, some authors contend that the first international criminal tribunals were the result of mere revenge, having little to do with the rationality of criminal justice systems. Thus, the International Military Tribunal (IMT) and the International Military Tribunal for the Far East (IMTFE) (created by the victorious allied powers after World War II) and the subsequent International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) (established by the United Nations Security Council (UNSC) in the early 1990s) sent the message that the application of individual criminal responsibility at the international level was inextricably linked to the exercise of political discretion (Zolo, 2006). This created strong emotions of empathy among supporters, while at the same time creating a visceral rejection by detractors, who perceived this external judicial interference as an act of excess by hegemonic powers.

In contrast, the creation of the ICC by the agreement of the ICC States Parties was perceived by many, not as the result of an unac-

ceptable external intervention, but rather as the final triumph of a moderate justice capable of overcoming, with principles and guarantees, the irrationality of retaliation. Thus, unlike the international criminal tribunals that preceded it, the ICC has been described as an institution founded on diplomatic understanding and based on legal legitimacy, due process and complementarity, with little room left for emotional excesses (Bosco, 2014: 3; Cryer, 2005: 228-229; Sadat, 2016: 141-142; Simpson, 2004: 51).

Nevertheless, the policy of the ICC Office of the Prosecutor (ICC OTP) between 2004 and 2016 to select only situations in African countries for investigation has drawn much criticism. This is illustrated by Köchler's statement at the 2009 World Conference for International Justice, in which he warned against the politicization of ICJ because, in his view, the ICC was more interested in carrying out targeted vengeance, rather than in promoting universal justice.

The relevance of the latent emotional dimension of the arguments put forward to justify or reject the existence and effectiveness of the ICC is not a minor factor. Indeed, emotional arguments (for example, those based on selectivity or universality) have often been used to support state positions in favour of and against the creation of the ICC.

In this regard, States Parties to the ICC Statute have resorted to emotion to persuade others about the need for a global peace and justice guaranteed by an independent, humanitarian and altruistic international body such as the ICC. They have highlighted the need that the ICC punish those persons most responsible for the worst atrocities being left unpunished at the national level (Bosco, 2014: 3; Cryer, 2005: 228-229; Sadat, 2016: 141-142; Simpson, 2004: 51).

Emotion has also been used by States that oppose the ICC (such as the United States (US/USA) or the Russian Federation) to defend local perceptions and promote the rejection of the internationalization of the administration of justice. According to these States, the existence of a permanent international criminal tribunal with a broad jurisdiction generates fear among State agents (especially, members of the armed forces), who limit their behaviours to avoid international criminal proceedings against them (Bosco, 2014: 1; Becker, 2010).

As a result, national sovereignty arguments raised by these States and sustained by emotions such as fear or suspicion are contrary to the establishment of a cosmopolitan justice, which, for ICC States Parties, is a necessary tool to provide an empathetic solution to human suffering, especially for those who lack effective tools to defend themselves against the commission of serious and massive crimes (Bosco, 2014: 1; Becker, 2010).

Moreover, the anthropological and cultural analysis of the ICC has led to the acknowledgment of the impact of ICC activities on victimized communities and on their emotional responses to conflicting interpretations about ICJ. For Clarke (2019) and Kotecha (2020), the cultural experiences of colonial violence and discrimination suffered by these communities calls into question the alleged "objectivity" of the ICC jurisdictional mission.

Considering the foregoing, it is reasonable to contend that the theory of emotions can be a useful tool to explain some of the underlying factors that have influenced ICJ and the activities of the ICC since their origin.

4. THE MICRO-LEVEL: EMOTIONS IN TRIALS BEFORE THE INTERNATIONAL CRIMINAL COURT

Along with the debate on the reasons for the existence of the ICC as an institution, new factors have been added in recent years with the discussion as between retributive and restorative justice that underlies ICJ enforcement. This has resulted from a need perceived by many to put the roles of victims and accused persons on the same level in international criminal proceedings.

This new focus on the actors involved in ICC proceedings (who have direct experience with the ICC system) has made relevant additional elements of the emotional dimension that surrounds the functioning of the ICC. As a result, the theory of emotion-based analysis, that has made it possible at a macro-level to perceive the acknowledgment or rejection by States of ICJ values, must be complemented by the analysis of the individual emotions channelled throughout proceedings in specific cases before the ICC.

Furthermore, an approach which is capable of accounting for the emotions inherent in ICC proceedings also shows the shortcomings of limiting the understanding of ICC cases to objective criteria.

With this in mind, this section analyses the emotions advanced in the trial proceedings of the cases against Thomas Lubanga Dyilo (ICC-01/04-01/06), Dominic Ongwen (ICC-02/04-01/15) and Ahmad Al-Mahdi (ICC-01/12-01/15). These three cases have been chosen due to their importance in emotional management since approaching more closely to the interests of the victims has required a clear emotional strategy.

4.1. Gender and active participation: the theory of emotion in the Lubanga case

The Lubanga case led to the first ICC judgment issued by ICC Trial Chamber I on March 14th, 2012. The defendant, Thomas Lubanga Dyilo, was the *de facto* governor of the province of Ituri in the Democratic Republic of the Congo (DRC). He was the founder and president of the political movement *Union des Patriots Congolais* (UPC) and the commander in chief of its military wing, the *Forces Patriotiques pour la Libération du Congo* (FPLC). He was convicted as a co-perpetrator of war crimes for: (a) having enlisted and recruited minors under fifteen years of age into the FPLC; and (b) having used them to actively participate in hostilities during the armed conflict that occurred in Ituri between September 2002 and August 2003 (ICC, Lubanga, 14/03/2012: paras. 890-895).

During the trial proceedings, several witnesses detailed the sexual violence to which the child soldiers were subjected on a regular basis (ibid). Nevertheless, the ICC OTP considered that these acts were not relevant when discussing the recruitment of child soldiers as an international crime. Moreover, the then ICC Prosecutor, Luis Moreno Ocampo, decided against prosecuting crimes of sexual violence due to the insufficiency of evidence and the need to avoid delays in trial proceedings (Chappell, 2014: 187; Galain Palermo, 2014: 391; Vasiliev, 2009: 642).

This decision was highly criticized because, for many, there was ample evidence to charge crimes of sexual violence (Pritchett, 2008; Smith, 2011). To remedy this omission, the legal representatives of the victims filed in 2009 a motion arguing that ICC Trial Chamber (TC) I should use the procedure established by ICC Regulation 55 to undertake a legal re-characterization of the facts included in the charges against Lubanga so as to include the crimes of sexual slavery and inhuman treatment. Although TC I granted the motion, its decision was rejected by the Appeals Chamber (AC), as the requested re-characterization was based on facts that were not included in the documents containing the confirmed charges. This was considered as a serious setback to achieving gender justice in the ICC system (Merope, 2011: 316-317).

During the sentencing process, the Majority of TC I did not refer to sexual violence because, according to article 74 (2) of the ICC Statute, TC I could not evaluate, on its own initiative, circumstances that were not alleged at trial by the ICC OTP. As a result, the absence of any reference to the numerous rapes committed by FPLC members against girls under the age of fifteen who had been enlisted or recruited into the FPLC caused surprise, anger and rejection among victims and women's rights advocates (Inder, 2011)[1].

The victims' interest in making sexual violence visible found support in the dissenting opinion of Judge Elizabeth Odio Benito, a well-known activist on gender issues, who harshly criticized the unilateral ICC OTP decision to exclude sexual violence from the charges (Galain Palermo, 2014: 424). Becoming a sort of spokesperson for

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[1] As Inder (2011) explains: "It was therefore shocking to many of us that the announcement in 2006 of the case against Thomas Lubanga did not include charges for such crimes and overlooked the suffering of thousands of victims of this conflict and victims of this militia. It was unimaginable to us and to our partners in eastern DRC, grassroots women's rights and peace advocates, that the Office of the Prosecutor (OTP) had not investigated these crimes in their initial strategy. It was also beyond comprehension that the OTP then decided not to undertake any specific investigations into these crimes in the six months between when Mr. Lubanga was taken into ICC custody in March 2006 and before the Confirmation Hearing in November of that year".

victims and for a large part of international society (which wanted to make gender crimes more visible), Odio Benito argued that TC I had the obligation to provide a general definition of the crime of recruitment of child soldiers without limiting itself to the charges laid by the ICC OTP[2]. For her, the obligation of TC I stems from article 21(3) of the ICC Statute, which requires ICC judges to interpret the ICC Statute, the ICC Elements of the Crimes (ICC EC) and the ICC Rules of Procedure and Evidence (RPE) in a way that is compatible with "recognized international human rights".

Although a literal reading of this provision appears to suggest that its purpose is to ensure that judicial interpretation of ICC legal sources is not contrary to international human rights standards universally accepted by international society (Bitti, 2009: 303; Pellet, 2002: 1079-1082), Judge Odio Benito went further. Indeed, she engaged in the interpretation of the definition of the notion of "active participation" in hostilities to conclude that the protection of minors under the age of fifteen from the horrors of war cannot be limited to the enemy's military activities per se, but it must also cover the harm that might be inflicted upon minors (inter alia by acts of sexual violence) by the members of the group who have recruited them illegally. To justify her position, Judge Odio Benito made special reference to: (a) victims' testimonies of rape, sexual slavery, HIV infections and abortions; and (b) the "transgenerational effects" of these crimes, which are capable of causing "serious and irreparable harm to the victims and their families" (ICC, Lubanga, 13/07/2012: para. 50).

There has been an almost unanimous rejection of Judge Odio Benito's interpretation of article 21(3) of the ICC Statute by criminal lawyers (Sheppard, 2010: 46-48; Sluiter, 2009: 466-467). Some have argued that it is a violation of the *nullum crime sine lege* principle because any ambiguity in the definition of the crimes should be interpreted in favour of the accused persons (*in dubio pro reo* principle) (Kurth, 2013: 442; Graf, 2012: 966). Others have argued that, based upon non-binding human rights norms, the *lex certa* principle pro-

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2 ICC. The Prosecutor v. Thomas Lubanga Dyilo. *Separate and Dissenting Opinion of Judge Odio Benito, Public Judgment pursuant to Article 74 of the Statute.* ICC-01/04-01/06-2842. 14 March 2012. Paras. 2-3, 6 and 34.

vided for in article 22 of the ICC Statute was infringed (Dias, 2014: 38). Finally, it has also been argued that Judge Odio Benito set aside any rigorous legal analysis to build, instead, a political discourse addressed to members of non-governmental organizations. This is a position that has been considered by Ambos (2012: 137-138, n. 155) to be rather similar to the Latin American neo-punitivist experiences.

An analysis of the proceedings in the Lubanga case based on the theory of emotions is useful to uncover some of the underlying reasons for the support and rejection of Judge Odio Benito's dissenting opinion. Such an analysis allows for the identification of a sharp contrast between the expectations of those who favour a strict interpretation of international criminal law (ICL) and procedure, and those who argue that international criminal tribunals should strive to give a voice to those who have not been able to obtain justice in their national jurisdictions. As a result, there is also a debate as to what is expected from an international judge when deciding a case.

The way in which Judge Odio Benito's dissenting opinion was read by supporters and opponents of her position indicated that ICC proceedings provide a *forum* for an exchange of expectations among the ICC OTP, the defence, judges, law experts and civil society. They facilitate the interaction within a professional community in which emotional repertoires are interchanged through individual and social views on the purpose, foundation and validity of an act of administration of justice (Ross, 2014: 1).

The relevance of the emotional element in Judge Odio Benito's dissenting opinion, which leaves aside the "strict legalism" of criminal law to promote humanitarian considerations, can also be found in the practice of some judges of regional tribunals on human rights[3].

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[3] There is an interesting "rotation" of judges in the international arena. In the case of Judge Odio Benito, before her appointment to the ICC, she was a member of the ICTY. After she finished her tenure at the ICC, she was appointed as judge and president of the Inter-American Court of Human Rights (IACHR). It is also worth mentioning the situation of Brazilian judge Antônio Augusto Cançado Trindade, due to the strong emotional imprint of his separate and dissenting judgments. After having been part of the IACHR, he served at the International Court of Justice. From a theory of

For this reason, it is not surprising that this emotional attempt to manifest the need to protect vulnerable girls is also referred to, albeit less explicitly, in TC I's subsequent decision on reparations in the Lubanga case. In this decision, TC I highlighted that in order to promote the effective social reintegration of victims, all forms of "victimization, discrimination and stigmatization" must be eradicated (ICC, Lubanga, 7/08/2012: para 240). Thus, in addition to rehabilitation and compensation, symbolic reparation constitutes a basic component for social pacification and reconciliation between victims, perpetrators and society at large (Galain Palermo, 2014: 430). As a result, an emotional vocabulary is used in this decision —understood in terms of Macagno & Walton (2014)— that cannot be found in the decision of the Majority.

For more than two decades, emotional discourse related to gender issues has emphasized the importance of explicit references to sexual violence by ICJ (Charlesworth, 1999). For this reason, Judge Odio Benito's dissenting opinion quickly gained solid support in feminist doctrine. In this regard, Morales Cerda (2015: 67; 74) has stated that article 21(3) of the ICC Statute requires the ICC to consider the abundant case law of regional human rights tribunals in relation to gender-related notions and standards. From this perspective, Judge Odio Benito's dissenting opinion has been interpreted as an effort to overcome silence and inaction (Chappell, 2014: 193)[4]. Her

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emotions perspective, it would be interesting to identify new developments in international case law based on the significant roles of certain personalities interested in proposing original and "humanitarian" interpretations of IL.

[4] For Chappell (2014: 193), the methodological lesson that can be learnt from this case "[…] relates to the importance of monitoring inaction, silences, and *lacunae* when attempting to identify informal gender rules. […] To uncover how gender works in a setting such as the ICC, it is therefore as important to account for actions not undertaken as it is to analyze those that have. Not investigating crimes that have been documented, not including gender-based crimes in the charges, and not accounting for evidence of these crimes in the verdict each demonstrates and reinforces gender biases in the law. It is what the ICC failed to do, as much as what it did, in the Lubanga case that demonstrated the ongoing operation and power of informal rules in this new arena. In the Lubanga case, old gender biases

reasoning was described as taking a position that pushes boundaries, appeals to gender sensitivities and exposes the frustrations that many had when reading the opinion of the Majority (Chappell, 2014: 193; Pallas, 2016: 42)[5].

Furthermore, Judge Odio Benito's dissenting opinion is not only an example of the emotions that a judge's view can cause but it has also created optimism regarding the future of gender justice in the ICC (Pallas, 2016: 42; Engle, 2014: 20). This emotional awakening of hopes thus becomes a clear example of the means by which a judge can transmit and arouse emotion in other actors involved in ICC proceedings (including other ICC judges) and in those who follow judicial activities with special expectations (such as victims and their families and human rights advocates).

4.2. Social victimization: the theory of emotions in the Ongwen case

The case of Dominic Ongwen is also significant because a reading of the allegations of the defence shows a manipulation of the discourse on the basis that the defendant was also a victimized former child soldier. He had been forcibly recruited by the Lord's Resistance Army (LRA) (an insurgent armed group involved in an internal armed conflict with the government of Uganda since 1985) when he

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in international law have been reinforced and new rules that were meant to provide greater access to victims of gender-based crimes have been distorted. At the same time, opportunities for challenging international law norms have also become apparent. In relation to the latter, the very articulation of the link between gender and child soldiers is important".

5 Judge Odio-Benito (2017: 3) has also stated: "It was evident, since the beginning of ICC's work, that it would be difficult for judges and prosecutors to understand and apply the new paradigms of international criminal justice with the dimensions emerging from the *ad hoc* tribunals. But we studied, discussed, and gathered some of those advances in decisions and judgments. We were very concerned with everything related to victims' rights, and procedures were designed in connection with their participation in the processes and their rights to reparations. Not everything resulted in success, but now, in December 2017, the picture that has evolved is simply bleak. The efforts of ICC's current president, Dr. Silvia Fernández de Gurmendi, to sensitize judges in these matters have been sterile".

was only 9 years old and was still an "innocent child who lacked the slightest tendency to violence or wrongdoing"[6].

Although at the time Ongwen allegedly committed the crimes (July 2002-December 2005) he was in his late twenties and held the position of LRA's brigade commander, the defence attempted to contextualize at trial the more than 70 confirmed charges of crimes against humanity and war crimes (including sexual slavery, torture and the inhuman act of forced marriage) by emphasizing his past experiences and his psychological disabilities resulting from the violence to which he had been subjected since his childhood. The rhetorical strategy of the defence consisted of identifying the defendant with his victims. By stating that Ongwen grew up in an environment of extreme brutality[7], the defence intended to generate in the ICC judges, and the public at large, an emotion of empathy that would replace the initial reactions aroused by an individual accused of horrendous crimes.

The ICC OTP also participated in this emotional fabric of persuasion. Amongst the emotional discourses of the defendant and the victims, the ICC OTP introduced an emotional vocabulary that sought to balance the defendant's violent experiences as a child soldier, against the seriousness of the confirmed charges and the need to ensure its institutional credibility (ICC OTP, Ongwen, 6/12/2016: 36). As a result, the ICC OTP stated in its opening statement that those following the case could experience "shared feelings". While they could be "horrified" by the acts committed by Ongwen (emotion of rejection), they could also feel compassion for him because he could not escape from a violent destiny set for him since his childhood (emotion of empathy).

Therefore, inside the cold walls of the ICC courtroom, located thousands of kilometres away from those who suffered the violence of Ongwen and his subordinates, a debate over the inclusion of an emotional dimension based on the effectiveness of commiseration

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6 ICC. The Prosecutor v. Dominic Ongwen. Pre-Trial Chamber II. *Transcript of the confirmation of charges hearing*. ICC-02/04-01/15. 25 January 2016. P. 41.

7 Ibid. P. 6.

took place. Through the rhetorical construction of the defence that portrayed the defendant as a victim, an attempt was made to blur the usual distinction as between the way in which victims and defendants are perceived in criminal proceedings (Baines, 2009; Drumbl, 2016)[8].

Consequently, the trial proceedings focused on the dual role of Ongwen as perpetrator and victim of the atrocious crimes which allegedly defined his personality. Throughout the trial, the defence sought to build an *êthos* based on a rhetorical argument having a strong emotional imprint, that aimed at placing the defendant in a similar position to that of the victims of his crimes. As a result, the ICC OTP and the defence sought to ratify or combat, as the case may be, the preconceptions of public opinion that identify those charged before international tribunals as criminals who lack empathy and act rationally and maliciously.

A second emotional aspect of the Ongwen case relates to the spiritual level. Considering the Christian rhetoric of the LRA and the almost omnipotent character of its leader, Joseph Kony, the defence affirmed in its opening statement that "Ongwen fell prey to Stockholm Syndrome and felt that he owed his life to Joseph Kony". The emotional tenor of this allegation is evident, especially if one reads it along with a previous statement of the defence about the presence of Kony's spirit in the courtroom.

Furthermore, to demonstrate the lack of planning in LRA actions, the defence called two witnesses who claimed to be spiritual mediums (*ajwaka* in the Acholi language) and to have the ability to communicate with the transcendental world. They testified as to the LRA special connection with external forces that inspired its members. With these allegations the defence sought, pursuant to article 31(1)

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8 According to Branch (2017: 24): "Doing so was made easier by the long history of Africa being represented as a terrain of humanity, of incorrigible savages committing atrocities against victims in need of a western savior. This humanitarian image of Africa fit squarely with the prosecution's black-and-white, unquestionable moral narratives of inhuman criminal atrocity against innocent victims. The ICC needs pure victims and perpetrators, without ambiguities or gray areas, and in Africa it could claim to have found them".

(a) and (b) of the ICC Statute, to exempt Ongwen from criminal responsibility because his submission to Kony's will could be considered as evidence of mental disease, deficiency or intoxication that deprived him of his ability to appreciate the nature of his conduct or to control it.

The emotional dimension of these allegations is clear since they sought to exploit the cultural gap between the ICC judges and a local community with cultural values that are alien to the idea of westernized and universal justice[9]. The ICC OTP dismissed them by emphasizing the need for the ICC judges to put aside their emotions when looking at the facts and to provide for blind justice.

In the end, this attempt to exploit the cultural gap between local traditions and the ICC cultural universe by relying on normative relativism failed as many of the religious beliefs referred to by defence's witnesses were not shared by Ongwen's victims[10]. Nevertheless, it showed the existing tension between the defence's emotional allegations, with its multiple layers, and the ICC OTP's claim for a more "neutral and objective" application of justice.

4.3. Repentance and forgiveness: the theory of emotions in the Al-Mahdi case

The latest case study included in this chapter concerns the case of Ahmad Al Faqi Al-Mahdi, a member of the Ansar Eddine armed movement associated with Al Qaeda in Mali, whose arrest warrant was

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9 There are at least five conceptions of justice among the Acholi communities of Uganda and Sudan: (a) justice as the re-establishment of relationships; (b) justice as an end to ongoing violations; (c) justice as accountability and punishment; (d) justice as an exercise in redistribution; and (e) justice as equality. The existence of a special ceremony (*mato uput*) in Northern Uganda shows how the idea of justice is linked there with reconciliation that involves drinking a bitter drink together (Nouwen & Werner, 2015).

10 The dissenting opinion of Judge King in the Civil Defence Forces case before the Special Court for Sierra Leone highlighted a similar situation. As a result, Judge King, the Sierra Leonian judge at trial, strongly criticized the treatment of the Majority of the alleged mystical role of Allieu Kondewa (2008).

issued by the ICC at the end of 2015. In 2012, Al-Mahdi was the head of the *Hisbah,* the body in charge of upholding values and preventing vice within the Al Qaeda in Mali movement. He was charged with the war crime of directing attacks against cultural property, since between June and July 2012 he and his subordinates destroyed 9 mausoleums and a mosque in Timbuktu (perhaps the best known historical and religious monuments in the Islamic Maghreb). Surrendered by Nigerian authorities to the ICC in September 2015, Al-Mahdi negotiated a plea agreement with the ICC OTP.

The role of emotion in the Al-Mahdi case has been partially studied by Bens (2017; 2018), who has analysed the symbolism of destroying cultural property. As Bens points out, the ICC OTP, and the legal representatives of the victims, alleged that the mausoleums represented a kind of corporeal image of the identity of Timbuktu.

A different aspect of the emotional dimension of the case relates to the emotional plea made by Al-Mahdi at the beginning of the trial (August 22, 2016), in which he admitted his guilt and expressed his deep regret and sadness toward the forgiving Muslims[11]. He also expressed his devastation and remorse, showing himself as "a son of Allah who had lost his way into the hands of evil spirits". Moreover, he ended his plea by promising that he would never again commit a similar crime.

The persuasiveness of Al-Mahdi's forgiveness plea had a practical effect: the trial was concluded two days later, and he was sentenced to only nine years of imprisonment. In explaining their decision, the ICC judges affirmed that Al-Mahdi's act of empathy should be a substantial factor in mitigating the sentence[12]. Moreover, they also took into consideration Al-Mahdi's solemn promise that this would be the first and last wrongful act that he would commit and that he was ready to accept their decision (ICC. Al Mahdi, 27/09/2016: para. 103).

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11 ICC. The Prosecutor v. Ahmad Al Faqi Al Mahdi. Trial Chamber VIII. *Transcript of the Admission of guilt.* ICC-01/12-01/15. 22 August 2016.

12 On the emotional dilemmas involved in forgiveness and remorse, when it comes to the commission of serious international crimes, see: Diggelmann (2016).

ICC judges rejected the request by the legal representatives of victims to impose a higher sentence because they considered that the empathy that the defendant showed towards victims was real, as shown, for example, by Al Mahdi's offer to finance the replacement of the door destroyed in the mosque of Sidi Yahia (ibid: para. 104). Although Ah-Mahdi's actions were insufficient to convince many victims, who felt "humiliated" by the destruction of cultural property[13], compassion played an important role in the outcome of the trial.

At trial, the defence resorted again to emotional manipulation to limit the number of victims having a right to compensation. In this regard, the defence claimed that any psychological damage derived from the destruction of cultural heritage could only be proven through a direct family bond between those who requested reparation for the damage and those who were buried in the mausoleums.

Nevertheless, ICC judges balanced the defence's emotional argument with other rational considerations, such as the non-pecuniary damage caused to the community (which had been minimized by the defence) and the failure of the defence to prove the existence of a different "emotional connection" with the destroyed sites depending on the existence of family bonds with the persons buried there (ICC, Al Mahdi, 17/08/2017: para 88). As a result, the judges affirmed that reparations were collectively owed to the entire community of Timbuktu (ibid: para 86)[14].

In the reparations order, the judges considered the emotional and symbolic value of the destroyed buildings and found that their demolition conveyed a message of terror and vulnerability to the community (ibid: para. 22). Consequently, they acknowledged that some victims felt that the sentence had been insufficient, and ordered, as a measure of satisfaction, that a video of Al-Mahdi's repentance be recorded and broadcast in the local language (ibid: paras. 68-70).

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13 See the report made in the reparation proceedings by expert witness Karima Bennoune. ICC. The Prosecutor v. Ahmad Al Faqi Al Mahdi. Trial Chamber VIII. *Brief by Ms. Karima Bennoune*. ICC-01/12-01/15. 27 April 2017.

14 The final decision was made considering "[…] the emotional distress and prejudice suffered by the whole community of Timbuktu".

As victims of international crimes usually expect some emotional healing from judicial decisions, criminal sanctions are only effective if they are taken along with measures aimed at victims' emotional recovery through overcoming their condition of vulnerability and purging the negative impact of the crimes (Karstedt, 2016: 50-55)[15]. As a result, the image of a repentant convicted person can be a rather useful tool in achieving this goal.

Based on the relevance to victims of the symbolic and emotional impact of judicial decisions, and as seen above with respect to Judge Odio Benito's dissenting opinion in the Lubanga case, it can be concluded that ICC judges are also influenced by emotions such as hatred, disgust, compassion or mercy, regardless of whether this is contrary to the neutral and objective approach that, for many, international judges should take (Popovski, 2016: 198-199).

5. CONCLUSION

The analysis of the ICC proceedings in the Lubanga, Ongwen and Al-Mahdi cases shows that, whether in making visible the suffering of victims of gender violence, in assimilating the accused to their victims or in generating compassion, the administration of justice by the ICC is not alien to the universe of human emotions, despite its presumed objectivity.

Consequently, it is highly relevant to identify at a micro level: (a) the perceptions that the actors involved in ICC proceedings (the ICC OTP, the defence, the victims and ICC judges) and those others closely following them (such as NGOs and ICL experts) have of themselves and of the others[16]; and (b) the conscious and uncon-

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15 Regarding the importance of considering the satisfaction of victims of international crimes in a broader framework of emotional assistance, see also: Doak (2011).

16 In this sense, the emotional dimension of ICC proceedings that has been analysed in this chapter can complement those 'expressivist' views of international criminal justice that have been recently put forward by Sander (2019), who also provides interesting reflections about ways of understanding the specific agendas of those actors that participate in ICC judicial proceedings.

scious exchanges of emotions that occur among them. The theory of emotions constitutes an essential theoretical tool for this purpose.

All of this makes it clear at a macro level that, despite the rational image that the ICC has sought to portray in contrast to previous institutional experiences, ICJ enforcement and the fulfilment of the ICC's role continues to depend upon multiple emotions in tension (which are present, although sometimes they are invisible, from the beginning of the investigation into each situation up until the final decisions on reparations)[17].

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17 For an emotional analysis of international criminal justice based on the Aristotelian notion of kátharsis, see: Buis (2020).

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PART III
APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

Chapter 5
The Constructivist Perspective[*]

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1. INTRODUCTION

Constructivism proposes that, in a socially constructed world, the existence of patterns, cause-and-effect relationships, and even States themselves, depend upon networks of meaning and practices from which they are constituted (Reus-Smit & Snidal, 2008). As a result, international society responds to the circumstances of the historical moment in which it finds itself, and concepts such as sovereignty and international peace and security begin to distance themselves from the dynamic of the supremacy of States as the predominant actors in international relations (IR) and international law (IL).

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

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There are four main characteristics of constructivism that distinguish it from other theoretical approaches to IR. Firstly, "constructivism" presents an alternative to "materialism" by emphasizing that the "meaning of things" is socially constructed. Secondly, it provides a different perspective on the creation of national interest via: (a) its social explanation; and (b) its analysis of the relationship of the State with other States through foreign policy. Thirdly, constructivism studies the relationship of national interests with international structures (understood as international institutions) and the agents that operate as actors within them. Finally, it offers a different reading of "international anarchy", because, while from a neorealist perspective the existence of anarchy at the international level is seen as chaos because of the absence of legitimate institutions of authority, for constructivism anarchy does not imply chaos, but rather it can mean a balance between States. In this way, as Waltz (1988) says, each one is equal and no one has the right to command. Thus, in the absence of agents who have authority over the entire system, relationships of domination and subordination fail to develop.

In this way, while for realism the "principle of self-help" in the midst of anarchy explains why security is so relevant, for constructivism anarchy is a product of intersubjectivity among the actors in the international system. Therefore, constructivism must be understood from the concepts of community, hierarchy and rivalry, which provide a social explanation that is compatible with a more comprehensive study of IR (Keohane & Nye, 1977; Morgenthau, 1986; Reus-Smit & Snidal, 2008).

For these purposes, constructivism includes in its analysis "ideas" and "beliefs", which are predicated upon accepting that concepts and definitions are not fixed, and that, therefore, reality is under constant construction and change depending upon the ideas and beliefs of the actors (Theys, 2017: 37).

Likewise, for constructivism, the concepts of "identity" and "interests" are fundamental because States can have multiple socially constructed identities through their interactions with other actors. In this way, identities are constructed and determined according to the self-perception that the actors in a given society have of themselves and the way in which they are perceived by others (Theys, 2017: 38).

Consequently, the identities of the actors in international society (States, international organizations (IOs) or transnational actors) are "mutually constitutive" (Wendt, 1992: 399) and materialize social norms, which are understood as appropriate standards of conduct for those actors who have a certain identity. It is therefore considered coherent that they act in a particular way, since that is what is expected of them (Theys, 2017:38; Katzenstein, 1995:5).

In addition to this, and considering that ideas and practices vary over time and place, the patterns that were once solid and predictable can change. For example, sovereignty is a social institution in the sense that States can only be sovereign when they are seen as actors with rights and obligations over a territory and a citizenry by the other main actors in its particular national society and by other States in international society. However, the meaning of this concept has changed, as have the powers and identities of States (Reus-Smit & Snidal, 2008). One particular scenario in which this evolution of the concept of sovereignty can be observed is international criminal justice (ICJ), because the creation of a permanent criminal tribunal having jurisdiction over crimes considered to be the most serious for international society has put an end to the dichotomy between States and citizens, according to which the former exclusively exercised criminal jurisdiction over the latter.

The International Criminal Court (ICC) was born as a triumph of humanity, according to which even the highest responsible officials can be tried for the most serious crimes of international concern (genocide, crimes against humanity, war crimes and aggression) without being able to hide within the traditional system of immunities. This achievement is the result of a long journey towards ending impunity and arose as a result of such atrocities as the Nazi Holocaust, the crimes committed by the Japanese during World War II in Southeast Asia and throughout the Pacific, the ethnic cleansing in the territory of the former Yugoslavia and the genocide in Rwanda. In this way, the States Parties to the ICC Statute have committed themselves to availing themselves of a complementary international criminal jurisdiction, which can judge and punish crimes committed in their territory or by their nationals. Furthermore, with the establishment of the ICC, a transfer of sovereignty has occurred, which was

debated in depth at the 1998 Diplomatic Conference out of which the ICC Statute arose, without it having undermined the need to maintain cooperation between States.

Based upon the foregoing, this chapter seeks to analyze the ICC through the lens of constructivism, so as to account for how the ICC responds to a social construction that is born out of a need of international society, but which faces the prevailing interests of states. In this way, after analyzing the central aspects of constructivism (section 2), and explaining how it understands ICJ historical shaping as an institution in the international system (section 3), the ICC's role as a primary manifestation of ICJ is addressed (section 4). This includes an analysis of the situation in Afghanistan in order to explain how the dynamics of a hegemonic Power that is not part of the ICC Statute (the United States (US/USA)) can directly influence the fulfillment of the ICC's role. All this takes into account, as Barnett & Finnemore (2004: 6) point out, that international institutions, far from being limited to simply complementing the behavior of States or being subsidiary actors, have the authority and power to cause fundamental changes in international reality.

2. STARTING POINT: CONSTRUCTIVISM AS AN ANALYTICAL PERSPECTIVE

When addressing international justice (IJ) in general, and ICJ in particular, there is an evident tension between the sovereignty of States as a constitutive factor of the international structure and IL as an ideal (Wendt, 1999). However, from a constructivist perspective, justice is not understood as a contrast amongst the interests of the actors in the international system, but rather, as occurs with States and other actors in that system, it is determined by an identity.

In this way, it is observed that international institutions have been key to the introduction of categories on the global stage, among which the concept of human rights stands out. In this regard, it is worth mentioning that, although neither ICJ, nor the ICC, relate to a specific dynamic of protection against human rights violations, all international crimes enshrined in art. 5 of the ICC Statute are serious

violations of human rights. Thus, although not every violation constitutes an international crime, every international crime has to do, in its essence, with a serious violation of human rights.

Concerning the specific role of IOs in the international system, Barnett & Finnemore (1999: 699) point out the following:

> Our argument is that the legal and rational authority that shelters International Organizations grants them power independent of the States that created them and likewise channels that power in various directions. Bureaucracies by definition generate rules, and in that process, they are also creating social knowledge.

With regard to the concept of sovereignty, Wendt (1999) points out how territory is its primary element, as observed especially in those States that face territorial tensions, such as Serbia, Spain, Israel and a good number of the States of the global South[1]. Nevertheless, for certain actors in international society, such as Sudan and Palestine (Sayigh, 1995; Hutton, 2014), the concept of sovereignty has acquired other meanings over time, which have to do with justice and the possibility of being recognized for their ability to manage situations of internal insecurity without the interference of third parties. In this way, for these actors, it is not only about being recognized as a territory with defined borders, but also about being permitted to control, without international interference, those situations that their respective governments consider as internal or external threats. In this new tension over the content of the concept of sovereignty, the way in which ICJ is institutionalized, is perceived in different ways depending on the realities of each State.

The explanatory scope of constructivism rests upon understanding that international politics is not determined by objective structures, but by social facts, such as discourse, norms, principles, ideas and values (Wendt, 1999; Onuf, 1989; Palan, 2004; Reus Smith, 2005). As Onuf (1989: 58) affirms, there is no primacy between the different

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[1] Territory is one of the constituent elements of the State, along with a permanent population, a government and the ability to enter into relations with other States. All these elements are essential for the exercise of sovereignty.

actors of the international system and the system itself, since each one is constituted in and through recurrent practices. In this way, actors and structure constitute each other reciprocally. In other words, international social reality is created through behavior. Accordingly, constructivism implies a break with those theories which: (a) have been traditionally the basis to approach reality; and (b) are strongly permeated by the idea that all actors on the international scene are rational and that their behavior is explained by a cost-benefit calculation in decision making (Wendt, 1992).

The logic of traditional theories assumes that the key variables of the international system are material, and therefore realists and liberals assume that States and other international actors are seeking material benefits. In contrast, constructivism departs from rationalism because it considers that actors are neither rational nor "unitary" units, and that, on the contrary, they are conditioned by their discursive acts (i.e., the self-perception of each actor and its interaction with the perceptions of the other actors (intersubjectivity)).

In this sense, Wendt wonders if in the hypothetical case in which Cuba and Canada announced the acquisition of nuclear warheads, the result would be the same (given that it would denote a very significant increase in their respective military capabilities). If reality were determined exclusively in terms of the distribution of material power, the result should be the same, because both would enter the exclusive group of nuclear Powers (Wendt, 1999: 397). However, the most relevant difference would be a direct consequence of the different way in which third States regard Cuba and Canada. Thus, Cuba is considered by numerous actors as a State that constantly challenges the logic of the international system, a situation that does not happen with Canada. Consequently, concepts such as order, security, threat and anarchy, far from representing immutable, given and material realities, reflect a conception of the world constructed upon the way in which States are perceived, and the way in which such representations impact upon the system.

Based on the foregoing, Wendt (1999) emphasizes how ideas constitute as much the materiality of the international system as the concepts of power and structure. Wendt states that the function given to each of the different social facts does not have a fixed content, but rather it con-

forms to the interpretation that the actors make of it. In particular, in relation to the creation and interaction of international institutions, the author emphasizes that the process by which egoists learn to cooperate is, at the same time, a process of reconstruction of their interests in the face of shared commitments to social norms (Wendt, 1992).

As regards institutions, it is important to mention that the concept of "institution" is linked to the notion of "international regime", understood as a set of principles, norms, rules and procedures ("social facts" for purposes of constructivism) around which the expectations of the actors converge in the area of IR. In this sense, institutions must be analyzed as: (a) the result of the discursive interactions and social construction carried out by States; and (b) a factor of change in the identity of States in a circular dynamic. In this way, States also accept a new form of behavior (accepted behavior) (Fehl, 2004; Wendt, 1999), which consists of values, ideas and norms that arise within international institutions.

Under these assumptions, the idea of ICJ arises out of the way in which perceptions and meanings regarding the concepts of sovereignty, responsibility of non-state actors and the fight against impunity have been changing. Consequently, the ICC should not be analyzed only considering its current role; rather, the social processes that led to its constitution should also be taken into consideration (Slaugher et. al., 1998; Onuf, 2012; Sinclair, 2010; Rudolph, 2017).

A scenario where this can be shown is the political mood that was generated with the creation of the ICC, and the distrust of the five permanent members of the United Nations Security Council (UNSC) for the creation of an IO that could undermine the UNSC powers in relation to the determination and management of the threats to peace, breaches of peace and acts of aggression (Bergsmo, 2000). However, the support of the European Union (EU), a good number of African and Latin American States and numerous NGOs grouped in the Coalition for the ICC (CICC) allowed for the convening of the Diplomatic Conference that led to the adoption of the ICC Statute in 1998, and its entry into force on July 1, 2002 (Olasolo et. al., 2018).

Finally, it is worth highlighting that the current weight of ICJ in IR is not only explained by the establishment of the ICC, because ICJ is as

an authentic international regime, which is applied by several international institutions, within which the ICC is placed. Moreover, far from finding a consensus on the meaning of the ICC, there are a multiplicity of perceptions and a fluid identity that is difficult to define.

3. HISTORICAL EVOLUTION OF INTERNATIONAL CRIMINAL JUSTICE WITHIN THE INTERNATIONAL SYSTEM

ICJ should not be understood as limited to the decisions of international criminal tribunals, but also as including the very structure of the system that has been developed through interactions amongst States, and between States and other international actors (Malekian, 2014: 1). In this way, under the constructivist understanding that actors, through their behavior, promote the development of identities and create international social reality, it is necessary to analyze how ICJ has been built until the establishment of the ICC.

The idea of ICJ arose out of a new perception of the concept of sovereignty in order to avoid impunity. As a result, ICJ evolved through processes that reveal the tension between the state interests of power and wealth, and the moral and social values commonly shared by international society (Bassiouni, 2009:271). Accordingly, in order to understand the ICC as an institutional manifestation of ICJ, it is necessary to study not only its current role, but also the processes that preceded it and led to its norms, principles, values and ideas.

In what Bassiouni calls the first historical stage of ICJ, three events were decisive: (a) the trial against Conradin von Hohenstaufen in 1268[2]; (b) the trial against Peter von Hagenbach in 1474[3]; and (c)

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[2] Conradin von Hohenstaufen, a German nobleman, was tried and executed in 1268 in Italy for transgressing Papal dictates by attacking a French nobleman, and pillaging and murdering Italian citizens near Naples. Some of these crimes were considered crimes against the laws of God and man (Bassiouni, 2009: 297 et seq).

[3] In 1474, Peter von Hagenbach, a Dutch condottiere (a mercenary) hired by the Duke of Burgundy to form an army to occupy the city of Breisach

the defeat of Napoleon's troops by Austria, England, Prussia and Russia in 1813[4]. These three events are relevant since they demonstrate the political nature of ICJ (Bassiouni, 2009).

A century afterwards, at the end of World War I, the Allies sought to prosecute the German leaders for starting the war and for the crimes committed during it. Thus, art. 227 of the Treaty of Versailles (1919) established the possibility of prosecuting Kaiser Wilhelm von Hohenzoller (Head of State of Germany during the conflict). This express reference to the principle of international criminal responsibility of individuals was later decisive in the establishment of the International Military Tribunal (IMT) (the Nuremberg Tribunal) and the International Military Tribunal for the Far East (IMTFE) (the Tokyo Tribunal) at the end of World War II.

In the statutes of these two tribunals, it is evident that, for the Allies, individuals, regardless of the position they held, could be responsible for crimes against peace, war crimes and crimes against humanity (Rudolph, 2017: 2). This lifted the veil from state sovereignty, by prohibiting conduct that, previously, was within exclusive competence of States in the internal sphere. Moreover, it generated a new relationship between individuals and States on the one hand, and between States and international society on the other (Melandri, 2009: 534).

(Germany) and collect taxes from the population, was tried in Breisach. When the population of Breisach opposed these taxes, the Duke of Burgundy ordered von Hagenbach to sack, rape and burn the city. This attack was so large that it was considered a crime against the laws of God and man. During the trial, the accused was refused permission to display the orders of the Duke, thus shielding the latter from responsibility (Bassiouni, 2009: 298).

4 In 1813, the Allies (Austria, England, Prussia and Russia) defeated Napoleon's troops in Leipzig (Germany). Months later, Napoleon was captured and sent to the island of Saint Helena. Even though the Allies were interested in trying Napoleon, it was considered that, because he was married to the daughter of the Emperor of Austria, he could not be tried as a common criminal. As a result, it was decided to just exile him (Bassiouni, 2009: 300).

Although this can be explained by the Allies' interest in preserving international peace and security (which would justify limiting, to a certain extent, the content of the concepts of immunity and sovereignty, previously perceived as sacrosanct) (Broomhall, 2004: 42), it is no less true that the idea of putting on trial those most responsible for international crimes was understood mainly as confirmation that a war had been won (Hirsch Ballin, 2019: 202). This did not detract these tribunals, however, from laying the foundations for the future establishment of a permanent criminal tribunal that would judge the most serious crimes of international concern.

Although the victors of World War II established the TMI and the TMILO, political tensions between the blocs led by the US and the USSR sparked the Cold War and put a halt to the process of ICJ evolution until the decade of the 1990s (Huikuri, 2019: 6). This "paralysis" shows the relationship and dynamics between the political interests of the hegemonic States and the evolution of ICJ.

After the end of the Cold War, the next development in the system was the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) (1993), the International Criminal Tribunal for Rwanda (ICTR) (1994) and the hybrid tribunals. With the establishment of the ICTY by UNSC Resolution 827 (1993), it was ensured that those responsible for international crimes could not hide behind the concept of sovereignty (Rudolph, 2017: 3, 16). However, at the same time, the fact that the UNSC established the ICTY and the ICTR still showed that there were still traces of "victors' justice" remaining, because both tribunals were established by the most influential States in the UNSC (Rudolph, 2017: 3).

Tribunals created for specific regional situations, such as the ICTY, the ICTR and the hybrid tribunals (including, the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers of the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL)), have fulfilled a fundamental role in enriching ICJ regime and consolidating a normative body both substantially and procedurally (Scheffer, 2011). The situations of atrocious crimes for which they were created caused important changes in the interests of States and other international actors, generating the development of new identities

that were reflected in the institutionalization process that led to the creation of the ICC.

Although the process of establishing the ICC can be traced back to the "Code of International Crimes" and "The Statute for an International Criminal Court", put forward by the International Law Commission after World War II, the process was halted until the early 1990s and only concluded with the approval of the ICC Statute on the last day of the Diplomatic Conference in Rome, on July 17, 1998 (Olasolo et. al., 2018).

This Diplomatic Conference has been the largest UN codification conference to date (with the participation of 160 States, 17 intergovernmental organizations, 14 UN agencies and funds and 124 NGOs) (Huikuri, 2019: 7). Within this conference, three bloc of States could be clearly distinguished: the so called "friends of the Court" (like-minded States (LMS))[5], the permanent members of the UNSC (with the exception of the United Kingdom) and the non-aligned States[6].

The LMS, which was the largest and most organized coalition, strove to establish the ICC as a strong institution, which would be both independent of States and of the UNSC (in particular, its Office of the Prosecutor) and effective. Furthermore, they argued that the effectiveness of the ICC should arise from a "universal obligation" to cooperate with it and from its autonomy to decide on the situations in which it should intervene (Huikuri, 2019: 7). The LMS managed to eliminate from the draft of the ICC Statute the UNSC veto on the investigations that the ICC would carry out. Likewise, they achieved the acceptance of the autonomy of the ICC Office of the Prosecutor (ICC OTP) to begin investigations. All of this demonstrated the interest of a considerable number of States in transferring part of their

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5 The LMS group was made up of 60 States, including Germany, the Netherlands, Canada, Australia, Argentina, South Africa and all countries of the European Union (with the exception of France). The NGO Coalition later joined the LMS group.

6 The Non-Aligned Movement was formed with the purpose of maintaining a neutral position and not allying itself with any of the Cold War superpowers (the former Soviet Union and the United States).

sovereignty to make ICC investigations more effective, thus reinforcing the capacity of the international regime (Krasner, 1982).

The permanent members of the UNSC had a different vision of the ICC. At the beginning of the negotiations, these States had to accustom themselves to being on equal terms with other States in the debates related to international peace and security issues, which until then they had controlled almost exclusively (Huikuri, 2019: 7; Benedetti & Washburn, 1999: 4; A/RES/50/46, 1995). These countries sought to ensure its control over the ICC by promoting the recognition of their right to veto ICC actions. In addition, they opposed both an independent ICC OTP and the inclusion of the crime of aggression within the ICC Statute. In this way, the ICC would be similar to an *ad hoc* tribunal such as the ICTY or the ICTR (Huikuri, 2019: 8; Benedetti & Washburn, 1999:18).

Finally, the non-aligned States sought an ICC that would not be under the control of the UNSC, but that would be weaker than the one proposed by the LMS (Huikuri, 2019: 8; Washburn, 1999: 367). They promoted the inclusion of the crime of aggression, and ICC respect for the sovereignty of States, which was why they firmly supported the principle of complementarity (Huikuri, 2019: 8).

It is important to emphasize that the United States (US/USA) (the hegemonic power in the 1990s) participated in the Diplomatic Conference with the largest delegation so as to ensure that the ICC Statute accommodated the US national interests (Huikuri, 2019: 9; A/CN.4/L.488, 1993). Nevertheless, in failing to achieve these goals, the US rejected the final text of the ICC Statute, which led it to vote against it along with China, Cuba, Iraq, Israel, Yemen and Qatar. As a result, the adoption of the ICC Statute is considered by many to be "a diplomatic defeat of epic proportions" for the US (Huikuri, 2019: 9; Brown, 2000: 66).

With the establishment of the ICC, States Parties "gave up" certain aspects of their sovereignty because the competence to investigate and prosecute had been one of the exclusive powers of state sovereignty since the 17th century (Rudolph, 2017; Cryer, 2005: 985-987; Morgenthau, 1978). It is for this reason that Rudolph (2017) suggests that the change towards a model of international criminal respon-

sibility of individuals also represents a notable transfer of authority from States to international institutions.

Although States had traditionally been reluctant to cede sovereignty by handing over jurisdictional powers to international institutions possessing the capacity to judge crimes committed in their territory or by their nationals, it was through an act of state sovereignty that the ICC was established and jurisdiction was attributed to it (thereby using state sovereignty to foster ICJ purposes) (Cryer, 2005: 985).

Since its creation, the ICC has taken into account the international standards created by other international criminal tribunals that preceded it (Scheffer, 2011; Olasolo et. al., 2018). Its establishment, together with the activities of those other tribunals, have created the idea that, through the ICC, it is possible to approach the ideal of justice in terms of the application of international criminal responsibility of individuals.

Likewise, with the establishment of the ICC, "victors' justice" is left aside, because, due to its permanent nature and the fact that it can only receive cases of crimes committed subsequent to its establishment, the ICC, unlike the IMT, the IMTFE, the ICTY and the ICTR, has not been created as a response by victors prosecuting losers. On the contrary, it has been created by an international treaty by which sovereign States, by becoming States Parties, express their consent to assume the obligations contained therein[7] (it is important, however, to emphasize that the UNSC can refer a situation to the ICC when is aware that one or more of the crimes provided for in the ICC Statute have been committed, even when these have occurred in States which are not part of the ICC Statute)[8].

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7 However, for Mérgret (2015: 85), those international criminal tribunals that have universal aspirations, such as the ICC, tend to become autonomous from the States that establish them to become institutions that seek to implement international values.

8 See art. 13 of the ICC Statute. As an example, the situation in Darfur (Sudan) was referred by the UNSC to the ICC through Resolution 1593 (2005) in March 2005. Similarly, the situation in Libya was referred by the UNSC through Resolution 1970 (2011) in February 2011.

Moreover, the ICC is also distinguished from the international criminal tribunals that preceded it by being the first ICJ institution to grant extensive rights to victims in terms of participation in proceedings and reparation. The introduction of the concept of "justice for the victims" is novel and constitutes a clear example of an identity of the ICC (based on values such as justice, the rights of victims and reparation), which is alien to "victors' justice". This does not mean, however, that the ICC has not received accusations about the way in which it selects its situations and cases based upon it being an institution at the service of Western/European States to dominate and "discipline" non-hegemonic countries (mainly African) (Huikuri, 2019: 14).

Regardless, the process of institutionalization of ICJ which, to a certain extent, is seen to have culminated in the creation of the ICC, demonstrates the evolution of the identities of the States, reflecting the construction of new values that determine the direction of many international institutions (many of them committed to the liberal order). Furthermore, as the application of international criminal responsibility of individuals has become an *erga omnes* obligation (Cassesse, 2003: 736), one can observe the appearance of "new" values in the international order. In this way, the ICC is one of the main results of understanding that the discourse on inviolable state sovereignty has traditionally protected serious violations of human rights, and that, in the interest of protecting other fundamental values of current international society, this discourse must be overcome (Sadat, 2007).

4. THE ROLE OF THE INTERNATIONAL CRIMINAL COURT AS A PRIMARY MANIFESTATION OF INTERNATIONAL CRIMINAL JUSTICE, ITS RELATIONSHIP WITH STATES AND ITS IMPACT UPON THE CONCEPT OF STATE SOVEREIGNTY

Having understood the historical evolution of ICJ which, to a certain extent, culminates with the establishment of the ICC, it is necessary to analyze the role of the ICC as a primary manifestation of ICJ. In this sense, from a constructivist perspective, its most notable aspect is the complementary nature of the ICC in relation to national

jurisdictions (for many the "cornerstone" upon which the ICC Statute is built) (Melandri, 2009: 535-536), because it allows us to understand the relationship between the ICC and State sovereignty.

The complementary nature of the ICC, which is in contrast to the primacy over State jurisdictions with which the international criminal tribunals that preceded it have been invested (Benzing, 2003), is enshrined in the preamble and in art. 1 of the ICC Statute. According to this, national jurisdictions have priority over the investigation and prosecution of crimes provided for in the ICC Statute, limiting the action of the ICC to those scenarios where local authorities do not act, or do so with a clear lack of willingness or capacity to carry out their actions (Delmas-Marty, 2006).

Art. 17 of the ICC Statute includes those circumstances in which it is considered that a State, despite having initiated criminal proceedings, lacks the willingness or capacity to investigate and/or prosecute international crimes committed within its territory or by its nationals (Stahn, 2018; Triffterer & Both, 2016). While the criterion of lack of capacity is preeminently objective in nature because it is based upon facts (such as the total or partial collapse of the national judicial system), the criterion of unwillingness is marked by a much more subjective component. It requires that national proceedings be carried out with: (a) the purpose of shielding the concerned person from criminal liability under the ICC Statute; (b) an unjustified delay; or (c) lack of independence or impartiality. Furthermore, in these last two cases, the delay or lack of independence or impartiality in national proceedings must be incompatible with the intention of bringing the concerned persons to justice (Benzing, 2003).

The ICC has the power to ultimately decide whether or not a State has the willingness and capacity to carry out its national proceedings (for which it may request the examination of such proceedings) (Melandri, 2009: 540). Art. 19 of the ICC Statute, however, grants concerned States the power to challenge the admissibility of situations and cases, thus encouraging the existence of a complex, interactive and dynamic relationship between the ICC and States.

The principle of complementarity has several goals. First, it recognizes that national authorities are in a better position than the ICC

to collect the necessary evidence and arrest the accused. Secondly, it safeguards the "sustainability" of the ICC, because it would be counterproductive for the ICC to be overwhelmed with situations and cases, in light of its infrastructure and financial limitations. Thirdly, it encourages States to exercise their jurisdiction over the crimes provided for in the ICC Statute. Finally, it represents a compromise between respect for State sovereignty and the need to promote effective ICJ enforcement (Philippe, 2006).

The tension between ICJ and State sovereignty is reflected in the different aspects of the principle of complementarity as the principle guiding the complex and multifaceted relations between the ICC and national jurisdictions (Melandri, 2009: 532). Its development reflects a change in recent decades in the conception of state sovereignty, which no longer has an absolute character and can be "ceded" (ICTY, Tadic, 10/02/1995: paras. 55, 97; Melandri, 2009: 542).

In this regard, Nagan & Hammer (2004: 31) argue that, in contemporary IL, the idea of sovereignty is not a vertical issue, but rather has a component based upon popular will from which its legitimacy arises. In this way, by including in the ICC Statute crimes which are committed mainly against people, it becomes a tool that protects the origin of the legitimacy of sovereignty. Furthermore, for these authors, the ICC Statute also protects sovereignty within the international system by defining the crime of aggression, which is always directed against the integrity and territorial and political independence of sovereign States (Nagan & Hammer, 2004: 34). Consequently, the States Parties do not renounce their sovereignty by attributing jurisdiction to ICJ institutions such as the ICC; rather they limit themselves to transferring it.

By making this transfer, States Parties commit to the ICC to having a dialogue and to working constructively to promote the fulfillment of its role (Melandri, 2009: 542). Likewise, the ICC Statute motivates States Parties to exercise their sovereignty because it recognizes them as having priority in prosecuting crimes committed in their territory or by their nationals. In this way, they internalize the value of investigating and prosecuting international crimes, participate in the development of international custom, and become directly involved in the administration of ICJ by participating, for example, in the nom-

ination and election of judges or by voting in the Assembly of States Parties (Melandri, 2009: 242-243). Consequently, it can be affirmed that the ICC plays a relevant role in the changes undertaken by the meaning of the concept of state sovereignty.

It is also important to emphasize that the ICC makes up part of the international system, and is entering a sphere in which interests and discourses are decisive. Furthermore, since the ICC organ that has the greatest scope of discretion is the ICC OTP (since it has the power to decide whether or not to request authorization from a Pre-Trial Chamber (PTC) to open an investigation or issue an arrest warrant or a summons to appear), it has the power to adopt different strategies in relation to States.

From a strictly legal approach, the ICC OTP is expected to act in an apolitical manner, while it examines information on the possible crimes set out in the ICC Statute with few references to the surrounding realities or the interests of the Great Powers (in particular, the US, China and Russia as the three permanent members of the UNSC that are not parties to the ICC Statute). According to this approach, the only role of the ICC OTP is to determine whether the ICC has material, personal, temporal and territorial jurisdiction, whether the crimes committed are sufficiently serious, and whether national jurisdictions are adequately investigating and prosecuting them. In this way, the political dynamics of the country, the region and international society are only relevant to the extent that they provide information on any of the legal issues mentioned above, because understanding the political context can help the ICC determine, among other things, if the key actors acted with "genocidal intent" or organized themselves according to a chain of command (Bosco; 2013: 18). Politics should not, therefore, be taken into consideration in any other sense.

By way of contrast, a more pragmatic approach accepts that the ICC can be dependent upon State support, and that there are diplomatic realities which determine whether an investigation is feasible or not. Consequently, the ICC OTP should consider these realities when adopting its investigative strategy, because ignoring the need of the ICC for State support could weaken its credibility (Bosco; 2013: 19).

Although this latter approach brings with it significant risks, because incorporating political considerations into decisions that are supposed to be based exclusively on legal criteria implies that the ICC ceases to be impartial (which could affect the system it has sought to develop), this dynamic can, at the same time, result in a "mutual accommodation" in which States, including the Great Powers, can tolerate and even support the ICC (Bosco; 2013: 20). This accommodation can be seen in the first decisions of the ICC OTP on the selection of situations to investigate. Although the ICC OTP was cautious to avoid tensions with the Great Powers, it established, at the same time, precedents that have been fundamental for future investigations.

In respect to the possible strategies of States regarding the ICC, these are determined by their own national interests and can be summarized in the following three categories: marginalization, control and acceptance (Bosco; 2013: 13). The first involves encouraging the ICC to remain weak and eventually lose relevance. This strategy, which can be implemented by formal and informal means (such as not providing resources to support the ICC even when the UNSC has referred a situation to it under art. 13 of the ICC Statute), has been adopted by the Great Powers, in response to an institution that they cannot directly control, and that may be inconvenient and dangerous to their interests. Thus, although the UNSC has the power to refer situations to the ICC OTP for investigation[9], and thereby extend the jurisdiction of the ICC to crimes committed in non-party States by their nationals[10] and increase the ICC legitimacy, this does not mean that the permanent members of the UNSC support the work of the ICC (Bosco, 2013: 21). Indeed, as Rudolph (2013: 3-6) has argued, the advantages of the ICC can be considered as being too diffuse to compete with the "benefits" of State sovereignty and other national interests.

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9 See: art. 13(b) del ICC Statute.

10 The situation in Darfur (Sudan) was referred by the UNSC to the ICC in March 2005 through Resolution 1593 (2005). The situation in Libya was susbsequently referred by the UNSC to the ICC in February 2011 through Resolution 1970 (2011).

Secondly, States may also seek to control the ICC to try to bind it to a strict interpretation of its mandate and prevent its interference with the political and diplomatic interests of the concerned States (Bosco, 2013: 14). The most obvious form of control is through the possibility of the permanent members of the UNSC exploiting the power of the UNSC to request the suspension for renewable periods of twelve months of the investigations and prosecutions carried out by the ICC[11].

Finally, States may also choose as a third strategy to accept an ICC that they cannot control, if they conclude that the benefits of supporting the institution outweigh the costs. Acceptance can be evidenced, for example, in the self-referrals by certain States of those situations that have occurred within their own national territory.

5. THE ANALYSIS OF THE OPENING OF THE INVESTIGATION IN THE SITUATION IN AFGHANISTAN FROM A CONSTRUCTIVIST PERSPECTIVE

On November 20th, 2017, the ICC OTP submitted *propio motu* to ICC Pre-Trial Chamber (PTC) II a request to open an investigation into the situation in the Islamic Republic of Afghanistan due to the crimes set out in the ICC Statute allegedly committed in its territory after May 1st, 2003 or in the territory of other States Parties after July 1st, 2002, as long as they were related to the first described (ICC, Public Information Office, 11/20/2017; ICC, Afghanistan, 20/11/2017). The request concerned, in particular, crimes against humanity and war crimes committed by: (a) the Taliban and their associated groups; (b) the Afghan special forces; and (c) the US military and the US Central Intelligence Agency (CIA) (ICC, Afghanistan, 11/20/2017; ICC, Afghanistan, 03/05/2020)[12].

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11 See: art. 16 del ICC Statute.

12 Article 15 of the ICC Statute allows the ICC OTP to open an investigation *motu propio* without the need for a referral by a State Party or the UNSC. However, such an investigation must be authorized by a Pre-Trial Chamber.

At first, on April 12th, 2019, PTC II denied authorization to open the investigation on the basis of art. 15(4) of the ICC Statute, because, without prejudice to the fact that all relevant requirements were met with regard to jurisdiction and admissibility, an investigation into the situation in Afghanistan would not have served the interests of justice (ICC, Afghanistan, 04/12/2019).

Nevertheless, on March 5th, 2020, the ICC Appeals Chamber (AC) revoked this decision and authorized the opening of the investigation. It considered that PTC II had made an error in law in considering *propio motu* the "interests of justice" factor when examining the ICC OTP request for authorization to open an investigation (ICC, Afghanistan, 03/05/2020: paras. 23-46)[13].

The opening by the ICC of the investigation in relation to possible crimes committed by the US armed forces and the CIA in Afghanistan marked a break with the hegemonic positioning of the US in international society, and provided a different perspective for the analysis of ICJ and international peace and security. This new perspective addressed the application of legal criteria to behaviors committed on the ground (particularly when they were as serious as those which occurred in Afghanistan). Furthermore, the tension created between the US and the ICC called into question the ability of the latter to develop its investigation because, although said relationship had always been complicated, after the ICC OTP presented its request in 2017, there had been further deterioration.

In this sense, it is worth emphasizing that since the "diplomatic defeat" suffered by the US delegation at the Rome Conference, the US has repeatedly requested that the jurisdiction of the ICC be voluntary, so as to preserve a more absolute concept of sovereignty and to prevent the ICC from exercising its jurisdiction over citizens of non-party States, including US citizens (Ochs, 2019).

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[13] On October 31st, 2022, ICC PTC II authorized the ICC OTP to resume the investigation into the situation in Afghanistan. This happened after a period of deferral of said investigation by the ICC OTP to the Afghan national jurisdiction. Such a deferral had taken place in the context of an admissibility challenge by the former government of Afghanistan. Since October 31st, 2022, the ICC OTP has been conducting its investigation into the situation in Afghanistan.

Moreover, the US has made multiple efforts to shield its nationals from any investigation or prosecution by the ICC. As a result, it has concluded bilateral immunity agreements with more than one hundred States Parties, under an extensive interpretation of art. 98(2) of the ICC Statute (the US has sought through these agreements to ensure that, in the event that the ICC requests a State Party to arrest and surrender any US national present in its territory, said State Party is obliged to obtain prior authorization from the US government to be able to surrender the individual to the ICC) (Schabas & Bernaz, 2011).

Furthermore, former US National Security Advisor, John Bolton, has always sought to undermine the legitimacy of the ICC by making it appear as a threat to the principles of non-intervention and State sovereignty, under the argument that anyone could be judged by an "alien foreign court" (Al Jazeera, 2018). Consequently, since the establishment of the ICC, US policy has been characterized by not supporting it, despite its leading role in the establishment of the international criminal tribunals that have preceded it (Bosco, 2013; Ochs, 2019).

With respect to the situation in Afghanistan, there are also other elements that must be highlighted, since the US intervention in that country from 2001 to 2021 has marked both points of continuity and rupture in the definition of the current international system (David, 2013). On the one hand, the so-called "Global War on Terrorism", which began in Afghanistan, has meant the reaffirmation by the US of armed responses to the challenges to its national security. On the other hand, the positioning of the "fight against terrorism" agenda has led to the proliferation of international institutions that seek to combat it. Thus, a new "label" has appeared to cover up the constant hegemonic practices of the US (David, 2013).

Consequently, the 2020 opening of an investigation into, *inter alia*, the acts committed by members of the US armed forces and members of the CIA represented a break with the hegemonic superiority of the US, and thereby increased the intensity of its characteristic animosity towards the ICC (the fact that the opening of the investigation into the situation in Afghanistan was legally sound in light of the ICC Statute was irrelevant for these purposes).

In this context, the US responded directly against the ICC, by withdrawing the visas of the officials in charge of the investigation (including that of the ICC Prosecutor herself), threatening to freeze their assets in US territory, and warning of the negative economic consequences that supporting the ICC investigation could have for any State Party (Ochs, 2019).

In this context, the then newly elected ICC Prosecutor, Karim Khan, made a statement on September 27, 2021 to focus the ICC OTP investigation in Afghanistan "on crimes allegedly committed by the Taliban and the Islamic State-Khorasan Province (IS-K) and to deprioritize other aspects of this investigation" (including the crimes alleged committed by the Afghan National Security Forces and the US armed forces and the CIA)[14]. The ICC Prosecutor took this decision even though this could put into question the ICC OTP future legitimacy[15].

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[14] See: International Criminal Court. Office of the Prosecutor (2021). *Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan.* 27 September 2021. https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application. In justifying his decision, the ICC Prosecutor stated as follows: "I am cognizant of the limited resources available to my Office relative to the scale and nature of crimes within the jurisdiction of the Court that are being or have been committed in various parts of the world. I have therefore decided to focus my Office's investigations in Afghanistan on crimes allegedly committed by the Taliban and the Islamic State-Khorasan Province ("IS-K") and to deprioritise other aspects of this investigation. The gravity, scale and continuing nature of alleged crimes by the Taliban and the Islamic State, which include allegations of indiscriminate attacks on civilians, targeted extrajudicial executions, persecution of women and girls, crimes against children and other crimes affecting the civilian population at large, demand focus and proper resources from my Office, if we are to construct credible cases capable of being proved beyond reasonable doubt in the courtroom".

[15] See: International Criminal Court: Office of Public Information (n.d.). *Situation in the Islamic Republic of Afghanistan.* https://www.icc-cpi.int/afghanistan. As the ICC Office of Public Information explains: "On 15 April 2020, the Prosecution notified the Chamber of the Government of Afghanistan's request of 26 March 2020 seeking a deferral, pursuant to article 18(2) of the Rome Statute of the Prosecution's investigation into the Afghanistan Situation. On 27 September 2021, the Prosecution requested authorisation

This growing tension between the US and the ICC shows how the relationships and interests of States (whether or not they are parties to the ICC Statute) have an impact (hindering or facilitating) on the fulfillment of the ICC's role of putting an end to the impunity of those most responsible for the most serious crimes of international concern. In fact, for some authors, US pressure has had an impact on certain decisions adopted by the ICC when prioritizing resources, opening investigations and closing cases (Poltronieri Rossetti, 2019). The ICC OTP "de-prioritization" decision could also be understood as a result of US pressure (and sanctions).

In this way, the explanation given by constructivism materializes, according to which, by leaving aside a strictly legal analysis of the ICC, one can see the identities of the actors involved in the development of the system of the ICC Statute, which are influenced not only by their actions, speeches and interests, but also by more powerful actors who determine their activity on the international scene.

6. CONCLUSIONS

Constructivism proposes an interpretation of the evolution of the concept of State sovereignty that challenges the generally accepted idea that such sovereignty is an immutable principle. Consequently,

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to resume its investigation under article 18(2) of the Rome Statute. On 31 October 2022, Pre-Trial Chamber II of the International Criminal Court (ICC) authorised the Prosecution to resume investigation into the Afghanistan Situation. The judges considered that Afghanistan is not presently carrying out genuine investigations in a manner that would justify a deferral of the Court's investigations and that Afghanistan authorities are not showing an interest to pursue the deferral request it submitted on 26 March 2020. On 4 April 2023, the Appeals Chamber issued its Judgment on the Prosecutor's appeal amending the Pre-Trial Chamber II's decision to align with the scope of the Prosecutor's investigation in the Afghanistan situation as previously determined by the Appeals Chamber" (thus, allowing the investigation of the crimes allegedly committed by the Islamic State-Khorasan Province (IS-K). Since then, the ICC OTP has been conducting its investigation in the Situation in Afghanistan, which encompasses allegations of systematic discrimination and persecution of women and girls.

it explains the profound transformation undergone by this concept in recent decades, especially due to the increasing pressure to administer justice in situations where international crimes have been committed (accordingly, the ICC is a particularly relevant reference for understanding this evolution).

At the same time, constructivism is a revealing approach when studying aspects of IL to the extent that it reflects principles, values, ideas and discourses that are nothing other than a social construction of reality. Therefore, to understand the genesis, development, scope and limitations of ICJ, and of the ICC, it is essential to approach it from a perspective that goes beyond the traditional interpretation (realist or liberal) in which rational decisions are the common denominator.

For constructivism, the ICC is the result of an evolution of the discourse about sovereignty, which is particularly noticeable in the way in which States have accepted the change of the political paradigm of "victors' justice" so as to subject it to international legal criteria. This means that international organizations (IOs), such as the ICC, have gained greater capacity for action in relation to issues (such as the administration of justice) that in the past were the exclusive jurisdiction of State sovereignty.

Although classical theories of IR recognize that IOs are created by States and, therefore, obey their interests, classical approaches cannot explain the reasons why organizations that do not serve, or do not submit to, State interests (whether hegemonic or peripheral) continue to remain in force (Barnett and Finnemore, 1999: 703). This is the case of the IOs for the promotion and protection of human rights and ICJ enforcement. In this way, ICJ institutions, such as the ICC, enjoy autonomy under the terms of constructivism and, consequently, play an important role in the definition of international reality and in the emergence and permanence of certain values.

In this context, the principle of complementarity responds to a relative concept of State sovereignty that supports the fight against the impunity of those most responsible for the most serious crimes of international concern (one of the most notable effects of the traditional definition of State sovereignty has been precisely the consoli-

dation of said impunity). The fact that the concept of sovereignty has evolved in this way has an impact on its relationship with ICJ, which is decisive in the constitution of the international structure.

The basis upon which the ICC interaction with States is determined is the principle of complementarity, which can be understood as the commitment that seeks to accommodate the individual and cooperative interests of States. Likewise, the ICC has reduced tension regarding the exercise of State sovereignty, having been created by a sovereign act of the States Parties and promoting States to use their national jurisdictions to satisfy the ICC main goals. Furthermore, although it is the ICC that ultimately determines the content and application of the principle of complementarity, there is always room for dialogue with States, the latter being able to challenge, in accordance with art. 19 of the ICC Statute, the admissibility of situations and cases, which bestows on them a certain level of influence in its application.

However, ICJ enforcement continues being limited because pressures (typical of IR) from States (particularly hegemonic States) on the ICC remain. This is a result of the fact that, regardless of whether or not they share ICJ purposes and the ICC's role, they only admit its enforcement when it does not affect their national interests, as reflected by the attitude of the US in relation to the opening by the ICC of the investigation into the situation in Afghanistan.

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Chapter 6
The Perspective of Feminist Theories in International Law[*]

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1. INTRODUCTION

Historically, violence against women within the context of armed conflicts has been rendered invisible, classified as collateral damage or as normal conduct in war. This has contributed to maintaining inequality before the law and perpetuating the social roles of submission, defenselessness and second-class citizenship assigned to wom-

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

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en, who do not have the option of accessing the same rights and protection enjoyed by men. This invisibility has allowed: (a) crimes of sexual violence (SxV) and/or gender-based violence (GBV) (SxV/GBV) to proliferate in armed conflicts; and (b) those responsible for them often remain unaccountable.

In light of this situation, in the 1990s, international criminal justice (ICJ) and international criminal law (ICL) began to criminalize some acts of SxV/GBV. This process has culminated in the Statute of the International Criminal Court (ICC), which incorporates a much broader gender perspective than that of the international criminal tribunals that preceded it. This has meant a significant advance in gender justice and victims' rights. Nevertheless, much still remains to be done to have effective investigations and prosecutions of SxV/GBV crimes.

This chapter will start by explaining some of the main feminist theories in order to understand their conception of justice and what they seek with the vindication of women's rights (section 2). Subsequently, it will address the evolution of the treatment of gender issues from the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) to the present day (section 3). Finally, it will analyze the ICC gender mandate and its implementation in the functioning of the ICC, highlighting what remains to be improved from the perspective of the feminist theories.

Considering that the purpose of this chapter is to analyze the ICC's role from the perspective of feminism and taking into account the existence of various feminist theories (as opposed to "a single feminism"), the method of "situated judgment" proposed by Radin (1990) will be applied, which consists of using a variety of analytical strategies instead of a single theory. In this sense, tools from liberal, cultural, radical, postmodern and poststructuralist feminist theories, as well as from third world feminisms, will be used, to the extent that each approach proves useful to address a specific object of analysis[1].

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[1] It should be noted, however, that this is done at the cost of a certain simplification of the feminist theories addressed.

It is hoped that this will identify some concerns that are pertinent to different feminist perspectives. Moreover, the oppressions underscored by feminism must always be understood as intersecting with other types of oppressions that arise from race, class, ability, origin, religion and the North-South division, among others.

2. THE HORIZON OF ANALYSIS: FEMINIST THEORIES

This section briefly presents the main characteristics of some strands of feminism that have been selected as a starting point for the analysis proposed in this chapter.

Liberal feminism is an individualistic form of feminist theory that is characterized by the belief that men and women should have the same rights and opportunities without any type of discrimination, given that by nature both possess the same intellectual capacities. In this sense, liberal feminists believe that female subordination occurs due to the existence of a set of restrictions, both in customs and in legal norms, that oppress women and block their entry and success in the public and political spheres (Tong, 2018). According to this approach, the elimination of these restrictions and their replacement by the principle of equal opportunities will allow for access of men and women to education, the labor market, the market for goods and services and the public and political spheres on equal terms (Charlesworth & Chinkin, 2016).

Cultural feminism equates the liberation of women with the development and preservation of a feminine counterculture (Echos, 1983), that is to say, it defends the exaltation of feminine principles and values by denigrating those of the masculine gender (Osborne, 1993). Cultural feminism considers that there is a feminine nature or essence, and seeks a positive valuation of the feminine by reaffirming the value of attributes associated with femininity and the construction of its cultural identity (Alcoff, 1988). From this perspective, it is argued that the feminine point of view understands nature and social life better than the masculine, and that if feminine values predominated, we would have a more peaceful world, in which there would be more conciliation and mediation.

Radical feminism, on the other hand, arises as a response to certain aspects of liberal and cultural feminism that are considered inadequate by some women. In relation to liberal feminism, radical feminists observe that the approach that insists that women and men should be treated equally is useless when women are not in the same position as men due to structural disadvantages. As Lacey (1987:415-420) explains, the principle of equality of opportunity is inadequate to criticize and transform a world in which the distribution of goods is structured in accordance with gender, and the assumption of a world of autonomous individuals who begin a career or who make decisions freely does not have enough weight against the argument that men and women are simply running in different races. Indeed, this last presupposition risks serving to legitimize existing differences, making them appear as the result of the various "free choices" made by individuals supposedly under conditions of equality. The premise of equality, as radical feminism observes, gives women access to a world constructed by men, in which they have to operate according to the parameters determined by them. Therefore, it is not an adequate approach to confronting oppression.

Likewise, radical feminism notes with concern that the acceptance by cultural feminism of the existence of a feminine nature or essence has as a corollary a biological determinism, which indicates to women what their place and role is. Therefore, for MacKinnon (1987: 39-45), "the feminine" is defined by a patriarchal culture, so that, if women claim to be different, when difference implies dominance, they are affirming that what characterizes them is their lack of power[2].

In contrast to the foregoing theories, post-structuralist feminism starts with the critique of (a) the binary vision of the world (which presents dichotomies, such as man/woman and masculine/feminine) based on social constructions; and (b) the identification of the strong, the public and the rational with the masculine, and the weak, the private and the sentimental with the feminine (Zambrini, 2014). These dichotomies, which separate men and women, are nothing

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[2] According to MacKinnon (1987: 39-45): "When you are powerless, you don't just speak differently. A lot, you don't speak".

more than social constructs that allow men to oppress women. Thus, in the process of deconstructing the truth about sexual differences, dichotomies are to be denounced as simplistic, since they leave aside the similarities between sexes so as to focus solely on the differences (Williams, 1990).

On the other hand, postmodern feminism is based on the criticism of modernism, in which knowledge arises from universal ideas, from great stories that give rise to the modern world, all arising out of perspectives of Western supremacy (Piedra Guillén, 2003). Thus, postmodern feminism seeks to put an end to this "single story", pointing out that different individual perspectives must be addressed, so that it should be through pragmatism that thought is constructed. One of the main criticisms is that there is no universal subject, no single vision, neither of freedom, nor of happiness; there are a series of differences that must be taken into account. It points out that feminism cannot be thought of from a single feminine perspective, because each woman is different in her race, creed, language and culture. Difference as an essential element in postmodern feminism allows us to recognize the differences amongst women themselves, which can lead to creating a context where everyone's voices can be heard (De las Heras Aguilera, 2009).

Finally, the expression Third World feminisms refer to feminist approaches developed by women in the Global South or by women of color in the Global North. These women have been critical of the thoughtless application of Western feminist theories to their societies and communities, and particularly of the equality approach of liberal currents. Likewise, they have also highlighted how, while gender and class are factors of oppression for women in the Global North, women in the Third World are also oppressed by imperialism and racism (Charlesworth & Chinkin, 2016: 46-47).

The first feminist movements in the Third World were closely related to nationalist struggles and, more recently, have largely focused on the eradication of poverty in their societies. In this regard, Third World feminisms have pointed out how the global economy perpetuates poverty and how the economic success of "developed" nations has been built on the exploitation of "developing" nations. This has created additional oppression for Third World women, from

which those of the Global North benefit. Thus, the latter must first recognize their privileged situation, and only by doing so and understanding the racism and economic exploitation suffered by Third World women, will they be in a position to better understand gender oppression within the framework of global capitalism (Charlesworth & Chinkin, 2016: 48).

3. THE ROLE OF THE INTERNATIONAL CRIMINAL COURT FROM THE PERSPECTIVE OF FEMINIST THEORIES

3.1. The context in which the International Criminal Court was created

The ICTY and the ICTR (ICTY/R) fostered the inclusion in the ICC Statute of SxV/GBV crimes that had been ignored in the trials held under the International Military Tribunal (IMT) and the International Military Tribunal for the Far East (TMILO) at the end of War World II, despite the blatant SxV/GBV suffered by women during the conflict. This was the result of the change undergone by the treatment of SxV/GBV in ICL as a result of: (a) the inclusion of rape as a crime against humanity and a war crime in the ICTY/R statutes; and (b) the recognition by the ICTY/R case law of certain crimes that can only be suffered by women, such as forced pregnancy.

Through their case law, the ICTY/R developed precedents that would chart the future of the ICC and its treatment of SxV/GBV. Landmark rulings were issued, *inter alia*, in: (a) the Akayesu case at the ICTR, in which the absence of consent in contexts of coercion was affirmed; and (b) the Kunarac case at the ICTY, in which the rape of a group of women in a "makeshift brothel" was found to constitute a form of slavery.

The Fourth World Conference on Women (1995), as well as the follow-up to the ICTY/R case law undertaken by feminist movements and lawyers, consolidated strong feminist networks that led to the formation of the Women's Caucus for Gender justice (WCGJ), which significantly influenced the final text of the ICC Statute, as its main proposals were accepted by the States participating in the 1998 Rome

Diplomatic Conference (Spees, 2003). They consisted *inter alia* of: (a) the inclusion in arts. 7 and 8 of the ICC Statute of several crimes of SxV/GBV as crimes against humanity and war crimes (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity); (b) the definition of these crimes and the adoption of provisions on procedure and evidence in line with a feminist and gender approach in light of the realities of war; (c) the express recognition in art. 36(8) of the need for "a fair representation of female and male judges" and for the selection of judges with legal expertise on violence against women; and (d) the inclusion in art. 7(3) of a notion of gender within the ICC Statute.

The WCGJ proposals were adopted despite the opposition from: (a) States whose delegations showed disinterest in the gender approach, as they considered that these issues were not relevant to the central aspects of the debate; and (b) States that actively opposed the implementation of these proposals (the Holy See (Vatican) and some States of the Arab League, among others), together with conservative and religious NGOs (Chappell, 2016).

The result was an ICC Statute that: (a) has been generally considered progressive on gender issues; (b) provides a detailed gender justice mandate to the ICC; and (c) promises to make SxV/SBV visible in the world. Therefore, although not free of problems, the adoption of the ICC Statute in 1998 was received as good news by feminism (Chappell, 2016: 2). Moreover, the ICC was perceived as a legitimate institution due to the participation of a variety of actors in its design.

Nevertheless, the analysis proposed in this chapter requires examining the institutional evolution of the ICC, and not only its foundational moment. An institution that is established in a patriarchal society, even if it has gender justice as one of its main goals, can end up functioning indifferently to it (or even to its detriment) because, even though the institution has formally been created with new norms, the unwritten rules of power relations always surface. As Charlesworth explains (2013: 32), there is always a risk that transformative norms, regarding sex and gender, are hollowed out in their application and end up even reinforcing the status quo.

In looking at the ICC through an institutional lens, Chappell (2016: 18) explains how gender operates as a set of norms and practices within institutions and behind the scenes, in a way that profoundly determines their design, their actions and their results. In the specific case of the ICC, the gender legacies of international law (IL), ICL and international humanitarian law (IHL) are particularly relevant.

Various authors (Askin, 2003; Charlesworth & Chinkin, 2016; Chappell, 2016; Coral Díaz, 2015, among others) have observed in the legacies of IL, and particularly in IHL, the following elements: (a) traditional narratives that have represented women as mothers, dependents, and passive subjects within different contexts, but not as actors with their own legal personality; (b) the consideration of SxV/GBV as less serious than other atrocities, by attributing to it a nature of collateral violence inevitable in conflicts (until very recently, SxV/GBV was treated as a crime against honor, which did not protect women as human beings *per se*, but rather men who were offended through the harm caused to women who depended on them); and (c) the invisibility of the experiences of male victims of SxV/GBV, because the dominant narrative is that it is only women who are subject to this violence.

There is also a prejudice against women, assuming that they make false complaints and are unreliable as witnesses. In addition, the stereotype of the "fresh complaint doctrine" has led to the belief that the truly virtuous woman (and therefore the one who tells the truth) is the one who reports sexual assault immediately (gender-based crimes that are not sexual in nature are thus ignored).

Likewise, SxV/GBV crimes have been under-applied due to a series of prejudices. Examples of this include that they are crimes that are difficult to investigate and prosecute, that it is difficult to obtain "reliable evidence" about them, that victims do not wish to testify, and that it is very difficult to apply adequate investigation techniques. Added to this is the fact that, when SxV/GBV crimes are addressed judicially, in most cases there is no discourse of recognition of patriarchal violence or of the context of gender stereotypes that play a role in what happened.

Finally, none of the four Geneva Conventions (GCs) (1949) connects or makes reference to the Universal Declaration of Human Rights (UDHR) (1948), or to the consequences of its serious violation. Moreover, none of them explicitly includes SxV/GBV crimes as a grave breach, nor attributes criminal liability to it. This also applies to art. 3 common to the GCs.

Furthermore, although Additional Protocol (AP) II (1977) classifies rape and forced prostitution, it does not do so as a criminal offence, but rather as acts contrary to IHL that constitute an affront to the "honour" of the family or of the woman, or in general, is an attack on moral *decorum* (all of which derives from a patriarchal conception of the honorability of families and women).

3.2. Fair gender representation in the International Criminal Court

Representation refers to the political dimension composed of the "who" and the "how" of justice, which are the aspects necessary for the analysis of the "what". As Fraser (2009) explained, whoever has the power to deliberate on justice and its processes can have an impact on the substance.

The ICC Statute contains a significant number of norms on fair representation that can be divided in two: (a) those aimed at a balance of gender representation in the composition of the different organs of the ICC (conceived under the binary perspective); and (b) those focused on ensuring the presence in the institution of technical SxV/GBV knowledge (Chappell, 2016: 30 et. seq.).

The first group includes: (a) art. 36(8)(a)(iii) of the ICC Statute, which provides that, when selecting judges, States Parties shall take into account the need, within the membership of the ICC, for a "a fair representation of female and male judges"; and (b) art. 44(2) of the ICC Statute, which extends this rule to the ICC Office of the Prosecutor (ICC OTP) and the ICC Registry.

The second group includes: (a) art. 36(8)(b) of the ICC Statute, which provides that "States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children; and (b)

art. 42(9) of the ICC Statute, which provides that "[t]he Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children".

The implementation of norms on a fair representation of female and male judges was satisfactory during the first ten years of the ICC because there was always a similar number of female judges to male judges, and their geographical diversity was ensured. In addition, the election in 2021 of four female judges as candidates among the new six judges was welcomed as it again allowed women to occupy half of the judicial bench (ICC, Public Information Office, 10/03/2021). However, there remains concern about female representation in other senior representative positions (WIGJ, 2018), because, in the period March 2021-November 2023, the positions of President, Prosecutor and Registrar of the ICC were all held my man.

The inclusion of judges with expertise in SxV/GBV has also been successful from the outset of the ICC, since more than half of the judges who made up the Chambers at any given time have had some type of expertise in the subject (Chappell, 2016: 68-69). On the other hand, it is also worth highlighting that expertise in gender matters has also been present through *amicus curiae*, that have included, *inter alia*, technical experts from the WCGJ (this is important given the key role played by this NGO during the negotiation process of the ICC Statute).

Neither has the ICC OTP been left behind as the first ICC Prosecutor, Luis Moreno Ocampo, appointed in 2008 Catharine MacKinnon as special advisor on gender-based crimes (an appointment that was celebrated by feminist sectors). Subsequently, the second ICC Prosecutor, Fatou Bessouda, appointed Brigid Inder, who had been the long-time executive director of WCGJ, to the same position (Chappell, 2016: 73). More recently, the third ICC Prosecutor, Karim Khan, appointed Lisa Davis, co-director of the Human Rights and Gender Justice (HRGJ) Clinic at CUNY School of Law, to this position.

With regard to victims' representation, the work of the ICC Office of Public Council for the Victims (OPCV) must be highlighted, as

the OPCV has sought to promote a fair representation of female and male lawyers as legal representatives of victims in ICC proceedings. Nevertheless, at the same time, it has been noted that the Outreach Unit has had difficulties in making women aware of the existence of the ICC and its mandate, which may be generating an under-reporting of female victims (Chappell, 2016: 78).

It can therefore be concluded that the implementation of the norms on fair representation at the ICC has been, to a large extent, satisfactory, thus constituting an important change of direction in terms of the treatment of gender in ICJ. As a result: (a) decision-making power has not been, exclusively or mainly, headed up by men; (b) the presence of women has provided the ICC with institutional legitimacy vis-à-vis victims (who are both women and men) and the public; and (c) a diverse organization has been established, allowing for the presence of different gender experiences in the taking of decisions. However, it is important not to deviate from this path, and to continue paying particular attention to female representation in the ICC leadership positions.

3.3. The role of the International Criminal Court in combating impunity for crimes of sexual and gender-based violence

Feminism has analysed how SxV/GBV play a role in the patriarchal system. Radical feminism sees SxV/GBV as a key component of women's subordination to men, placing it within a theoretical framework in which it is identified as a symptom and a tool of patriarchy. According to MacKinnon, rape is an act of dominance that systematically works to maintain a sex-stratified society in which women are disadvantaged by being the targets of sexual assault. Radical feminist theories therefore criticize the perspective that describes rape as an aberration and rapists as subnormal men. On the contrary, radical feminism insists that sexual coercion permeates women's lives and is an accepted aspect of gender roles (Brenner, 2013).

The ICC Statute contains a variety of provisions that recognize SxV/GBV. This is found in the ICC Statute, the ICC Elements of the Crimes (ICC EC), the ICC Rules of Procedure and Evidence (ICC

RPE) and the Regulations of the Court (ICC Reg). In particular, the ICC Statute and the ICC EC contains the most sophisticated definition of SxV/GBV crimes of all international criminal tribunals (Chappell, 2016: 32). Moreover, the ICC Statute and the ICC RPE provides for the most developed ICL evidentiary regime concerning SxV/GBV crimes (Delgado et. al., 2016).

3.3.1. Norms on sexual and gender violence

3.3.1.1. Sexual and gender-based violence as a crime against humanity and as a war crime

Feminism has been very critical of IHL instruments due to their deficiencies in the definition and prohibition of SxV/GBV, as well as for their weak binding force, which has perpetuated impunity for SxV/GBV crimes. The ICC Statute, however, has managed to include and define these crimes, building on the progress made by the ICTY/R and including other conduct that had never been criminalized before in ICL.

In particular, thanks to the influence of the WCGJ, the ICC Statute provides for new types of crimes against humanity and war crimes. On the one hand, crimes against humanity include rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and "any other form of sexual violence of comparable gravity" (art. 7(1)(g) of the ICC Statute). This last definition opens up the possibility of prosecuting other sexual crimes not expressly mentioned in the ICC Statute.

On the other hand, war crimes also include rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and any other form of sexual violence also constituting a grave breach of the GCs (art. 8(2)(b)(xxii) of the ICC Statute) or a serious violation of art. 3 common to the GCs (art. 8(2)(e)(vi) of the ICC Statute).

As a result, the ICC Statute punish SxV/GBV atrocities that have been previously "naturalized" in armed conflicts, and which have historically remained unpunished.

3.3.1.2. Sexual and gender-based violence as other crimes within the jurisdiction of the International Criminal Court: genocide, persecution as a crime against humanity and the war crime of unlawful recruitment

Concerning the crime of genocide provided for in art. 6 of the ICC Statute, different feminist currents have argued that the ICC Statute did not take into account the ICTR case law in the Akayesu case and the ICTY case law in the Milosevic case. In both cases, the accused were convicted of genocide as a result of having caused, through acts of SxV/GBV (rape and physical assault), serious bodily or mental harm to victims, as part of a campaign aiming at destroying the ethnic, racial or religious group to which the victims belonged (MacKinnon, 2006). As a result, art. 6 of the ICC Statute, like the Convention on the Prevention and Punishment of the crime of Genocide, contains no reference to the commission of genocide through SxV/GBV.

However, the ICC OTP (2014) has expressly stated that SxV/GBV crimes committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group may also constitute acts of genocide under art. 6 of the ICC Statute. The ICC OTP, based on the ICTR case law in the Akayesu case, has also noted that acts such as murder, serious bodily or mental harm and the imposition of measures intended to prevent births within the group, may have a sexual and/or gender component, and if committed with the intent to destroy in whole or in part a national, ethnic, racial or religious group, may constitute genocide.

Indeed, the severe physical or mental harm, and the potential social stigma associated with rape and other forms of SxV/GBV against the members of the target group, may cause significant and irreversible harm to victims and their communities, meaning that such acts may be an integral component of a strategy of destruction applied to a particular group. In such circumstances, criminal responsibility for genocide may arise.

However, despite this progress, authors, such as Radhakrishnan, emphasize that: (a) one must look beyond SxV because, during a genocide, there is a much broader range of gender-based crimes than those of an obviously sexual nature; and (b) it is important to apply a gender analysis to assess both violence and the structural elements that exist when a

genocide occurs. Likewise, according to this author, the destruction of the regenerative capacity of a group is primarily associated with women due to their reproductive capacity. As a result, men and boys are rarely considered reproductive agents, which shows the need for a robust gender study that also includes the experiences of men and boys in the analysis of the crime of genocide (Global Justice Center, 2018).

The definition of gender contained in art. 7(3) of the ICC Statute has also allowed it to extend the scope of other crimes against humanity and war crimes provide for in the ICC Statute. This is the case of the crime against humanity of persecution, provided for in art. 7(1)(h) of the ICC Statute, which establishes that among the groups that may be persecuted are those with an identity based on gender (Spees, 2003). As long as their members are subjected to serious deprivations of fundamental rights that are related to other crimes within the ICC jurisdiction, persecution on the basis of sexual orientation, and even on the basis of gender identity depending on the context of society (according to a broader interpretation of arts. 7(1)(h) y and 7(3) of the ICC Statute), may fall within the ICC jurisdiction.

Finally, the crime of recruiting minors under 15 years of age has been interpreted in ICC case law to extend protection to girls under 15 who have been recruited by national armies or organized armed groups for the purpose of becoming "wives" or sexual slaves of their members. This has allowed for the addition of SxV/GBV charges to those responsible for their recruitment, as reflected in the case against Bosco Ntaganda. In this case, the Appeals Chamber further determined that the girls who had been recruited, and were subject to SxV/GBV, could not have been active participants in the hostilities and consequently maintained their protection as civilians within the conflict (ICC, Ntaganda, 15/07/2017).

3.3.1.3. Other substantive provisions on gender-based violence: the definition of gender, a gender-neutral definition of rape and the definition of the element of force

There are a number of other relevant substantive rules on gender-based violence in the ICC Statute. First, as proposed by the WCGJ

at the Rome Diplomatic Conference, art. 7(3) of the ICC Statute expressly provides for a definition of gender, which says as follows:

For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Second, another important contribution of the WCGJ was the adoption of a gender-neutral definition of SxV/GBV crimes, such as the definition of rape included in art. 7(1)(g) of the ICC Statute. This refers to the body of a person, recognizing that the majority of victims of these acts are women, but without excluding that SxV/SBV towards men is also a reality in armed conflicts.

Third, an intense debate took place at the Rome Diplomatic Conference around the component of force and the absence of consent when articulating the evidentiary standards for the SxV/GBV crimes included in art. 7(1)(g) of the ICC Statute. As a result of this debate, the definition of force was broad enough so that all coercive circumstances fit into it, without being limited to physical force or the threat of death (Spees, 2003).

3.3.1.4. Procedural rules

The ICC Statute includes some procedural provisions that foster a gender perspective. In this regard, art. 68(1) of the ICC Statute establishes that the ICC must adopt appropriate measures to ensure the safety, well-being and dignity of victims and witnesses, and that in doing so it must take into account certain aspects such as whether the crime in question involves SxV/GBV or whether it was committed on gender grounds.

Moreover, art. 68(2) of the ICC Statute establishes that Chambers may make an exception to the principle of the public nature of hearings and order that part of the trial be held behind closed doors, or allow the presentation of evidence by electronic means, so as to protect victims, witnesses or accused persons, especially in cases of victims of sexual violence.

Additionally, the ICC RPE also contains provisions that reflect a gender perspective. In particular, rule 70 establishes the following principles to be applied to the ICC RPE applicable to SxV/GBV cases: (a) consent cannot be inferred where force, threat of force, coercion or a coercive environment has diminished the victim's ability to give consent freely and voluntarily; (b) consent cannot in any case be inferred where the victim is incapable of giving consent freely; (c) consent cannot be inferred from silence or lack of resistance; and (d) the credibility, integrity or sexual availability of the victim or a witness cannot be inferred from the sexual nature of his or her prior or subsequent behavior.

Finally, rule 71 of the ICC RPE states categorically that the ICC will not admit evidence of the prior or subsequent sexual behavior of the victim or a witness. Furthermore, rule 72 provides that, where a party to the proceedings intends to introduce evidence on the alleged consent of the victim to the relevant act of SxV/GBV, or on the victim's behavior, words, silence or lack of resistance, the relevant ICC Chamber must be notified so that it can hear, behind closed doors, the submissions of the parties to the proceedings, and decide whether the evidence has sufficient probative value to be admitted.

3.3.1.5. Other relevant provisions on sexual and gender-based violence: the mandate of the Prosecutor, the use of gender as an aggravating circumstance and the non-discrimination on gender clause

There are a number of other provisions on sexual and gender-based violence in the ICC Statute. First, art. 54(1)(b) of the ICC Statute establishes that the ICC OTP must:

> Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.

Second, rule 145(2)(b)(v) of the ICC RPE establishes as an aggravating circumstance in the determination of the sentence, the

"commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3", including gender.

Third, art. 21(3) of the ICC Statute establishes that:

> The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

As seen below in further detail, this clause may become a fundamental tool in the search for gender justice at the ICC.

3.3.1.6. Final remark

Based on the foregoing, it can be concluded that the ICC Statute contains norms drafted from a gender perspective. However, it is necessary to review their effectiveness, since as noted previously, patriarchal legacies of gender often permeate institutions and operate as informal rules that can foster the non-application or inadequate application of gender-based norms.

3.3.2. The limited fulfillment of the role of the International Criminal Court to investigate and prosecute crimes of sexual and gender-based violence

Rosemary Grey (2015) has underscored how, despite the steps forward that have been taken in relation to the content of the applicable norms, the ICC has not done sufficiently to end the lack of recognition of gender and the inaction against SxV/GBV. In her study on the evolution of SxV/GBV charges, she has demonstrated how, in the period 2003-2014, despite the Pre-Trial Chambers (PTCs) having included 51 SxV/GBV charges in their arrest warrants and having confirmed 20 of them, none of them had yet been the subject of a conviction. Thus, in its first 12 years, the ICC had not imposed a single conviction for SxV/GBV crimes.

The first conviction for these crimes did not come until 2016, when Jean Pierre Bemba was sentenced by Trial Chamber (TC) III for rape as a crime against humanity and as a war crime. However, in 2018, on appeal, Bemba was acquitted of all charges (ICC, Public Information Office, Bemba, n.d).

A year later, Bosco Ntaganda was found responsible by TC VI for, *inter alia*, rape and sexual slavery as crimes against humanity and war crimes and sentenced to 30 years in prison. In March 2021, the Appeals Chamber (AC) confirmed this decision. After 19 years of operation, this was the first final conviction for SxV/GBV crimes at the ICC (ICC, Public Information Office, Ntaganda, n.d.).

One month before (February 2021), Dominic Ongwen had been found responsible by TC IX for, *inter alia,* 12 counts of SxV/GBV crimes, including rape, sexual slavery, forced pregnancy and forced marriage (the latter being considered "another inhuman act"). He was sentenced to 25 years in prison in May 2021. On December 15th, 2022, the AC confirmed the charges and sentence against Ongwen ((ICC, Public Information Office, Ongwen, n.d.).

As a result of the foregoing, it can be affirmed that, in the eight years following the Grey study (2015-2023): (a) 18 SxV/GBV charges have been the subject of conviction at trial[3]; (b) 12 have been confirmed on appeal[4]; and (c) another 4 were dismissed: two on appeal and two at

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3 Two in the Bemba case (2016): rape as a crime against humanity and rape as a war crime (ICC, Office of Public Information, Bemba, n.d). Four in the Ntaganda case (2019): rape and sexual slavery as crimes against humanity and rape and sexual slavery as war crimes (ICC, Office of Public Information, Ntaganda, n.d.). Twelve in the Ongwen case (2021): two of forced marriage as a crime against humanity, two of rape as a crime against humanity and two as a war crime, two of sexual slavery as a crime against humanity and two as a war crime, and forced pregnancy as a crime against humanity and as a war crime (ICC, Office of Public Information, Ongwen, n.d.).

4 Four in the Ntaganda case (2021): rape and sexual slavery as crimes against humanity and rape and sexual slavery as war crimes (ICC, Office of Public Information, Ntaganda, n.d.). Twelve in the Ongwen case (2021): two of forced marriage as a crime against humanity, two of rape as a crime against humanity and two as a war crime, two of sexual slavery as a crime against humanity and

an earlier stage of the proceedings)[5]. Moreover, 4 new charges of SxV/GBV charges have included in the arrest warrants issued during this period[6]; and (e) 10 SxV/GBV charges have been confirmed[7].

The ICC OTP has had some difficulties in implementing the ICC Statute mandate on SxV/GBV. As a result, it has been said that the first twelve years of the ICC were marked by a lack of recognition of gender by the prosecuting body (Chappell, 2016). Nevertheless, after the first twelve years, the ICC OTP has, in general, changed its approach to give more relevance to the investigation and prosecution of SxV/GBV crimes.

However, given the discretion the ICC OTP enjoys, it has limited, to an important extent, its investigations and prosecutions to rape, leaving aside other forms of SxV/GBV. Furthermore, it has had problems in even pursuing rape charges, by comparison to what has happened with other charges of a different nature. Consequently, it can be said that the ICC OTP actions have not made a sufficiently significant contribution to the fight against the impunity that has traditionally sheltered those responsible for SxV/GBV crimes (Chappell, 2016).

This does not mean, however, that the Chambers have not had responsibility for the insufficient application of the extensive gender justice mandate contained in the ICC Statute, as will be seen below.

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two as a war crime, and forced pregnancy as a crime against humanity and as a war crime (ICC, Office of Public Information, Ongwen, n.d.).

5 Two in the Bemba case (2018) (ICC, Office of Public Information, Bemba, n.d.) and two in the Gbagbo & Blé Goudé case (2019) (ICC, Office of Public Information, Gbagbo & Blé Goudé, n.d.).

6 Four in the Al Hassan case (2018): rape as a crime against humanity and as a war crime, and sexual slavery as a crime against humanity and as a war crime (ICC, Office of Public Information, Al Hassan, n.d.).

7 Four in the Hassan case (2019): rape as a crime against humanity and as a war crime, and sexual slavery as a crime against humanity and as a war crime (ICC, Office of Public Information, Al Hassan, n.d.). Four in the Ongwen case (2016): rape and sexual slavery as crimes against humanity, and rape and sexual slavery as war crimes (ICC, Office of Public Information, Ongwen, n.d.). Two in the Yekatom & Ngaissona case (2020): rape as a crime against humanity and as a war crime (ICC, Office of Public Information, Yekatom & Ngaissona, n.d.).

3.3.2.1. The case against Thomas Lubanga Dyilo

The case against Thomas Lubanga, former de facto governor of Ituri district in the Democratic Republic of the Congo (DRC) and president and commander-in-chief of the *Union des Patriots Congolais* (UPC) and *Forces Patriotiques pour la Libération du Congo* (FPLC), is emblematic of the invisibility of SxV/GBV, and the consequent reinforcement of gender injustice. The then ICC Prosecutor, Moreno Ocampo, brought war crimes charges for the recruitment of girls and boys under 15, but not for SxV/GBV, despite available information suggesting that the latter had permeated all violence for which Lubanga was responsible. Indeed, Women's Initiatives for Gender Justice (WIGJ) conducted 31 interviews with witnesses (who said they were willing to cooperate with the Prosecutor, if necessary). As a result, CIGJ concluded that SxV&/GBV had been an integral component of the attack on civilians and identified a pattern of rape, sexual slavery and torture. However, this initiative bore no fruit (WIGJ, Gender Report Card 2011; Chappell, 2016).

The victims' representatives subsequently adopted the same position, requesting TC I to modify the legal classification of the facts in accordance with Rule 55 of the ICC Rules. This request was accepted by the TC (which reclassified some of facts as sexual slavery), but denied on appeal (ICC. Office of Public Information, Lubanga, n.d.).

Judge Odio Benito played the most important role in matters of gender justice in this case. Through her interviews with witnesses, she managed to consolidate evidence on the different treatments applied to boy and girl soldiers, and the explicitly sexual and gender-based nature of the difference (Chappell, 2016: 113). Of the 133 questions she asked, 107 were related to SxV/GBV and the presence of women and girls in armed groups (WIGJ, 2010: 132).

The ICC OTP, in an attempt to remedy the misuse of its discretion, underscored the SxV/GBV experiences of the recruited girls, and invited the ICC to interpret "active participation" in hostilities broadly, so as to include the recruitment of girls for sexual purposes or forced marriage (Chappell, 2016: 113).

This, however, proved to be too late an attempt to remedy the glaring omission made by the ICC OTP in presenting the charges, and was unsuccessful. In the end, TC I found Lubanga guilty of all

counts and did indeed mention that the girl soldiers were subjected to SxV/GBV. However, as SxV/GBV did not comprise part of the charges, no further consideration in the judgment was given to SxV/GBV (ICC, Lubanga, 14/03/2012).

Judge Odio Benito, in an effort to implement the gender justice mandate of the ICC Statute, issued a dissenting opinion, in which she stated that SxV/GBV was an intrinsic element of the punishable conduct. She also stated, based on art. 21(3) of the ICC Statute, which states that the application and interpretation of the ICC Statute must be applied without any distinction based on gender, that the treatment given to SxV/GBV by the Majority in the trial judgment was discriminatory. This was so, in her opinion, because it had been shown that gender made a difference in: (a) the victimization of boys and girls; and (b) their assignment in the organization to fulfill the role of escorts or sexual slaves (ICC, Lubanga, 14/03/2012).

3.3.2.2. The case against Jean Pierre Bemba Gombo

In the case against Jean Pierre Bemba, former Vice-President of the Democratic Republic of the Congo (DRC) and President of the *Mouvement de Libération du Congo* (MLC), the Prosecution presented a wide array of SxV/GBV crimes, including charges of: (a) rape as a crime against humanity and as a war crime; (b) rape as torture (a crime against humanity and a war crime); (c) the war crime of outrages upon personal dignity; and (d) other forms of sexual violence as a crime against humanity and as a war crime. However, most of these charges were not confirmed by Pre-Trial Chamber (PTC) III. Thus, at the start of the trial only the charges of rape remained, along with the murder and pillage charges (ICC, Bemba, 15/06/2009).

In 2016, Chappell noted how PTC III failed to apply recent developments in ICL in relation to SxV/GBV crimes. As an example, she pointed out the fact that, even though PTC III had accepted that there were substantial grounds to believe that women had been forced to strip naked to be publicly humiliated, it did not consider these acts sufficiently grave in light of the other SxV/GBV crimes provided for in art. 7(1)(g) of the Statute. As a result, it rejected the charges of other forms of sexual violence as a crime against humanity

and as a war crime. As a result, PTC III did not apply the ICTR case law on forced nudity, according to which SxV/GBV, including rape and forced nudity, could constitute genocide, crimes against humanity and war crimes under the ICTR Statute (Akayesu case).

A second example was PTC III rejection of the cumulative charges brought by the ICC OTP, which were intended to reflect as best as possible the extensive harm caused through SxV/GBV. As a result, the PTC subsumed all acts of SxV/GBV under the rape charges, arguing that to do otherwise would place a disproportionate burden on the defence. WIGJ filed an *amicus curiae* brief in this regard, arguing that cumulative charges were necessary to capture the degree of harm caused. It argued that this was a practice that had already been used in other international criminal tribunals, without this having entailed a violation of the rights of the defence. Nevertheless, the AC conformed the decision of PTC III (Chappell, 2016).

Finally, in 2018, the initial rape conviction was overturned by the AC when Bemba was acquitted of all charges on appeal (ICC, Office of Public Information, Bemba, n.d.).

3.3.2.3. The case against Germain Katanga

The case against Germain Katanga, a leader of the *Forces de résistance patriotique en Ituri*, who coordinated the arms distribution for the attack on the village of Bogoro (DRC) in February 2003, was the first in which SxV/GBV charges, including rape and sexual slavery, were confirmed. However, the defendant was acquitted of them and was only convicted of crimes of a different nature (ICC, Katanga, 07/03/2014).

Although Trial Chamber (TC) II acquitted Katanga of SxV/GBV crimes, it did determine that rape and sexual slavery as crimes against humanity and war crimes had taken place. In doing so, it brought about two important developments: on the one hand, it confirmed that the absence of consent need not be proven in rape cases; on the other hand, it clarified the elements of sexual slavery, considering as such those situations in which women and girls are forced to act as both "romantic partners" and sexual mates of other members of the group that recruited them (Stahn, 2014).

3.3.2.4. The case against Muthaura and Kenyatta

The treatment of SxV/GBV against men, which has traditionally been rendered invisible, is an important issue from a gender perspective. This type of violence was initially dealt with at the ICC in the Bemba case, as the ICC OTP alleged that men were also raped and both witnesses and experts underscore the impact of rape on masculinity and gender relations in the community. However, SxV/GBV against men was not the subject of the later stages of the case.

Subsequently, the issue of SxV/GBV against men arose in the case against Muthaura & Kenyatta. PTC II has been particularly criticized because, while the ICC OTP sought to characterize forced circumcision and forced genital amputation in men as SxV/GBV (arguing that these acts not only sought to attack the physical integrity, but also the masculinity and identity of the victims), PTC II considered that, since these acts were ethnically motivated (they were intended to show the cultural superiority of one ethnic group over another), they should not be considered sexual in nature (WIGJ, Gender Report Card, 2013: 72).

Despite this, PTC II confirmed a charge of rape as a crime against humanity, which was later withdrawn by the ICC OTP in 2014 along with all other confirmed charges (ICC, Office of Public Information, Kenyatta, n.d.).

3.3.2.5. The case against Bosco Ntaganda

Following Lubanga's sentencing, the ICC OTP filed charges against one of his closest collaborators, Bosco Ntaganda. This time charges of SxV/GBV as crimes against humanity and war crimes were included. Subsequently, other charges were added at the request of the ICC OTP under Prosecutor Bensouda, including SxV/GBV against children recruited by the FPLC, which Ntaganda was deputy chief of operations of (ICC, Office of Public Information, Ntaganda, n.d.).

On July 8th, 2019, the TC VI found Ntaganda guilty of rape and sexual slavery as crimes against humanity and war crimes. TC VI highlighted that SxV/GBV within an armed group may constitute a war crime. This was an important ICL development that moves away from the traditional view that IHL only applies to acts committed by one party to the conflict against the other (ICC, Ntaganda, 07/08/2019). In March 2021, this decision was upheld on appeal, becoming the first final ICC conviction for SxV/GBV crimes (ICC, Office of Public Information, Ntaganda, n.d.).

3.3.2.6. The case against Dominic Ongwen

On February, 4th, 2021, TC IX convicted Ongwen on 61 crimes against humanity and war crimes, including 12 SxV/GBV crimes (torture, rape, sexual slavery, forced pregnancy and other inhuman acts (forced marriage) as crimes against humanity and war crimes, and the war crime of outrages upon personal dignity). In particular, the consideration of forced marriage as other inhuman acts was a milestone in the ICC case law. Almost two years later, the AC confirmed the trial judgment on December 15th, 2022 (ICC, Public Information Office, Ongwen, n.d.).

3.3.2.7. The case against Al Hassan

Similar to the Ongwen case, in the Al Hassan case PTC I confirmed the charge of other inhuman acts (forced marriage) as a crime against humanity. The Al Hassan case is also crucial as it is the first one in which a charge of gender-based persecution has reached the trial stage. By November 2023 Al Hassan's trial is over, and the trial judgment by TC X is awaited (ICC, Public Information Office, Al Hassan, n.d.). Although a gender-based persecution charge was brought by the ICC OTP in the Mbarushimana case in 2010, none of the charges were confirmed in this case by PTC I (ICC, Public Information Office, Mbarushimana, n.d.).

3.3.2.8. Other cases

In addition to the above-mentioned cases, charges of SxV/GBV were also brought in the following cases: Matheiu Ngudjolo Chui, Laurent Gbagbo & Charles Blé Goudé and Callixte Mbarishumana. However, none of these cases was concluded with the conviction of the accused.

Finally, charges of SxV/GBV crimes have also been brought in the cases against Omar Hassan Ahmad Al Bashir, Ahmad Muhammad Harun, Abdel Raheem Muhammad Hussein, Joseph Kony, Sylvestre Mudacumura and Alfred Yekatom and Patrice-Edouard Ngaïsonna. All these cases are currently ongoing at different stages.

3.3.2.9. Final reflection

In conclusion, although the ICC Statute contains a broad mandate to investigate and prosecute SxV/GBV crimes, which makes the ICC Statute truly progressive in terms of gender inequality recognition, this mandate has not been, so far, satisfactorily applied. This is due to fact that the patriarchal legacies of gender have affected the fulfillment of the ICC's role in this regard. As a result, SxV/GBV crimes have not been investigated and prosecuted effectively, having been relegated to a secondary plane for two decades. Consequently, the androcentrism that has always characterized ICJ and ICL has not really changed much with the ICC.

Nevertheless, the ICC OTP has shown that it is aware of the mistakes it has made in the first years of the ICC and that it is committed to not repeating them. This new approach has taken place since the implementation of the ICC OTP Strategic Plan for 2012-2015 under Prosecutor Bensouda, which resulted in the publication of the OTP ICC policy document on SxV/GBV. This document clarifies issues argued for a long time by feminism, including, among others, the following: (a) the use of a dual approach to this type of violence (filing SxV/GBV charges and highlighting the SxV/GBV elements in non SxV/GBV charges); (b) the need to foster the enforcement of the crime against humanity of gender-based persecution; (c) the importance of showing that SxV/GBV can occur without physical contact

(such as forced nudity); and (d) the relevance of a broad implementation of the prohibition of gender discrimination under art. 21(3) of the ICC Statute.

Consequently, it is of utmost importance that: (a) the ICC OTP manages to fully implement its SxV/GBV policy document; and (b) the ICC Chambers stop refusing to apply the aforementioned developments in ICL case law on SxV/GBV crimes. The Ntaganda and Ongwen cases are, without a doubt, an important step in this direction.

3.4. Reducing gender inequality: Is the International Criminal Court an effective tool against oppression?

3.4.1. The gender perspective in reparation regulations

The right to reparation is included in arts. 75 and 79 of the ICC Statute, rules 94 to 99 of the ICC RPE, and in the regulations of the Trust Fund for Victims (TFV), the latter being the body responsible for the implementation of reparation orders and victims' assistance programs (Chappell, 2016).

Victims' reparation is one of the ways of achieving justice, and, consequently, it is one of the purposes of the ICC (Dwertmann, 2010). Moreover, according to art. 75 of the ICC Statute, reparation includes restitution, compensation and rehabilitation for victims and their successors.

Understanding the gender perspective on reparation is essential to avoid perpetuating gender inequality in societies, to promote the non-repetition of SxV/GBV and to achieve sustainable peace, as SxV/GBV breaks the social fabric and destroys the identity of affected communities.

In this sense, the ICC OTP (2014) has stressed that, when designing a reparation plan, an inclusive approach to gender must be taken, considering the impact of gender on the harm suffered by victims. Hence, there is an increasingly widespread understanding that reparation also includes the entire community, as occurs, for example, with the rehabilitation of health centers or the implementation of

communal psychological support programs. It is the combination of individual and collective elements that makes a reparation program more effective in both preventing the repetition of SxV/GBV after a conflict and strengthening the community (Durbach, Chappell & Williams, 2017).

Durbach, Chappell & Williams (2017) have pointed out that the reparation measures contained in the reparation orders and in the TFV's reparation plans should not reinforce pre-existing patterns of gender-based discrimination, but should aim at transforming them, with a view towards destabilizing patriarchal and sexual hierarchies and customs.

Therefore, the transformative dimension of reparation contemplates not only addressing victims' rehabilitation and compensation needs, but also reforming, and, where necessary, weakening, the structural (economic, social, political and cultural) and institutional conditions that favored SxV/GBV in armed conflicts. In this way, eliminating or, at least, weakening those conditions constitutes a key guarantee of non-repetition that "implies the need for structural and institutional reforms" (Durbach, Chappell, & Williams, 2017). In this regard, the ICC OTP (2014) has highlighted that, from a gender perspective, victims must be consulted to: (a) determine which is the most appropriate and effective form of reparation in their specific community; and (b) ensure that reparation measures are transformative, so that they contribute to advancing gender equality.

It is evident, then, that integrating a gender perspective into reparation measures offers the opportunity to provide a more effective reparation to victims and to transform the affected community. However, this faces different challenges in practice, which prevent reparation from having a positive impact in SxV/GBV cases.

3.4.2. Challenges to reparation from a gender perspective

From a gender perspective, there are a number of challenges to the design and implementation of reparation plans by the ICC. The main challenge is that, according to rule 98 of the ICC RPE, direct reparation (whether individual or collective) is limited to victims of

the crimes for which the accused is convicted. This is in addition to the difficulties of proving beyond reasonable doubt the accused's responsibility for SxV/GBV crimes, as shown by the ICC case law (Durbach, Chappell & Williams, 2017).

A second challenge consists of obtaining sufficient funding to allow the TFV to properly fulfil its mandate to implement reparation measures. The large number of direct and indirect victims in most of ICC cases and the frequent declarations of insolvency of the convicted persons increases the gravity of this problem. Furthermore, the TFV has no funds allocated by the ICC annual budget, and its assistance mandate comes exclusively from voluntary contributions from States Parties or third parties (WIGJ, 2018).

A third challenge consists of the need to improve accessibility to reparation mechanisms, because the reparation process is far from being substantially effective and inclusive. This can be done through the recognition of procedural rights and the application of more transparent processes, with a view to fostering access to reparation to victims who are marginalized or discriminated against, or who have not participated in the reparation process due to stigmatization, shame or trauma (Chappell, 2016).

Finally, the practice in the Lubanga, Katanga and Al Mahdi cases demonstrates that several years are needed from the time the conviction become final, until the reparation plan proposed by the TFV is approved and implemented. This generates disaffection and a feeling of lack of justice amongst the victims, whose expectations are disappointed (Chappell, 2016).

3.4.3. The practical application of the gender perspective in reparations

The three first cases which reached the reparation phase at the ICC were the Lubanga, Katanga and Al Mahdi cases, whose reparation orders were issued by TC I, II and VI between 2017 (Katanga and Al Mahdi) and 2018 (Lubanga and), and were final by 2019. Enforcement activities are still ongoing in all three cases.

In March 2021, TC VI issued its reparation order in the Ntaganda case, which was complemented by the addendum to the reparation order issued by TC VI in July 2023. Nevertheless, by November 2023, such reparation order is not still final (ICC, Office of Public Information, Ntaganda, n.d.). Likewise, by November 2023, TC IX has not issued yet its reparation order in the Ongwen case (ICC, Office of the Prosecutor, Ongwen, n.d.).

The August 2012 Lubanga judgment led to the initiation of reparation proceedings for the first time in the ICC. Given the declaration of insolvency of the convicted person, the TFV has implemented a symbolic service-based collective reparation in the form of social services, including the construction of three community centers and the launch of a mobile program with activities to reduce stigma and discrimination against former child soldiers. The TFV has also provided for physical and psychological rehabilitation measures, vocational training and income-generating activities (Coalition for the ICC, n.d).

However, for Durbach, Chappell & Williams (2017), the ICC has missed the opportunity to: (a) develop the transformative potential of reparation measures; and (b) guarantee long-term gender justice in the affected communities. As a result, more than a decade after the issuance of the trial judgment, the implementation of the reparation measures in the Lubanga case continue lacking a consistent gender approach.

In the Katanga case, the TFV submitted on July 25th, 2017, a draft plan for the implementation of individual and collective reparations in accordance with Reparation Order issued by TC II a few months earlier. In the draft plan, the TFV stressed the importance of sensitivity to gender-specific issues during the process of identifying channels for access by women and girls to reparation (ensuring confidentiality in accessing the services offered by the TFV and avoiding their stigmatization were the main concerns of the TFV). Moreover, the TFV stressed that it would adopt the necessary measures to ensure that women victims had equal access and maintained control over the benefits to which they were entitled (WIGJ, 2018).

Nevertheless, the ICC has also missed the opportunity to develop in this case the transformative potential of reparation measures because, as in the Lubanga case, victims of crimes for which the accused

has not been convicted have no access to reparation. This is the case for applicants who claimed to have suffered physical and psychological harm as a result of rape and sexual slavery committed during the attack by the Katanga-led militia on the Bogoro municipality (DRC) in February 2003 (Durbach, Chappell & Williams, 2017).

In the Al Mahdi case (concerning the criminal liability of the former chief of the political and religious police in Timbuktu (Mali) for the damages caused in 2012 to historic and religiously significant buildings in Timbuktu)[8], the TC VIII has highlighted the need to adopt a gender-sensitive approach to prevent and combat the destruction of cultural heritage and to remedy the damage caused to it. According to TC VIII, this is particularly important, given that women and girls may face gender-specific risks, discrimination and difficulties in accessing cultural heritage. Furthermore, TC VIII has underlined the need for a transformative reparation, stressing that, so far as possible, reparation measures should be applied in a generic and culturally sensitive manner that does not exacerbate (and indeed addresses) any pre-existing situation of discrimination that prevents victims from equal opportunities (WIGJ, 2018).

Finally, in the Ntaganda case, TC VI has estimated in its reparation order:

> […] an approximate number of direct and indirect victims of crimes against child soldiers, to approximately 3,000 individuals in total; and the estimation of the approximate number of direct and indirect victims of the attacks, to approximately 7,500 individuals in total. The Chamber assessed Mr. Ntaganda's liability for reparations at USD 31,300,000 (ICC, Office of Public Information, 2023)

Moreover, it is worth noting that TC VI has especially recognized the suffering of SxV/GBV victims and has adopted additional principles that should guide each step of the reparation process.

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8 Al Mahdi was part of the Ansar Dine movement and head of the political-religious police in Timbuktu (Mali), when Ansar Dine and its allies took control of the north of the country in 2012. He pleaded guilty in 2016 to war crimes of attacking historic and religiously significant buildings in Timbuktu. He became the first person convicted of such crimes by the ICC (WIGJ, 2018).

This includes, inter alia, an inclusive and gender-sensitive approach to reparation, requiring that due consideration and attention be given to the specific needs of victims without discrimination on the basis of sex or gender identity (ICC, Public Information Office, 08/03/2021).

Consequently, there is still a long way to go for the ICC reparation process (described as "too little, too late") to constitute an authentic mechanism for the reduction of gender inequality. Nevertheless, if implemented correctly, ICC-ordered reparation measures could become a mechanism for addressing SxV/GBV crimes in the aftermath of armed conflicts, as they: (a) have a significant transformative potential; and (b) could contribute to promoting gender justice in affected communities in the long term. The Ntaganda case constitutes an important turning point in this regard, which is expected to be continued in the coming years in the Ongwen, Hassan and Yekatom & Ngaïsonna cases (ICC, Office of Public Information, 2021).

4. CONCLUSIONS

Throughout this chapter, it has been observed how the different feminist theories have influenced ICL and how the ICC Statute is an important step forward from a gender perspective. However, during its first two decades, the ICC has been, to an important extent, indifferent, to SxV/GBV in armed conflicts, and has not shown a real commitment to ending impunity for crimes in which gender inequality plays a key role.

Although an effective application of the rules on gender balance in the election of ICC judges and senior officials has been achieved, and the presence at the ICC of technical knowledge on SxV/GBV has also been guaranteed, the fulfillment of the ICC's role in the fight against impunity for SxV/GBV crimes is still pending.

The ICC Statute and its complementary legislation contain a broad supply of tools for achieving this goal. However, it has taken 19 years to obtain the first final conviction for SxV/GBV crimes, despite the fact that this type of violence has been used massively in a significant number of the situations and cases investigated and prosecuted by the ICC OTP.

With respect to reparations, several difficulties have also been identified for the ICC to fulfill its role as a mechanism for reducing gender inequality. As a result, no real transformative impact on the affected communities can be expected in the first ICC cases.

It is true that the ICC is a young institution and still has a long way to go. However, it is no less true that in order to exploit its potential, the ICC will have to: (a) continue the line of work initiated in 2015 by the ICC OTP in relation to SxV/GBV crimes; and (b) build on the case law developed after 2019 in the Ntaganda and Ongwen cases concerning this type of crimes.

To conclude, it is worth underlining that the ICC has great potential as a transformative tool against patriarchal oppression. Nevertheless, in order for the ICC to fulfil this role, it must implement its gender justice mandate in a much more effective way than has happened so far. Otherwise, the ICC may end up emptying the transformative norms on gender justice that are part of the ICC Statute, the ICC EC and the ICC RPE, whereby reinforcing the *status quo*, as it would create the appearance of taking steps towards gender equality, when in reality this progress would not be taking place.

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Chapter 7
The Perspectives of Post-Structuralism and Queer Theory[*]

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1. INTRODUCTION

After more than twenty years since its establishment, the role of the International Criminal Court (ICC) can be questioned and reconsidered from different theoretical and practical approaches, including from the social impact of its actions on the international stage. Due to its relevance in the fight against impunity and in vindicating the rights of victims, the ICC must play a leading role in the transformation of scenarios of violence faced by intersexual persons. This implies that the ICC must be a participant in the social construction of identities and the addressing of violence, regardless of the binary logic of the sexes and the heterosexual matrix of law.

In recent years, the ICC has faced scenarios that require the analysis of violence from perspectives that involve questioning heteronormative conceptions of sexuality and gender. On November 8th, 2017, the ICC Office of the Prosecutor (ICC OTP) received a request to open a preliminary examination into the crimes that the Islamic State was committing against people who consider themselves, or were considered by others, as sexually diverse in Iraq and Syria (Suhr, 2018). Likewise, in 2019, the ICC OTP began an investigation into the situation in Bangladesh/Myanmar in which one of the aspects under analysis was the sexual violence suffered by the Rohingya community (ICC OTP, 2019). Moreover, in 2020, for the first time the ICC began a trial for gender-based persecution against Al Hassan (an alleged member of the organized armed group Ansar Eddine and de facto chief of Islamic police, who was allegedly involved in the work of the Islamic court in Timbuktu) (ICC, Office of Public Information, n.d)[1]. As a result, the ICC has had a window of opportunity to: (a) investigate acts of violence through an alternative and more fluid approach to sex, gender and human sexuality; and thereby; (b) extend protection to groups that have until now remained invisible.

In this scenario, questions arise about the scope of application of international crimes when the victims are intersex persons, and particularly about the scope of the role that the ICC is called to carry out

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1 This chapter has been finalized in November 2023. Trial Chamber X has not yet issued its judgment at the time of finalization of the chapter.

in addressing gender-based violence falling beyond the restrictive approaches to human sexuality. In light of these questions, this chapter studies the role of the ICC from the perspectives of post-structuralism and queer theory, starting with a critique of the heteronormative hegemony of the ICC Statute and ICC practice to date.

It is important to highlight how feminism has taught us that, for centuries, international law (IL) and international justice (IJ) have been a patriarchal and violent regime, in which no debate has taken place about sex despite regulating it. As a result, hetero-patriarchal and Western patterns of human sexuality have been violently imposed on the bodies subjected to their domination, especially in the Global South.

Likewise, liberal and critical theories of IL have not questioned the normative force of the categories of gender, sex and sexuality, but have imposed regulatory mechanisms that exercise power over intersexual bodies (Butler 2005: 9; García León, 2017: 133; Suárez, 2019: 14). This is how the international legal framework has managed to silence human sexual diversity.

International criminal justice (ICJ) and international criminal law (ICL) are not immune to this situation because their norms and procedures do not provide for rights for sexually diverse persons. They are not named as such. They are not protected. Ultimately, their lives are irrelevant.

As a result, this chapter questions the existence of a stable and homogeneous approach to sex, gender and human sexuality, and denounces the practices that perpetuate the categorizations that trap individuals within fixed and immutable identities (Llamas, 1998). For this, the chapter looks into: (a) the way in which human sexuality can be understood according to queer theory and its relationship with poststructuralism (section 2); (b) the role of law and justice from this theoretical perspective and the criticism of this approach to the universal and regional systems for the protection of human rights (section 3); and (c) the role that the ICC could fulfill (section 4). The chapter ends with a brief account of the main conclusions (section 5).

2. THE HORIZON OF ANALYSIS: QUEER THEORY AND ITS METHOD

The starting point of the chapter is the theoretical discussion about the concepts of identity, identification and sexuality, and in particular whether human sexuality is an exclusively natural phenomenon, or whether it can be shaped, and to some extent governed, by social institutions. In contrast with the view that affirms the existence of fixed gender and sexuality identities (Bhikhu, 2008), queer theory sees these categories as being based upon the interaction of historical, cultural, racial and gender factors, which influence how human beings perceive themselves at any given time (Vidarte, 2005).

Social dynamics bring about the division of people into different categories (for example, men and women, blacks and whites, or nationals and foreigners). This implies access to certain privileges or preferential social positions when one belongs to a certain group, or if not, condemnation to abjection, discrimination or violence (Halley, 1985; Jaramillo & Alonso, 2008). Nevertheless, throughout our lives we are not identified as part of just a single group (Rutter-Jensen, 2012), but of several, which leads to our body becoming the object of intersections (Creenshaw, 1989; La Barbera, 2016). Furthermore, the borders that have been drawn to delimit categories of people appear to be unstable, contradictory and fragile.

With regards to human sexuality, these social dynamics have been articulated around practices which are related to the concepts of sex, gender and sexuality, in order to define a series of qualifications and classifications of people according to their sexual preferences, the acts that they perform in sex and the gender patterns with which they identify. As a result of these interactions (which are mediated through disciplines such as medicine, psychoanalysis, philosophy, anthropology, sociology and law) the categories that we know today as part of the LGBTIQ+ acronym have been generated.

Regarding this, Foucault (2002) explained how, through a variety of mechanisms of power, a discourse on sex is produced which administers and manages human sexuality. For this reason, he rejects the idea that sexuality has been repressed in Western societies, since

it is in constant shaping thanks to the efforts of institutions and social practices (Foucault, 2002: 38-39).

The foregoing occurs in a quite tangible way. Family, religion, school, pedagogy, psychology and psychiatry are some of the institutions and disciplines from which these discourses are dispensed onto human bodies. In this regard, Rubin maintains that:

> The concrete institutional forms of sexuality at any given time and place are products of human activity. They are, accordingly, imbued with conflicts of interest and political maneuvering, both deliberate and unconscious. In this sense, sex is always political, but there are historical periods in which sexuality is more intensely contested and more openly politicized (Rubin, 1989: 114).

Rubin is concerned by the way in which state and non-state institutions are articulated so as to punish and discipline any type of "deviation" of sexuality. These institutions conceal that sexual identities are cultural creations resulting from specific contexts and situations. Human sexuality, therefore, cannot be understood from a purely biological perspective, but rather from a sociocultural one (Rubin, 1989: 131). Consequently, he maintains that the social regulation of sexuality is designed to hierarchically classify sexual acts and identities. This has the effect of relegating those bodies which are diverse to abjection and illegitimacy. Condemning gays, lesbians or bisexuals to discrimination and violence was thus necessary before these identities were even created.

As a result, sexual desire between people of the same sex has been subject to different types of scrutiny, punishment and permissions over time, societies and cultures, transferring the way it has been analytically approached from the perspective of acts to that of identities (Byrne, 2008).

This conceptual framework can also be applied from the perspective of the intersection of human sexuality and gender. In this sense, feminism has, for decades, studied and denounced the subordination of women to men in cultural dynamics, which have traditionally relegated them to the private sphere, where they are governed and receive unequal treatment (Sherry, 1974; Rosaldo, 1974; Merry, 2009).

The concept of gender is currently the main theoretical tool through which this field is approached. This implies that differences between

men and women are produced primarily through cultural processes and not because of innate biological differences. The concept of sex therefore refers to biology, while that of gender describes cultural expectations about how men and women should act (Jaramillo, 2000).

Gender roles entail mandatory heterosexuality for women, so that the experience and existence of love and sex between them has been "crushed, invalidated, forced to hide and disguise itself" (Rich, 1996: 18). In this regard, Rich takes up MacKinnon's proposals to defend the view that women have learned how to adapt to a world in which they are forced to behave as heterosexuals and to be the objects of male desire (MacKinnon, 1979). This implies "perceiving oneself" as sexual prey. Thus, this must raise questions about both the supposed nature or predisposition of women to have sexual desire for men and heterosexuality as an institution (Rich, 1996: 35-36).

Heterosexuality presupposes that there is a fixed identity that precedes gender and sex, and that it can be of only two kinds: masculine or feminine. Furthermore, it also presupposes that the world is divided between homosexuals and heterosexuals. However, the birth of queer theory about gender and human sexuality has shown the instability and contradictions inherent to these binaries. In this sense, Butler questions the existence of a fixed biological sex antecedent to gender. As a result, the problem is the identification of the point at which sex stops being sex and becomes gender (Butler, 1990).

As a consequence, gender is under constant construction. Thus, to name the sexes is to create them (Butler, 1990). This does not mean denying the biological difference between bodies, referring specifically to genitals. On the contrary, what it leads to is to question whether the possession or absence of these traits determines the sexual identity of an individual.

Ultimately, the normative is disguised as natural through the constant repetition of a variety of performative acts (Butler, 1999). Gender is always an action, a constant repetition, but not carried out by persons whose gender identity preexists; as such, identity is constructed alongside this process. Thus, queer theory allows us to expand the field of studies on masculinity (Minello, 2002; Guttman, 1998; Nuñez, 2015; Viveros, 2002) and femininity, sexual orientation (Sedwick, 1998) and gender identity.

Queer theory allows to open new sociopolitical alternatives (calling into question what is normal and what is natural), which end up delimiting what is abnormal and unnatural (Seidman, 1993). Thus, studying the way in which discourses on human sexuality are created and reproduced becomes an analysis on the exercise of the power of representation in bodies (Nuñez, 2015).

In conclusion, human sexuality is subject to discursive and performative (actions) dynamics, which constitute it in different social contexts. This occurs at and in many levels and scenarios during people's lives, so that each social context can have its own particular way of influencing bodies.

These dynamics can be of different kinds. On the one hand, there are punitive sanctions, such as criminal sanctions for "crimes" related to acts of sodomy, or disciplinary sanctions imposed for behavior not permitted in an institutional context. On the other hand, they can entail social violence (Gómez, 2005), as shown by the sexual assaults suffered by trans women on the streets of Latin America, for the simple fact of identifying themselves as such. Moreover, they also provide a position of social privilege to heterosexual couples who choose marriage.

These types of dynamics can manifest themselves in any social context, as well as in specific places such as in family homes, schools or prisons. Ultimately, this social regulation of sexuality ends up being a fragmented and localized process, given that it does not arise from a single disciplinary context but, rather, is a process in which different social institutions of all kinds participate.

3. THE TREATMENT OF INTERNATIONAL JUSTICE FROM THE HORIZON OF ANALYSIS: PARTICULAR ATTENTION TO QUEER THEORY CRITICISM OF THE UNIVERSAL AND REGIONAL SYSTEMS FOR THE PROTECTION OF HUMAN RIGHTS

3.1. First approach

In international relations (IR), the notions (or "figurations", as Donna Haraway refers to them) of "homosexuality" and "homosex-

ual" allow us to question modes of organization and regulation of national, regional and international politics (Weber 2016b: 21). They are, in turn, relevant to IL to the extent that the analysis of these figurations shows how human sexuality functions as one of its organizational principles (Otto, 2017), which also happens in international human rights law (IHRL) and ICL.

The way in which homosexuality and homosexuals are understood through queer theory has been studied in the field of IR (Weber, 2016a: 11). In particular, the figuration of homosexual has been studied through concepts of IR such as post-structuralism and its vision of the sovereign man (Weber, 2016b), or via phenomena that occurred in various places. For instance, in the Victorian era in England, homosexuality was understood as a "deviant" or "perverse" sexuality, opposed to "normal" heterosexuality (Hoad, 2000). Likewise, Barack Obama's language refers to homosexuality as "LGBT", although in terms of human rights that must be extended to LGBTIQ+ populations throughout the world (Langlois, 2015: 28; 3-4). Moreover, in Europe, the understanding of homosexuality has varied over time from "normal" to "deviant", due to the instrumentalization of the term by European leaders in accordance with their progressive or traditionalist vision (Weber, 2016a: 13; Thomas, 2012; Wilson, 2013). All these phenomena have been analyzed from post-structuralist and queer approaches to IR.

In relation to IL, there has been analysis as to how certain international organizations (IOs), including the United Nations Security Council (UNSC) (Stern, 2016; Paige, 2017), the United Nations General Assembly (UNGA), the Human Rights Council (D'Amico, 2015), the European Council (Thiel, 2015) and the ICC (Barrera Moore, 2017; Olasolo, Buitrago & Bonilla, 2020), as well as IHRL, approach homosexuality. Furthermore, the hetero/homonormativity of the recognition of LGBTIQ+ rights has been criticized. In this sense, D'Amico (2015: 56) suggests that under current IL there will be no global success in the protection of LGBTIQ+ rights because "universal" human rights instruments create conditions which are necessary but insufficient for success. Likewise, for Langlois (2015: 27), the institutions of IHRL can be emancipatory, but at the same time they can constrain freedom, generate inequality and reinforce

injustice, since IHRL establishes normative limits, while queerness is characterized by being anti-normative.

In this order of ideas, the studies on LGBTIQ+ rights in IL have emphasized: (a) that they do not have a universal scope; and (b) the hetero/homonormativity of existing norms and standards. For its part, IR studies have identified the figuration of homosexuality and the criticism of the use of LGBTIQ+ rights in state discourses. In both fields, queer theory has served as a critical lens that has allowed the identification of: (a) the inadequacies of IHRL and the universal and regional systems for the protection of human rights; and (b) the opportunities for improvement that they may have. Despite these advances, the issue remains notably understudied in relation to ICL and the role of the ICC.

From a theoretical point of view, there are two ways of understanding queer theory in IL and IR: (a) the search for equal rights between heterosexual and non-heterosexual people, which includes, among other issues, the elimination of homosexuality as a crime and the recognition of equality of marriage; and (b) the use of sexuality as a primary category of analysis so as to make visible a heterosexual order that is understood as normal in society, in the nation State and in IL (Otto, 2007).

In this order of ideas, queer theory is not designed only for queer people (that is to say, the LGBTIQ+ population) because, beyond analyzing how gender, sexuality and heterosexuality organize hierarchies in what is considered normal in human sexuality and intimacy, this theory seeks to challenge the very idea of what is considered "normal". Furthermore, queer theory does not apply only to the private sphere because, it being a theory of deconstruction, it reveals the structure that sustains social reality. Finally, it analyzes the "heteronormativity" of IL, that is, institutionalized heterosexuality (which includes institutions, culture and ideology) through which heterosexuality is imposed as the idealized form of intimacy (Buss, 2007).

Based on the foregoing, it can be asserted that queer theory does not focus exclusively on IHRL. In fact, when the authors of this theory address the tension between globalization and the diversity of sexual identities, they state that the discourse that states that "gay rights

are human rights" is not the same as what queer theory proposes. It does not suggest "reifying" the gay category on a historical and social level, but rather understanding sexuality as a product of Western modernity (Gross, 2007).

Furthermore, from a methodological point of view, the analysis of the different approaches to the figurations of homosexuality and homosexual (normal or perverse, individual or collective) shows that by placing these concepts at its methodological core, the method of queer theory in IR does a great deal more than add (homo)sexuality to this field of study, because it can be applied as a category of analysis to the current normative body of IL (Otto, 2017: 5-6), allowing thereby the articulation of the study of IR and IL. Consequently, this theory offers ways to map phenomena as diverse as colonialism, human rights, and the formation of States and transnational communities, which provide representations of international politics in ways which are very different from those that emerge from other research methodologies (Weber, 2016b: 2. 3).

In this sense, it is worth noting that Donna Haraway's notion of figuration (of homosexuality and of homosexual) is built on Judith Butler's concept of performativity (in the sense of "acting or in action"). Thus, for Haraway, figurations are images in action that can be inhabited. They emerge from assemblages of discourses and semiotic materials that condense diffuse "imaginaries" about the world in specific images and forms (Haraway, 1997; Randolph, 1997: 11; Weber, 2016b: 28). In this way, for Haraway, the notion of figuration involves the use of semiotic references (tropes) that combine knowledge, practices and power to shape how words are mapped and how real things are understood through those words (Weber, 2016b: 28; Haraway, 1997; Randolph, 1997: 11).

Based on the foregoing, Haraway establishes four elements through which figurations take specific forms. These are semiotic references (tropes)[2], temporalities (temporal roots that are progres-

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[2] Tropes are material and semiotic references that refer to real things and how we understand them (Weber, 2016b: 29). They are constituted by shocks that generate changes of course or deviations in "literal mentality" (Haraway 1997; Randolph, 1997: 11).

sively transformed)[3], actions[4] and worldings[5], which influence the various ways in which homosexuality and the homosexual can be conceived (Weber, 2016b:28) (Haraway, 1997; Randolph, 1997:11).

At the same time, the analysis proposal of queer theory is not to start from singular logoi, but plural ones. The plural logoi allow homosexuality to be understood as normal and/or perverse (Weber, 2016b: 39). The description of plural logoi comes from Ronald Barthes and his description of the "and/or" rule (1974: 76-77). For this author, while the "one of the two" rule (either/or) operates according to binary logic (which forces a choice in the meaning of the text, for example, between man or woman), the "and/or rule" exceeds the logic of binaries, since it expresses plurality. Under this last logic, a person is in both one thing and in the other, and can simultaneously be one and the other, just as happens with trans people or transvestites[6]. Accordingly, from this perspective there is no traditional reduction to the dichotomies of sex, gender and sexuality, introducing numerous pluralities into the discourse, which generates a queer logic (Weber, 2016b: 40).

Finally, from the poststructuralism perspective, there is an analysis of homosexuality through the notion of "statecraft as mancraft",

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3 Haraway refers to temporalities in terms of Western Christian realism. Thus, temporalities refer to a relationship with time, in how figurations have temporal roots and are progressively transformed (Haraway 1997; Randolph, 1997: 9-11). In this way, the figuration of the homosexual depends greatly on where one is (which can be seen, for example, in the colonial legacy on homosexuality in the West, or in the current understanding of the homosexual as an LGBTQ holder of human rights) (Weber, 2016b: 29-30).

4 For Haraway, figurations, which are not stable, are performative images that can be inhabited. These images, through their repetition, become, under certain circumstances, habitable images of oneself or others (Weber 2016b, 31-32).

5 Worlding is the way in which the universe of knowledge, practice and power is mapped. The different ways in which the homosexual is conceived are products of types of power, bodies and pleasures when defining norms and rules (Weber, 2016b: 33).

6 Weber (2016b) undertakes an in-depth analysis of Conchita Wurst (winner of the Eurovision contest in 2014) and her representation as normal and/or perverse and developed and/or underdeveloped.

developed by Ashley (1989), with respect to how the figuration of homosexuality (normality/perversion) affects the concept of "the sovereign man" (Weber, 2016b: 38). What poststructuralists assert about sovereignty is that it refers to those practices that attempt to: (a) create an actor in whose name a political community governs; and (b) attribute legitimacy and authority to that actor (Weber, 2016b: 3). As a result, from the perspective of IR it has been argued that the relationship between sexuality and sovereignty is related to the way in which sexualized persons such as "homosexual" or "trans" are closely tied to the notion of order or anarchy at the national and international levels. In other words, people with diverse sexualities constitute a notion that is contrary to that of the sovereign man.

If the analysis of Foucault and Haraway is superimposed upon Ashley's poststructuralism, it is clear how States try to freeze the meaning of "homosexual" when they enter into international games of "powers and pleasures" (Foucault, 1980: 48; Weber, 2016b: 34). Thus, based on Ashley's approach, Weber (2016b) states that:

> […] it is impossible to understand the formation of modern sovereign States and international orders without understanding how a particular version of the "sovereign man" is inscribed as the necessary basis of a sovereign State and how this procedure of "statecraft as mancraft" produces an ordering of international relations.

3.2. Queer criticism of international system for the protection of human rights

There being no queer approach to IHRL or a text dedicated to studying a process of "queering international criminal law", the initial queer theory criticism of IHRL takes on particular importance for the purpose of this work.

In this sense, it is worth emphasizing how the universal system for the protection of human rights aims at protecting the rights of homosexual people. Thus, for example, the Human Rights Committee (HRCom) has taken decisions in cases regarding the criminalization of homosexuality (HRCom, Toonen case, 1994: 8.3), and regarding pensions for homosexual couples (HRCom, case X 2005: 7.2-7.3).

The European system for the protection of human rights has also issued multiple rulings in which the protection of the rights of homosexual and trans people has been addressed, including the marriage of same-sex couples (ECtHR, Shalk and Kopf case, 2010; Hämäläinen case, 2014), their registration if they were celebrated outside the European system (ECHR, Orlando Case, 2017b), the recognition of maternity or paternity when there is a gender change, and the recognition of the right of people to openly identify themselves as gay, lesbian or any other sexual minority (ECHR, Bayev case, 2017a), among others.

With regard to the Inter-American system, most of the rulings deal with homosexual rights issues, such as the recognition of pension rights between same-sex couples and discrimination on the basis of sexual orientation. In fact, the majority of the petitions submitted to this system have been brought by homosexual men and women (eight homosexual men, five lesbian women and three trans women[7] have brought contentious petitions before the Inter-American Commission on Human Rights (IACHR), of which only three cases have ended up reaching the Inter-American Court (IACtHR) (IACtHR, Freire case, 2016; Duque case, 2016; Atala case, 2012)[8].

Queer theory's criticism of the universal and regional systems for the protection of human rights focuses on homo/heteronormativity[9]

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7 Admitted petitions and friendly settlement procedures have been taken into account in the drafting of this chapter. The IACHR has admitted cases against El Salvador (Report No. 73/16), Venezuela (Report No. 66/16), Honduras (Report No. 64/16), Brazil (Report No. 11/16), Chile (Reports No. 30/15 and No. 42/08), Peru (Report No. 99/14) and Colombia (Reports No. 150/11 and No. 71/99). Moreover, there have been two friendly settlement processes with the Chilean State (Report No. 81/09 and Case P-946-12). Precautionary measures granted by the IACHR to LGBTQ+ persons have not been taken into account.

8 Provisional measures granted by the IACtHR to LGBTQ+ persons have not been taken into account when drafting this chapter. The cases concerning the rights of LGBTQ persons that have reached the IACtHR are the following: Atala Riffo and girls v. Chile (2012), Duque v. Colombia (2016a) and Flor Freire v. Ecuador (2016b).

9 Duggan (2003: 50) refers to homonormativity as a new neoliberal sexual politics that does not question dominant heteronormative assumptions and

(Duggan, 2003: 50). This implies two components: (a) that the human rights organizations that participate in the processes of creating norms on LGBTIQ+ rights are mainly comprised by part of the gay and lesbian liberation movement; and (b) that these organizations seek to obtain rights that equate heterosexuals with homosexuals, thereby setting aside sexualities and identities other than those usually represented by mainstream social movements of gay liberation or LGBTIQ+ (DeFilippis, 2015).

Thus, although systems for the protection of human rights, through their contentious rulings, have developed frameworks for protecting the rights of trans and homosexual people, they still present problems of hetero/homonormativity, as well as a binary understanding of sexuality (which prevents LGBTIQ+ rights from moving beyond a mere equivalence with the rights of heterosexual people). This does not mean, however, that their consideration of homosexuality, and of homosexuals, as normal and, therefore, as persons entitled to human rights, should not be highlighted as a positive element (all references to the perverse nature of homosexuality have been eliminated from their rulings, which is particularly notable in the Inter-American system).

However, with respect to the Inter-American system in particular, two important specific criticisms are made from queer theory. First, by conceptually clarifying what the LGBTIQ+ population is, it has imposed as a human rights project certain epistemologies regarding sex and sexuality, that is to say, what is understood by lesbian, gay, bisexual, transgender, intersexual or queer (Thoreson, 2011: 16). Second, despite presenting significant advances in the protection of indigenous peoples in the region, no dialogue has been established between queer and postcolonial visions, since queer is considered a Western approach. Consequently, it is necessary to put an end to this dynamic so that "anti-systemic" LGBTIQ+ sexualities are considered, and dialogue with them is entered into (Sjoberg, 2015: 167-168).

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institutions, but rather defends and sustains them, while promising a demobilized gay electorate and a privatized and depoliticized public.

Finally, with regard to other IOs, Phillipa Paige (2017) has analyzed from a queer theory perspective how the understanding of sexualities in a binary and heteronormative way has caused the UNSC to render sexually diverse people invisible as victims of sexual violence. Within the UNSC it has not been possible for sexual violence to be considered to be a threat to international peace and security, since Russia and China consider this issue to come under the jurisdiction of other UN bodies. Furthermore, the use of language in which men are understood as perpetrators and women as victims of sexual violence (in a binary manner) has impeded the protection of other categories of victims (including men, transsexual people or transgender people) through, inter alia, the adoption of sanctioning measures against their perpetrators, who may not necessarily be men (Paige, 2017).

4. THE ANALYSIS OF THE ROLE OF THE INTERNATIONAL CRIMINAL COURT FROM POST-STRUCTURALIST AND QUEER PERSPECTIVES

As mentioned above, poststructuralist and queer perspectives seek to vindicate human sexuality and gender expression in all its diversity and fluidity, beyond the dualistic confines of heterosexuality, homosexuality, and the male/female binomial. Under these two theoretical perspectives, the purpose of this section is to analyze in the first instance the impact of these theoretical assumptions on the ICC's role, and in turn, try to elucidate the role the ICC is called to play in challenging binary hegemonic structures, and vindicating in ICJ the recognition of persons with diverse sexuality.

In order to understand the position of the ICC regarding international crimes committed against those persons with non-stereotypical queer sexual and gender identities, the provisions of the ICC Statute, particularly the definition of gender included in art. 7(3), will be first examined. Secondly, the policy on sexual and gender-based crimes of the ICC OTP and its impact on the treatment of cases with non-conforming gender or sex victims will also be analyzed.

The ICC Statute contains no provision that explicitly includes the protection of people with non-binary gender identity or sexual orientation. A first approach to an analysis of the perspective of human sexuality incorporated in the ICC Statute is through the definition of gender included in art. 7(3) of the ICC Statute, which provides that "[…] the term `gender´ shall be understood to refer to the two sexes, male and female, in the context of society". And it adds that, "[t]he term gender will have no other meaning than the above".

As can be deduced from its content, the concept of gender is limited to masculine and feminine, thereby adopting a heteronormative perspective of the expression "gender", which in principle excludes those persons who express non-binary sexual and gender identities. For authors such as Triffterer & Both (2016: 293), art. 7(3) recognizes the existence of biological sex and refers to the roles assumed "in the context of society". As such, it only recognizes expressly the two roles socially assumed as masculine and feminine by men and women respectively.

In fact, Cerone & Bricker suggest that the final wording of art. 7(3) of the ICC Statute would seem to be aimed at preventing the term "gender" from being interpreted as inclusive of the category of sexual orientation (2005: 42). In this way, the definition of gender would have been the result of negotiations between States with conflicting positions, in which the conservative vision of gender, constructed from the biological and binary perspective of man/woman, finally prevailed (Sengupta, 2003: 32).

However, Kritz points out that while the reference to "the two sexes, male and female" turned out to be a concession made to the conservative coalition, the expression "within the context of society" entails the incorporation of a definition of gender as fluid as possible (2014: 1-38).

In any case, the definition of gender in art. 7(3) of the ICC Statute represents a setback in the understanding of this concept from the sociological point of view, which goes beyond the biological one (Oosterveld, 2005). In this sense, Dolan (2015) and Stahn (2019) consider that gender in the binary terms of feminine and masculine implies an artificial exclusion of intersex persons, or those with a

non-conforming gender or sexual orientation. In this same sense, Olasolo et. al. (2020: 374) emphasize that the wording of art. 7(3) of the ICC Statute is not broad enough to conclude, *prima facie*, that it can be extended to people with non-binary gender identities.

There are, however, other authors, such as Boot, who emphasize that the definition of gender is not exclusive because it recognizes, on the one hand, the existence of biological sex and, on the other hand, it accepts differences constructed between genders "in the context of society" (2016: 293). Thus, although art. 7(3) of the ICC Statute excludes intersex persons, according to this author, this does not preclude the application of the interpretation criteria of art. 21 of the ICC Statute, including the "applicable treaties, principles and norms of international law", which could allow the extension of protection to other categories not exhaustively included in the definition (2016: 293).

Regarding the content of international crimes, some authors such as MacKinnon (2013: 105-122), Boot (2016: 293) and Barrera Moore (2017: 1288) consider that the crime against humanity of persecution provided for in art. 7(1)(h) and (2)(g) of the ICC Statute, could be the most appropriate way to protect the LGBTIQ+ community[10]. Moreover, Barrera Moore (2017) and Boot & Hall (2016: 293) consider that sexual orientation and gender identity can be included as "other grounds universally recognized as unacceptable under inter-

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[10] According to the EC, the crime against humanity of persecution occurs when: "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 art. 7, para. 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 art 7, para. 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".

national law". Bassiouni even warns about the need to extend the *ratione materiae* jurisdiction of the ICC in relation to crimes against humanity, to include the persecution of people by reason of their sexual orientation or disability (2011: 14). Nevertheless, other authors stress that the standard of the general clause "universally recognized grounds" implies too high a requirement to include aspects of gender identity (Edwards, 2001). Furthermore, its inclusion could run contrary to the principle of legality (Cryer, 2014: 206).

Even though the doctrine shows significant discrepancies in the interpretation of the definition of gender and in its application in relation to international crimes (Olasolo et. al., 2020: 374), none of the interpretations outlined follows the postulates of queer theory and post-structuralism, because they are all based on a heteronormative and binary conception of human sexuality (leaving thus aside sexualities and identities beyond those consecrated by the mainstream of gay liberation or LGBTIQ+). In this sense, not only the lack of a broader definition of gender, but the absence of specific criteria upon which to find the existence of the crime against humanity of persecution against queer persons or those having non-stereotypical sexuality, denotes the binary logic of the sexes and the eminently heterosexual matrix of the ICC Statute.

From a practical perspective, a first attempt to extend the scope of the concept of gender came through the Policy Document on Sexual and Gender-Based Crimes. This document was adopted in 2014 by the ICC OTP in response to criticism received for the lack of conviction of Germain Katanga for the crimes against humanity and war crimes of rape and other forms of sexual violence (ICC, Katanga & Ngudjolo, 07/28/2010). In an attempt to expand the concept of gender under art. 7(3) of the ICC Statute, the document emphasizes that it refers to the two sexes (male and female), and adds that its definition recognizes the social construction of gender, as well as the corresponding roles, behaviors, activities and attributes assigned to women and men and girls and boys (ICC, 2014: 3-4).

Furthermore, this document conceptualizes sex, sexual crime, gender-based crime, gender perspective and gender analysis based upon the universal dualistic categories of man/woman. Both the addition and the definition of these concepts do not help the de-

construction of the naturalized categories of sex, gender and human sexuality. On the contrary, it demonstrates the continuity of the heteronormative approach of the ICC Statute.

Nevertheless, the document does appear to propose a much broader perspective when addressing art. 21(3) of the ICC Statute, which establishes that the application and interpretation of the ICC Statute must be compatible with internationally recognized human rights, without any distinction based on such grounds as, among others, gender or other status (ICC, 2014: 16). Along the same lines, the document mentions among the intersectionality factors, sexual orientation and other conditions or identities that can give rise to multiple forms of discrimination and social inequalities (ICC, 2014: 17). The inclusion of sexual orientation and an open clause for diverse identities represents a window of opportunity to accommodate persons and violence that until now have remained invisible as a consequence of the heteronormative sex-gender structure.

Despite the foregoing, the truth is that, to date, the ICC Chambers have not yet had the opportunity to rule on the definition of gender included in art. 7(3) of the ICC Statute, or on its position regarding the crime against humanity of persecution[11]. As a result, the ICC, and particularly the ICC OTP, have the opportunity to question its approach to the dualistic categories of man/woman and heterosexuality/homosexuality in their application and interpretation of the ICC Statute. In this sense, from a perspective of investigative and judicial practice, both the ICC OTP and the ICC Chambers have a transformative potential, since they can challenge the binary hegemonic structures of the ICL through the approach they adopt towards the situations under investigation, and the way in which they delimit legal problems in decisions that have an effect on the diversification or restriction of human sexuality and gender identity expressions.

To achieve transformative potential, it is necessary to take affirmative steps to challenge certain preconceptions such as the male ag-

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11 As explained above, this chapter has been finalized in November 2023. Trial Chamber X has not issued yet its judgment at the time of finalization of the chapter.

gressor/female victim dynamic, characterizing violence through the lens of familial and cultural roles, and erotic attraction limited to individuals of the opposite sex (mandatory heterosexuality). In this sense, Paige (2018: 97) affirms that the inclusion of men as potential victims in the first UNSC resolution dedicated to addressing sexual violence was a very important step towards more inclusive and diverse language and policies. Likewise, Durham & O'Byrne (2010: 49) point out that recognizing the international criminal responsibility of women implies an overcoming of the social and cultural constructions of women as innocent, inherently peaceful and incapable of committing such atrocities.

These are precisely the social and cultural constructions that deny that sexual violence can take place against male victims. In this way, the reluctance to confront the binary paradigms of sexuality can be explained by the prevalence of homophobia, which impels the belief that sexual violence feminizes the victim, and emphasizes in those who suffer it their possible homosexual orientation ahead of their condition of victim of sexual violence (Sivakumaran, 2005: 48).

From poststructuralist and queer perspectives, the absence of addressing sexual violence involving people who cannot be classified as cisgender can be understood as a direct result of the invisibility that some individuals, who do not fit within normalized binary genders, face. In turn, resistance can be explained as a manifestation of the fear of undermining heteronormative social structures (Shepherd & Sjoberg, 2012: 11; Otto, 2013: 82).

It is within this context that the ICC OTP and the ICC Chambers are called on to participate in discussions on the different modalities of violence in order to consider and protect the diversity and fluidity of human sexuality, and to recognize persons with non-stereotypical identities. Thus, taking a critical approach to the definition of gender incorporated in the ICC Statute, the universe of victims should be expanded to include male victims and victims of the LGBTIQ+ community. Further, the male perpetrators/female victims dynamic should be confronted so as to make room for other dynamics that go against traditional cultural codes.

This is especially relevant today, since both the ICC OTP and the ICC are faced with the opportunity to change the characteristic heteronormative paradigm of the ICC Statute. For example, if it were decided to open a preliminary investigation into crimes allegedly committed in Syria and Iraq against people who identify, or were identified, as sexually diverse, the ICC OTP and the ICC would be called upon to address violence against sexually diverse persons as a fluid phenomenon, not pigeonholed within heteronormative limits. The same would apply to the investigation into the sexual violence suffered by the Rohingya community and the case against Al-Hassan for, inter alia, the crime against humanity of gender-based persecution. They will, without a doubt, put to the test the ability of the ICC OTP and the ICC Chambers to break the binary confines of sex-gender-sexuality, rethink culturally ingrained patterns of gender violence, and adopt inclusive practices that will reduce the number of silenced victims and contribute to the fight against impunity.

5. CONCLUSIONS

ICJ, ICL and the ICC Statute not only reflect, but participate in the configuration and delimitation of concepts of sex, gender and sexuality, and perpetuate the binary logic of the sexes and the heterosexual matrix of IL and IJ. In this way, not only are the varied expressions of human sexuality restricted, but sexually diverse persons are also left devoid of protection.

The analysis of the role of the ICC from the postulates of queer theory and post-structuralism seeks to bring to light the intrinsic injustices of hegemonic binary structures, and particularly of the hetero-patriarchal structure based on gender binarism. Along these lines, it is possible to undertake a critique of ICJ, ICL and the ICC Statute as mechanisms that privilege all heterosexual and cisgender persons who comply with traditionally conceived gender stereotypes.

Proof of this is the absence of any provision in the ICC Statute that explicitly provides protection for people with non-binary gender identity or sexual orientation. Likewise, art. 7(3) of the ICC Statute incorporates a definition of gender limited to masculine and femi-

nine, thus maintaining the heteronormative hegemony of the ICC Statute and the exclusion of persons who express non-binary sexual and gender identities.

The ICC has maintained a passive position in the search for solutions to queer and post-structuralist criticisms. Although the ICC Chambers have not had the opportunity to rule on its position regarding the definition of gender contained in the ICC Statute, the ICC OTP Policy Document on Sexual and Gender-Based Crimes would appear to present a window of opportunity to challenge the gender roles imposed by the masculine-feminine binomial.

Given the prevailing silence, both the ICC OTP and the ICC Chambers have the potential to transform the heteronormative ideological framework that actively discriminates against anyone who challenges it. To achieve this, it is necessary to take firmer steps to move away from certain preconceptions in criminal phenomenology, such as the male aggressor and female victim dynamic or the understanding of violence through the lens of family and cultural roles.

In this same sense, the ICC is called to participate in discussions aimed at identifying and protecting the diversity and fluidity of human sexuality, and to recognize persons with non-stereotypical identities. The current panorama of the ICC, and in particular the possibility of investigating crimes against sexually diverse people in Iraq and Syria and against the Rohingya community in Myanmar, as well as the Al Hassan case for the crime against humanity of persecution for gender-based reasons, show opportunities to put into practice a much more fluid approach to the categories of gender, sex and human sexuality.

This would mean, ultimately, that the criticisms outlined in recent decades from the perspectives of queer theory and post-structuralism, in addition to making visible those persons who do not fit within the normalized binary genders, could have finally an impact in advancing their own protection through ICJ, ICL and the ICC Statute.

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Chapter 8
The Role of the International Criminal Court from the Perspective of the Special Reparation Needs of Minors and Elderly

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1. INTRODUCTION

One of the areas in which the different instruments of international criminal justice (ICJ) and international criminal law (ICL) have experienced the greatest evolution, has been the treatment provided to the victims. Thus, although international criminal tribunals were initially designed in an exclusively retributive manner, without any focus on victims, this has been changing over time. In this way, while

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the *ad hoc* tribunals for the situations in former Yugoslavia (1993) and Rwanda (1994) did not consider either the participation or reparation of the victims, both aspects are expressly developed in the Statute of the International Criminal Court (ICC Statute) (2002) and in the regulations of some hybrid tribunals, such as the Extraordinary Chambers of the Courts of Cambodia (ECTC) (2004).

The systematic and/or generalized violence is a characteristic of international crimes that affect various communities in several ways. It has a special impact on those who present more vulnerabilities due to their age, as is the case with minors and elderly. Nevertheless, despite the formal recognition of age as an objective factor of vulnerability, it has not necessarily resulted in a differential treatment in the judicial practice of the application of ICJ and ICL. On the contrary, as reflected, for example, by the experience of hybrid tribunals established in the first decade of the 21st century (Special Court for Sierra Leone (SCSL) (2002), ECTC and Special Tribunal for Lebanon (STL) (2007)), the limitations and challenges in the implementation of specific reparation measures for age-vulnerable groups remain highly significant.

In this context, it is important to analyze the role of the ICC from the perspective of the special needs of minors and elderly persons who have been victims of genocide, crimes against humanity, war crimes or aggression. To this end, we have focused our analysis on the area of reparations measures, due to its particular importance for addressing these needs (leaving, therefore, for future work the questions related to their participation in ICC proceedings and their effective protection against new acts of violence). All this, in order to reflect the progress achieved, identify existing gaps and highlight pending challenges in the shaping of the ICC's role from the perspective of the special reparation needs of minors and the elderly.

2. AGE AS AN ESSENTIAL FACTOR OF VULNERABILITY

The vulnerability of minors and the elderly due to age has been a recurring problem, whose protection, although widely recognized internationally, continues to be insufficiently implemented in practice.

Thus, the United Nations Convention on the Rights of the Child (1989), highlights the need for special protection for minors, due to their physical and mental immaturity and recognizes that "in every country of the world there are children who live in exceptionally difficult conditions" and who need special attention. Furthermore, it establishes that it is the responsibility of States to adopt protection and prevention measures against all forms of child abuse, as well as to support parents in the exercise of their parenting responsibilities thorough the development of appropriate institutions, facilities, and services.

The Organization for Economic Cooperation and Development (OECD) has also recognized the vulnerability of minors. Moreover, the verification that in the majority of member countries the policies directed to minors are developed in a fragmented manner without adequate consideration of how various factors that influence children's well-being interact with each other, has underlined the need for children and adolescents to receive constant, coherent, and coordinated support throughout their entire growth process.

Thus, the OECD has placed special emphasis, for example, on the impact that poor mental health has on school performance and level of commitment, as well as the way in which poor quality housing affects both children´s health and their family relationships. In fact, it is unlikely that isolated approaches that focus solely on exceptional aspects of the well-being of children are effective if other barriers to a healthy development are not also addressed.

Furthermore, as explained by the OECD, inequality in childhood means inequality throughout the entire life cycle, in a way that children who grow up in families with scarce resources have less access to a quality education and healthcare and are highly likely to enter the labor market at an early age in low-skilled jobs that offer far fewer opportunities to improve their skills. The situation is of such gravity that it is estimated that it would take between four to five generations for a child born in a family with scarce resources to reach the average income level.

As for the elderly, they also face a marked situation of vulnerability, as a consequence of: (a) the economic inequality and opportunities

to which they are exposed to due to their low social coverage and the low income offered by pensions (especially in the case of women)[1]; (b) their insufficient access to the health system, to housing with minimum habitable conditions and to the justice system; and (c) the multiple situations of discrimination to which they are subjected.

As a result, the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) (2022) has indicated that urgent actions are required in order to address the diverse situations of vulnerability faced by the elderly, including specifically their job insecurity (not being able to live from their pensions) their health problems (reflected on a high prevalence of non-communicable diseases, premature death and disability) and the frequent situations of abandonment by their families and by the State.

3. THE LACK OF INTEREST OF INTERNATIONAL CRIMINAL JUSTICE REGARDING THE SPECIAL REPARATION NEEDS OF MINORS AND THE ELDERLY WHO ARE VICTIMS OF INTERNATIONAL CRIMES: THE CASES OF THE HYBRID TRIBUNALS ESTABLISHED IN THE FIRST DECADE OF THE XX CENTURY

3.1. Minors

Armed conflict situations in which children and adolescents are forcibly recruited to participate in hostilities are very frequent, which is why some hybrid tribunals have sought to identify reparation measures that could be specifically implemented within the framework of the reintegration processes of former child soldiers into civil society. Above all, it has to be considered that, once demobilized, ex-combatants, including child soldiers, suffer serious situations of stigmatization[2].

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1 CEPAL, 2022, *Infancias y adolescencias en América Latina y el Caribe: Deudas de derechos y brechas en las políticas.* https://repositorio.cepal.org/server/api/core/bitstreams/e345daf3-2e35-4569-a2f8-4e22db139a02/content

2 Coulter, C., 2009, Bush wives and girl soldiers: Women's lives through war and peace in Sierra Leone, Cornell University Press, pp. 132, 208.

Among the situations for which the three main hybrid tribunals born in the first decade of the 21st century (the SCSL, the ECTC y STL) were created, the phenomenon of forced recruitment of minors has been especially serious in Sierra Leone. For this reason, the Final Agreement signed between the Government of Sierra Leone and the Revolutionary United Front (RUF) expressly recognizes in its preamble:

> […] the imperative that the children of Sierra Leone, especially those affected by armed conflict, in view of their vulnerability, are entitled to special care and the protection of their inherent right to life, survival and development, in accordance with the provisions of the International Convention on the Rights of the Child.

The same is reiterated in Article XXX of the Agreement, which provides that it is the duty of the State:

> [to] accord particular attention to the issue of child soldiers. It shall, accordingly, mobilize resources, both within the country and from the International Community, and especially through the Office of the UN Special Representative for Children in Armed Conflict, UNICEF and other agencies, to address the special needs of these children in the existing disarmament, demobilization and reintegration processes.

Most of the child soldiers' recruitment in Sierra Leone was carried out by the RUF[3], constituting a very important part of its combatants. However, other organized armed groups involved in said armed conflict, such as the Armed Forces Revolutionary Council (AFRC) or the Civil Defense Forces (CDF), also resorted to this practice, which made the use of child soldiers, in the end, becoming one of their main strategies for maintaining their numerical superiority[4].

In this context, the role of the SCSL was unfortunately limited to the investigation, prosecution and punishment of those most responsible for international crimes, and thus reparation to victims (including former child soldiers) did not comprise part of its role.

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3 Mazurana, D., & Carlson, K., 2004, From combat to community: Women and girls of Sierra Leone, Refugees International, p. 3.

4 Langmack, A., 2023, Reparation in transitional justice: A global perspective, SSOAR, p. 98; Langmack, F. J., 2023, Reparation in transitional justice: A normative framework, Nomos Verlagsgesellschaft, p. 110.

In contrast, other institutions established in the Lomé Peace Agreement (in particular, the Truth and Reconciliation Commission (TRC)) have had a reparative role. In carrying out this role, the TRC: (a) has asserted that minors, along with amputees or injured persons and victims of sexual violence, constituted special categories of victims and, therefore, primarily deserved direct reparation; and (b) has asserted that the following groups were deserving of specific reparation measures, as long as they were 18 years old of age or younger by 1 March 2002: (a) children who suffered from physical injury, such as amputees, other war-wounded or victims of sexual violence; (b) children whose parents were killed as a consequence of any abuse or violation as described in this report; (c) children born out of an act of sexual violence and whose mother is single; (d) children who suffer from psychological harm; and (e) war-wounded children.

For those who were part of these groups, there have been adopted, amongst other steps, health measures of reparation, including those aimed at eliminating scars, and measures for protecting victims of sexual and gender-based violence. However, the Sierra Leone Reparations Program as a whole has only allowed for the reparation of approximately 32.000 persons[5]. This means that the vast majority of the victims have not received any reparation due to the requirements to be able to access them, and the evidentiary standards applied, have been high, which has limited the measures to those who have suffered the most serious harm. Hence, the measures that have had the most widespread reach have been those that consist of regulatory changes, and in particular the adoption of new national regulations for the protection of minors.

For its part, in the ECTCs it is notable that the process of recognition of reparations included in its statute has taken place after the completion of the investigations, which, in turn, have been carried out more than thirty years after the Fall of Phnom Penh (Cambodia) at the hands of Khmer Rouge in 1975 (the starting point of the Cambodian genocide). In consequence, none of the children affected

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5 OIM, s. f., Support to the implementation of the Sierra Leone Reparations Programme (SLRP), International Organization for Migration.

by the violence exerted by Khmer Rouge were still minors when the ECTC began operating in 2004.

Finally, with regard to the STL, and as is the case with the SCSL, its regulatory instruments do not attribute to it any type of reparation mandate for the victims of the assassination of the former Lebanese Prime Minister, Rafiq Hariri, and its related crimes[6].

As a result of the above, it can be stated that the experiences of the hybrid tribunals established during the first decade of the 21st century, such as SCSL, and the ECTC and the STL, are showcases for the systematic limitations in the treatment of the minors who are victims of international crimes. Despite recognizing their vulnerability, some tribunals, such as the SCSL or the STL, do not even have a reparative and/or restorative function. Furthermore, those who lack this function, such as the ECTC, have not gone beyond the merely declaratory level which has prevented the adoption of material reparation measures aimed specifically at minors.

Even where extrajudicial bodies have been established with a reparatory mandate, such as the TRC in Sierra Leone, they have gone no further than establishing certain specific categories of children who should have been subject to reparation (such as children with physical injuries, orphans or victims of sexual violence). In this way, in the best cases, only a small number of minors have been able to realistically have access to reparatory measures, which demonstrates a very important gap between the normative principles of child protection and their practical implementation through ICJ and ICL enforcement mechanisms.

3.2. The elderly

Although the ICJ has moves towards a more restorative model of justice (from a starting point limited to retributive justice), as well as a certain express recognition of the relevance to consider the el-

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6 Morrison, H., & Pountney, E., 2014, Victim participation at the Special Tribunal for Lebanon., en: A. Alamuddin, N. N. Jurdi & D. Tolbert (Eds.), The Special Tribunal for Lebanon: Law and practice, Oxford University Press, pp. 153–176.

derly as victims of armed conflicts, no development is observed in the practice of these statements (apart from intersectional measures that have been adopted where the elderly are also victims of sexual violence). A good example of this situation is the three main hybrid courts established in the first decade of the 21st century: the SCSL, the ECTC and STL.

As we have seen, the SCSL has had an essentially retributive nature, so it has not played any role in the matters of reparation[7] (the participation of the victims in the SCSL has also been minimal)[8]. In fact, after the civil war in Sierra Leone, reparations were understood as an area of public policy (alien to ICJ), which had to be assumed by the State through the adoption of the necessary measures to apply the recommendations given by the TRC in its Final Report[9].

In this regard, the report exposes the serious situations of vulnerability of elderly women, highlighting that the collapse during armed conflict of the support networks that historically had been available to them, had led to a situation of absolute lack of protection: society had "abandoned" them and they now lived within its margins[10]. Volume 3b-3 of the TRC Final Report, relating to women, also highlights the extensive sexual violence suffered by elderly women[11].

Despite this situation, volume 4 of the TRC Final Report, relating to reparations proposals, does not mention measures specifically aimed at the elderly. Furthermore, Sierra Leone has not provided the information on the status of elderly women that has been requested

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7 Evans, C., 2012, Case study: Reparations in Sierra Leone, en: The right to reparation in international law for victims of armed conflict, Cambridge University Press, pp. 164–184. https://doi.org/10.1017/CBO9781139096171.010

8 Schulz, P., & Kreft, A.K., 2022, Accountability for conflict-related sexual violence, United Nations. https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/03/report/accountability-for-conflict-related-sexual-violence/20220224-CRSV-Philipp-Schultz.pdf

9 Langmack, F.J., 2020, 3 de febrero, Reparations in Sierra Leone: News from the periphery of transitional justice, JusticeInfo.net.

10 Vid.: https://www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents

11 Ibidem.

of it by the Committee established by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

To all the above, the absence of resources that has characterized the reparation process in Sierra Leone must be added, which ultimately has meant that:

> Sierra Leone's reparation program did not manage to fulfill the expectations the SLTRC created. It offered much fewer benefits in a piecemeal fashion depending on the funds available at any given moment. Severe delay pervaded the entire program. It started only four years after the government accepted the SLTRC reparation recommendations. Most survivors waited several more years before they received their grant. Survivors of sexualized violence and war widows found themselves at the end of a long queue. They waited 14 years from the point the SLTRC promised them reparation until they finally received them. The delay coupled with almost no survivor participation and a non-transparent process sent a fatal signal of neglect to survivors[12].

As a result, it can be asserted that, despite the concern about the damages caused to elderly women and the situation of risk in which they found themselves as a consequence of armed conflict, there cannot be seen, in Sierra Leone, an emphasis on the rights of such people much less on the rights of the elderly as a whole. On the contrary, what has happened is that the elderly have been blamed for the conflict, due to the traditional authority they had over the communities' marginalized minors[13]. Consequently, during the post-conflict, the elderly have had to face social reintegration and peace-building obligations, without having any access to reparation measures for the damage suffered.

Regarding the situation in Cambodia, the adoption of a legal regime for the protection of civilians within the transition´s framework constitutes a relevant example of: (a) government articulation of a program aimed at repairing the damage of systematic and/or gener-

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12 Langmack, A., 2023, Reparation in transitional justice: A global perspective, SSOAR, p. 98; Langmack, F. J., 2023, Reparation in transitional justice: A normative framework, Nomos Verlagsgesellschaft, p. 110.

13 Vázquez Aranda, D., 2023, The hopeful transformative potential of engaging youth voices in transitional justice processes: A case study of Sierra Leone, Tesis de maestría, Universidad de Utrecht.

alized violence caused by a previous political regime[14]; and (b) the search for a transformative justice system aimed at resolving situations of inequality and social pressure caused by violence[15] (although, ultimately, its application has been very limited).

The development of this justice system that led to the creation of the ECTC was marked by the debates on the draft ICC Statute that took place in the UN International Law Commission during the 1990s[16], which favored the inclusion of a system of reparation for victims, although its scope was very limited[17]. In this way, unlike what happened in other hybrid tribunals, the ECTC Statute ascribes to them a reparative role[18].

However, despite the above, neither the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (2004), nor the Law on the Establishment of the ECTC (2004), contain provisions relating to the determination of reparation measures (let alone specific regulations for the elderly). In this way, it was not until the adoption of the ECTC Internal Rules (2007) that its reparative role was regulated. In particular, it was rule 23 that established the right of victims, constituted in the civil part, to request the determination by the ECTC of the moral and collective damages suffered, which should be the object of reparation.

Based on the above, in the three cases completed up to the present day, reparation measures have been requested for, *inter alia,* the collec-

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14 Phan, H. D., 2009, Reparations to victims of gross human rights violations: The case of Cambodia, East Asia Law Review, 4(2), pp. 277–297.

15 Williams, S., & Palmer, E., 2016, Transformative reparations for women and girls at the Extraordinary Chambers in the Courts of Cambodia, The International Journal of Transitional Justice, 10(2), 311–331.

16 Sperfeldt, C., 2012, Collective reparations at the Extraordinary Chambers in the Courts of Cambodia, International Criminal Law Review, 12(3), 457–490.

17 UN, 1999, Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, p. 61.

18 Killean, R., & Moffett, L., 2020, What's in a name? 'Reparations' at the Extraordinary Chambers in the Courts of Cambodia, Melbourne Journal of International Law, 21, 1–27.

tive damages suffered. However, only in case 002/01 have the elderly been recognized as victims of specific harm as a result of the policies implemented by the *Khmer Rouge* between 1975 and 1979, which has not ultimately translated into material reparation measures.

However, despite this recognition, the final result has not been very different from what can be observed in Sierra Leone because, ultimately, reparation to the elderly in the Cambodian peace process has also fallen practically exclusively on public policies, specifically through the pension system for ex-combatants[19]. This has been due, in large part, to the fact that the ECTC has not shown any interest in meeting the special needs derived from the special vulnerability of the elderly who were victims of the international crimes committed by the *Khmer Rouge*.

The same conclusion is also applicable to the STL, as its statute or its complementary instruments do not attribute a reparative role to it. As we have already pointed out in relation to minors, this situation only shows once again that reparation to victims is not a relevant issue for hybrid tribunals[20], even when, as is the case with minors and the elderly, they present special needs due to their particular situation of vulnerability due to age.

4. INTRODUCTION TO THE ROLE OF THE ICC CONCERNING THE SPECIAL REPARATION NEEDS OF MINORS AND THE ELDERLY

Unlike the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the afore-mentioned hybrid tribunals (the ECTC being the only exception), reparation for the harm suffered by victims does constitute a central element of the role of the ICC. Thus, according to art. 75(1) of the ICC Statute:

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19 Bartu, P., & Wilford, N., 2009, *Transitional justice and DDR: The case of Cambodia. International Center for Transitional Justice*

20 Morrison, H., & Pountney, E., 2014, Victim participation at the Special Tribunal for Lebanon., en: A. Alamuddin, N. N. Jurdi & D. Tolbert (Eds.), The Special Tribunal for Lebanon: Law and practice, Oxford University Press, pp. 153–176.

> The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

Although the only forms of reparation mentioned are restitution, compensation and rehabilitation, this list is not exhaustive, because according to art. 75(2) of the ICC Statute, "[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".

However, despite the above, neither the ICC Statute, nor ICC Rules of Procedure and Evidence (ICC RPE), draw any distinction between the various types of victims or establish any sort of differential treatment with respect to the adoption of certain reparation measures[21]. The above does not vary by age, because there is no com-

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[21] The situation is different regarding participation in the proceedings and protection of victims and witnesses, since the ICC Statute and its complementary instruments expressly attribute in this area a certain relevance to age as a specific differentiating factor. Thus, art. 68 (1) of the ICC Statute (2002) expressly states the following: "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". In development of this disposition, Rule 86 of the ICC Rules of Procedure and Evidence (ICC RPE) provide that "[a] Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence". This is specifically the case of the Victims and Witnesses Unit which, in accordance with rule 17 (3) indicates the following: "In performing its functions, the Unit shall give due regard

prehensive reparation system focused on minors or the elderly due to their situation of special vulnerability.

In terms of jurisprudence, the ICC, since its first decision on the principles of reparation in the Lubanga case (2012), has adopted a comprehensive approach that includes psychosocial assistance, medical treatment and specific assistance measures for certain groups of victims, including minors, but not the elderly.

As we have seen in relation to Sierra Leone, in situations of armed conflict the forced recruitment of children and adolescents to participate in hostilities is usual. This dynamic was, in fact, the epicenter of the Lubanga case, reason for which in its decision on principles of reparation (2012), the ICC Trial Chamber (TC) I, citing the UN Convention on the Rights of the Child, established general criteria for designing appropriate reparation measures for minors, underlining the need to apply measures that take into account their best interest (Article 3).

In particular, TC I focused on what former child soldiers required to return to their lives, reintegrate into their communities and resume their training process (seriously affected by their recruitment):

> Reparation orders and programmes in favour of child soldiers, should guarantee the development of the victims' personalities, talents and abilities to the fullest possible extent and, more broadly, they should ensure the development of respect for human rights and fundamental freedoms. For each child, the measures should aim at developing respect for their parents, cultural identity and language.

Based on this decision, various reparation orders were issued in the Lubanga case, some of which were appealed before the ICC Appeals Chamber (AC). Thus, in 2015, the AC amended the initial reparation order issued by TC I and requested the ICC Trust Fund for

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to the particular needs of children, elderly persons and persons with disabilities. In order to facilitate the participation and protection of children as witnesses, the Unit may assign, as appropriate, and with the agreement of the parents or the legal guardian, a child-support person to assist a child through all stages of the proceedings".

Victims (TFV) to: (a) prepare a draft implementation plan for collective measures of reparation; and (b) present it to TC II.

In 2016, TC II approved and ordered the implementation of the plan put forward by the TFV, concerning collective reparation measures of a symbolic nature. Moreover, in 2017, TC II also approved the service-based collective reparation framework proposed by the TFV, as well as the first stage of its implementation process. Months later, TC II established the amount of liability of Thomas Lubanga Dyilo (2017), thus completing the initial reparation order issued by TC I in 2015.

However, it was not until 2021 (nine years after Lubanga´s conviction and fifteen years after his capture) that these reparation orders could begin to be materially implemented by the TFV in the Ituri District (DRC); a process which still continues at the end of 2024. In fact, the most recent reports of the TFV still refer to the process of accrediting the victims and the problems faced in communicating with them[22]. This delay has prevented the application of effective measures for the psychosocial rehabilitation of the former child soldiers before they reached adulthood.

Concerning the Ntaganda case, the reparation order issued by TC VI[23] is almost identical to that of the Lubanga case in regard to its justification and disposition, thus it is also based on the principle of prevalence of the best interest of the child. However, unlike TC I and TC II in the Lubanga case, TC VI has recognized that, due to the time that has passed from the commission of the crimes, most victims have reached adulthood without receiving any reparation measure to address their psychosocial and educational issues.

Notwithstanding the above, the TFV has sought to implement certain individual and collective reparation measures in the affected

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22 ICC, 2023, Consolidated response of the Common Legal Representative of the Former Child Soldiers to the VPRS' and TFV's submissions of supplementary information in accordance with Trial Chamber II's First Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, ICC-01/04-02/06-2883.

23 ICC, 2021, Trial Chamber VI, Reparations Order, The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-2659, para. 47

communities, such as: (a) imparting a 10-day general training and/or training in specific competencies for 2 to 4 months[24]; (b) supporting the creation and development of economic activities that generate income for the victims and/or communities[25]; (c) financing the education of the victims or of their close relatives[26] and (d) offering 1300 physical and/or mental health treatments.

Moreover, when applying these measures, the TFV has adopted some complementary measures, including: (a) the search for missing persons; (b) psychological support for the victims; (c) the strengthening of local infrastructure; (d) the establishment of protective measures concerning sexual and gender violence; and (e) the access to public education[27]. All these measures have been articulated in the Former Child Soldiers Programme in the Ntaganda case (a similar program has also been articulated in the Lubanga case).

More recently, in 2024, ICC TC IX issued its reparation order in the Ongwen case, in which several of the elements articulated in the orders issued in the Lubanga and Ntaganda cases have been included:

> Reparation orders and programmes in favour of child victims, should guarantee the development of the victims' personalities, talents, and abilities fully and, more broadly, they should ensure the development of respect for human rights and fundamental freedoms. They should also include measures to combat stigmatization, discrimination and social isolation of child victims and survivors through awareness raising and education within communities. Furthermore, bearing in mind that children who have experienced international crimes are in extremely vulnerable situations, they should be assisted to ensure they gain access all of the rights found in the Convention on the Rights of the Child including birth registration, basic health, education, and

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24 ICC, 2024, Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, ICC-02/04-01/15-2074.

25 Ibid., p. 14

26 Idem.

27 ICC, 2023, Consolidated response of the Common Legal Representative of the Former Child Soldiers to the VPRS' and TFV's submissions of supplementary information in accordance with Trial Chamber II's First Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, ICC-01/04-02/06-2883; ICC, 2024, Decision on the Trust Fund for Victims' Draft Implementation Plan for Reparations, ICC-02/04-01/15-2074.

> social welfare in order to fully participate in their recovery and reintegration into society. Former child soldiers, children born out of SGBC, and child victims in general should also be helped to live responsibly in a free society, recognizing the need for a spirit of understanding, peace, and tolerance, with respect for equality between the sexes and friendship between all peoples and groups.

However, TC IX has also included in its reparation order additional elements. First, Ongwen´s arguments regarding the interrelation between the status of victim of forced recruitment and the subsequent commission of international crimes have been addressed. This, taking into account that the active participation in hostilities of the recruited minors, has been forced through the application of traditional measures like the *baraza* in the Democratic Republic of Congo (DRC) and the *mato oput* in the North of Uganda[28] (for TC IX these factors have not been relevant because the crimes were committed when Ongwen was already an adult who was aware and responsible for his actions)[29].

Furthermore, TC IX has analyzed the distinction between intergenerational and transgenerational harm, which, although had already been covered by the reparation order in the Katanga case (2017), was not centered around minors due to its exclusive focus on the attack on the Bogoro town (DRC)[30]. Based on this distinction, TC IX has highlighted that reparation measures for indirect victims from other generations[31] should be directed towards a *community* rehabilitation that limits the harm caused by the trauma suffered by parents and transmitted to their children (either through epigenetics or through social transmission).

Consequently, in contrast to the international criminal tribunals (ICTY and ICTR) and hybrid criminal tribunals (SCSL, ECTC and

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28 Kiyala, J. C. K., 2016, Utilising a traditional approach to restorative justice in the reintegration of former child soldiers in the North Kivu Province, Democratic Republic of Congo, Africa Insight, 46(3), 33-50

29 ICC, 2024, Trial Chamber IX, Reparations Order, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-2074, 28 February, paras. 658-660.

30 ICC, 2017, Order for reparations pursuant to article 75 of the Statute, ICC-01/04-01/07-3728.

31 Ibid., p. 67.

STL), the reparation orders issued by ICC TC I, TC II and TC X in the Lubanga, Katanga and Ongwen cases have been focused on: (a) the principle of prevalence of the best interest of the child, as provided for in the Convention on the Rights of the Child; and (b) the need for the damages suffered to be compensated through more complex reparation measures than in the case for adults.

In this way, the ICC´s jurisprudence has progressively developed a comprehensive theoretical framework to address reparations for the minors who have been victims of international crimes, recognizing the need for integral reparations that go beyond economic compensation, with the aim of also including psychosocial, educational, and social reintegration aspects.

However, as will be seen below in greater detail, these efforts have faced significant challenges, especially regarding the delay in the implementation of reparation measures in the places where the crimes have been committed, as shown particularly by the Lubanga case. Lubanga is a paradigmatic example, having begun to implement reparation measures nearly a decade after the conviction, which prevents them from being effective in rehabilitating the victims[32].

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[32] In contrast with the ICC, the Inter-American system of human rights protection initially limited, in the reparation, an economic compensation for the material harm suffered. However, the Inter-American Court of Human Rights (IACtHR) has adopted in the XXI century an integral standard of reparation according to which States, apart from restoring the affected situation as much as possible, also have to repair pecuniary and non-pecuniary damages (including moral damage). Vid. Shelton, D. (2010). Remedies in International Human Rights Law. Oxford University Press eBooks. Vid.also: ISCHR Case Velásquez Rodríguez v. Honduras. Reparaciones y Costas.Decision of 21 July 1989. Series C No. 7; Case of Godínez Cruz v. Honduras. Reparaciones y Costas. Decision of 21 July 1989. Series C No. 8, paras. 23-24; Case of Penal Miguel Castro Castro v. Perú. Fondo, Reparaciones y Costas. Decision of 25 November 2006. Series C No. 160, para. 413, and Case of La Cantuta v. Perú. Fondo, Reparaciones y Costas. Decision of 29 November 2006. Series C No. 162, para. 199).
Furthermore, art. 19 of the American Convention on Human Rights (ACHR), regarding the rights of the child, provides that every child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state. This recognizes the right of

minors to special protection measures due to their vulnerability because of their age. Yet, the content of the minimum standards of protection that the states must grant and the specific reparation avenues have still not been fully developed by the IACtHR. Vid. Ibañez, J. (2010). Los derechos de los niños, niñas y adolescentes en la jurisprudencia de la Corte Interamericana de Derechos Humanos. Pg. 23. Vid. also: IACHR., case of Los Hermanos Gómez Paquiyauri v. Perú, fondo, reparaciones y costas, decisión of 8 July 2004. Series C No. 110, para. 168 and IACHR case of Chitay Nech y otros v. Guatemala, preliminary exceptions, fondo, reparaciones y costas, decisión of 25 May 2010. Series C No. 212, para. 169.

Likewise, the Inter-American System of Human Rights has recognized the vulnerability of the elderly and the need to guarantee their fundamental rights in the context of accelerated aging in Latin American and the Caribbean. For this purpose, the Organization of American States (OAE) adopted in 2015 the American Convention for the Protection of the Human Rights of the Elderly, which is the first binding instrument at a global level centered exclusively on this group. The Convention establishes specific obligations for the member states, such as guaranteeing the right to health, social security, autonomy, and an active participation in society, promoting a dignified and inclusive life for the elderly. Based on the foregoing, the Inter-American Commission of Human Rights (IAComHR) has issued thematic reports that tackle the situation of the elderly, highlighting challenges in areas like poverty, social exclusion, and the lack of access to essential services. The IAComHR also emphasizes the importance for states to implement public policies that integrate an intersectional perspective, recognizing that factors like gender, ethnicity, and disabilities can aggravate the vulnerability of the elderly. This is essential to address the systematic inequalities faced in the region. The Convention also urges the States to guarantee the integration of the elderly in the political, social, economic and cultural life, ensuring opportunities for participation in the decision-making that affects their wellbeing. This not only implies the recognition of their rights, but also the strengthening of their agency and protagonism, promoting a positive image of aging as a productive and valuable stage. Vid.: Organización Panamericana de la Salud. La Convención Interamericana sobre la Protección de los Derechos Humanos de las Personas Mayores como herramienta para promover la Década del Envejecimiento Saludable. Washington, DC: OPS; 2023. Available at: https://doi.org/10.37774/9789275326947.

In contrast with the IACtHR, the European Court of Human Rights (ECtHR), presents a reparation system centered on the categories of restoration of the situation before the human rights violation, and, if this is not possible, the individual (or in some cases collective) indemnification or compensation of the suffered harm. However, neither normatively nor

5. THE TREATMENT OF THE SPECIAL NEEDS OF MINORS IN REPARATION ORDERS ISSUED BY THE ICC AND IN THE EXERCISE BY THE TRUST FUND FOR VICTIMS OF ITS ASSISTANCE MANDATE

5.1. The treatment of the special needs of minors in the reparation orders issued by the ICC

5.1.1. Measures concerning health

In the decision on the principles of reparation in the Lubanga case, psychosocial assistance and health benefits are explicitly mentioned as a way of reparation for the victims. The foregoing as part of the necessary rehabilitation measures for the existence of an integral reparation. As TC I points out in its decision on the principles of reparation in the Lubanga case (2012), the reparation measures for minors have to: (a) protect the best interests of the child; (b) address their feelings; (c) avoid their revictimization; (d) include their communities; (e) be developed in their own towns; and (f) be endowed with transformative objectives[33]. Moreover, regarding specifically the rehabilitation of minors, it must: (a) include the provision of medical and health services, as well as psychological, psychiatric and social assistance to support the overcoming of grief and trauma caused by the violence suffered; and (b) place emphasis on the treatment of sexually transmitted diseases and the assistance to minors infected with HIV[34]. Nevertheless, the decision does not explicitly contain a section that highlights the importance of social integration assistance, or which explains the way it should be carried out[35].

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through jurisprudence, is there a differential regime based on age in relation to minors or the elderly. Vid. Cruz Ortiz de Landázuri, L. M. (2010). La reparación a las víctimas en el Convenio Europeo de Derechos Humanos. Revista española de derecho internacional, 62(1), 89-117.

33 ICC, 2012, Trial Chamber I, Decision of 7 August 2012, ICC-01/04-01/06-2904, § 79.

34 Ibid., p. 32.

35 Ibid., p. 79.

In the Ntaganda case, TC VI issued a reparation order (2021) that contains measures specifically aimed at the restitution of physical, moral, psychological, and material harm suffered by the minors. These measures include: (a) psychological rehabilitation; physical rehabilitation; and (c) programs for the recovery of the physical infrastructure used by the minors, such as schools and hospitals. Considering that most of the victims of this case were child-soldiers, who suffered sexual abuses, the sanitary measures of the reparation are fundamental for their socio-economic reinsertion and reintegration (ICC, 2019).

Finally, the reparation order issued by TC VIII in the Al-Mahdi case (2017) constitutes an important example of: (a) the importance of moral harm; and (b) the adoption of individual as well as collective reparation measures, in the face of such harm, as both aspects are closely related. As TC VIII pointed out, the concept of moral damages is not only a central aspect in the restoration process, but has begun to be interpreted broadly, including within it the injury, or even the loss of childhood.

Thus, the importance of mental health measures to repair the damage caused to minors by forced recruitment is recognized. However, in spite of this advancement in the reparation of moral harm, TC VIII has not adopted any differentiated standard for minors, limiting itself to affirming that measures focused on mental health are materialized through compensation (in the cases of individual reparation) or rehabilitation (in the cases of collective reparation)[36].

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[36] As the ICC, the IACtHR has adopted reparation measures aimed at protecting the health of the minors. Still, this has been carried out through an indirect accompaniment, since the rehabilitation orders have to be carried out by exogenous entities, representing a great difficulty for their realization. Consequently, the dependence of the ICC and the IACtHR on exogenous entities that materially carry out the reparation, represents an important problem that is not easy to overcome. Vid. Cubides Molina, J.M. (2016). Reparaciones en la Corte Interamericana de Derechos Humanos. Razón Crítica, 1, 52-91 doi: http://dx.doi.org/10.21789/25007807.1137 y Corte IDH. Caso Vera Rojas y otros v. Chile. Preliminary exceptions, Fondo, Reparaciones y Costas. Decision of 1 October 2021. Series C No. 439. The problem is, if possible, even greater in relation to the ECtHR, because although through jurisprudence

5.1.2. Measures in the area of education and insertion into the labor market

In its decision on the principles of reparation in the Lubanga case (2012), TC I has affirmed the importance of promoting the restitution of minors to their former life, through, inter alia: (a) returning to their families, as well as, their former homes and employment; (b) the possibility of continuous education; and (c) the guarantee of an economic income. It has even been stated that restitution could also be appropriate for legal entities such as schools or other institutions[37].

Likewise, in the matter of compensation, TC I has highlighted the need to compensate for lost opportunities, including those related to employment, education, and social benefits (such as, for example, the loss of status). Furthermore, in the area of rehabilitation, the importance of adopting measures aimed at facilitating the reintegration of minors into society is also highlighted, in light of the impact that the crimes they have committed have had on them. Therefore, these modes of reparation include measures in the area of education and vocational training, along with sustainable job opportunities that allow the promotion of an active and economic role of the minors in the society[38].

5.1.3. Compensation measures

Regarding compensation measures, it can be said that, although minors are mentioned as a group with special conditions and especially protected, there is no differentiated approach in relation to

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there have been attempts to establish arguments to integrate the protection of the right to health within the Tribunal, this has not crystallized in the adoption of integral reparations. On the contrary, the reparations issued by the ECtHR are indemnification for the most part, consisting of a single payment to be reimbursed by the state that generates the violation. Vid. Hernández, A. C. G. (2018). El derecho a la salud en la jurisprudencia del Tribunal Europeo de Derechos Humanos y de la Corte Interamericana de Derechos Humanos. https://www.redalyc.org/journal/282/28264622027/html/.

37 ICC, 2012, Trial Chamber I, Decision of 7 August 2012, ICC-01/04-01/06-2904, § 79.

38 Idem.

measures of this nature to which they may be entitled. Thus, in the Lubanga case, TC I has addressed the question of compensation for children under the age of 15 who are victims of forced recruitment, stating that this form of reparation should only be considered when: (a) the economic damages are sufficiently quantifiable; and (b) the circumstances of the case and the available funds make it feasible, so that the amount allocated can be appropriate and proportional to the damages suffered. For TC I, the damages that can be object of economic reparation are only the following: (a) physical harm, including the loss of ability to have children; (b) moral and intangible damages that result in physical, mental and emotional suffering; (c) material damages, including the loss of economic gains and employment opportunities, the loss or damage of property and any other form of interference with the individual capacity of working or that entails the loss of savings; (d) loss of opportunities (including those related to employment, education, and social benefits), the loss of status and the affectation of fundamental rights (in this respect, the ICC has especially emphasized that traditional discriminatory practices, such as those based on gender, should not be extended); and (e) costs of professional, medical, psychological, or social assistance services, including, where relevant, the assistance to minors suffering from HIV and any other sexually transmitted disease[39].

TC I have also highlighted that reparation is not only limited to direct victims, (meaning, recruited minors or sexually abused girls), but it should also include their parents and their community. Therefore, to establish an adequate compensation, the gender and age of the victims should be taken into account and should therefore objectively evaluate the impact of the commission of these crimes in all its aspects[40].

However, despite recognizing all these elements in relation to the compensation of minors (considering their special needs, the comprehension of their condition of vulnerability, and the devastating effects of being victimized at an early age), TC I does not establish

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39 ICC, 2012, Trial Chamber I, Decision of 7 August 2012, ICC-01/04-01/06-2904, § 79.

40 Idem.

a differential rule for its determination (like, for example, a minimum standard). This is coupled with the existing normative gap on this matter in the ICC Statute and its complementary instruments. As a result, the amount of compensation to the victims (including minors) ultimately depends upon the will of the judges in the case. This problem is partially addressed in the Al Mahdi case, whose reparation order specified certain relevant factors for determining the compensation to minors, recognizing the loss of childhood as a moral harm that must be repaired in this manner (2017). To this end, TC VIII proceeded to calculate the compensation based on the indemnification awarded by the Eritrea-Ethiopia Claims Commission in a case with a similar factual basis[41].

5.1.4. Symbolic reparation measures

As in the Inter-American Court of Human Rights (IACtHR), the ICC recognizes the importance of symbolic reparation measures, adopting its own approach. Thus, although TC I (2012) does not provide in the Lubanga case a specific section for symbolic reparation measures, some of these measures are mentioned in the sections on reparation modalities, including: (a) reuniting the minors with their families; (b) reconstructing the social fabric of the community; (c) reconstructing the historical memory of what occurred; and (d) collecting the traces left in the territories by the international crimes committed. Moreover, within the section on other reparation mo-

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[41] All of this in contrast with the judicial decisions of the IACtHR and ECtHR, where there is a development in the jurisprudence regarding the protection of minors based on the progress of the cases decided there. However, neither of the two tribunals has managed to establish a differentiating factor in practice, repeating the pattern of issuing reparations based on the crime committed against them, and not based on the differentiating factors specific to the type of victim that condition the way harm is experienced, and thus the consequences and impact it causes. Vid. case of Velásquez Rodríguez v. Honduras, Indemnización Compensatoria (Art. 63.1 Convención Americana sobre Derechos Humanos), Decision of 21 July 1989, Series C Nº. 7. 26 and IACHR case of Fornerón e hija v. Argentina. Fondo, Reparaciones y Costas. Decision of 27 April 2012. Series C No. 242. 212.

dalities, it is stated that convictions issued by the ICC, as well as the imposed sentences, constitute symbolic reparation measures because they usually have great relevance for the victims, their families and communities.

In the same sense, TC I stresses that a wide dissemination of the conviction can contribute to raising awareness about the perpetrated violence, and thus prevent the commission of future crimes, including the forced recruitment of children under 15 years of age to actively participate in hostilities. TC I also states the need for: (a) symbolically repairing the social shame felt by the former child soldiers; and (b) preventing future revictimizations, especially when they have suffered sexual violence, torture and other inhumane and/or degrading treatment during the recruitment.

Subsequently, in the reparation order in the Ntaganda case (2021) TC VI has placed emphasis on the relevance of hearing the victims in order to declare reparation measures, which in this case implies acquiring awareness of their desire not to be repaired through: (a) symbolic measures that lack pragmatic effects; or (b) short-term and long-term unsustainable measures. This calls into question the efficiency of symbolic reparations, because generally, they lack practical effects[42].

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[42] In contrast, the IDH Court has adopted more visible symbolic measures, like a public pardon and the erection of mUNments, with a high impact in cases such as the massacres of El Mozote and Barrios Altos. Nevertheless, as the ICC, it lacks a solid doctrine focused on the reparations specific to children, leaving a gap in the differentiated attention to underage victims. On the other hand, the ECtHR presents a different perspective centered around the concept of equitable satisfaction, where the judicial recognition of the violations is considered sufficient as symbolic reparation. This perspective has received criticism for limiting itself to monetary compensation and omitting more comprehensive reparations, as evidenced by the case of the Bangladeshi child migrants in Malta. In contrast with the ICC and the IACtHR, the EctHR seems to prioritize a formalistic model, leaving behind differential approaches and measures with a greater social impact. All of this highlights the need for international tribunals to develop specific guidelines and more inclusive approaches to ensure effective symbolic reparations, particularly for vulnerable groups such as children Vid. IACHR case of Masacres de El Mozote y lugares aledaños v. El Salva-

5.1.5. Collective reparation measures

Collective reparations refer to diverse forms of reparation involving a particular community or group that share certain characteristics. With respect to these types of reparations, the ICC has highlighted the importance of community members being the fundamental pillar in the design of reparation measures[43].

In its decision on the principles of reparation in the Lubanga case (2012), TC I has underlined that collective reparation measures are difficult to apply to ex-child soldiers because they are not a cohesive group and are frequently in conflict with their communities. Nonetheless, despite these problems, TC I ended up supporting the adoption of such collective measures in the interest of promoting the social reintegration of ex-child soldiers. Furthermore, for TC I, these types of reparations should focus on the communities to which the minors belong, since: (a) it is not possible to identify them all as a collective; and (b) it is an offense to generalize the way in which each child lived this experience and the trauma suffered as a result of the violence endured (ICC, 2012).

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dor. Fondo, Reparaciones y Costas. Decision of 25 October 2012. Serie C No. 252 and IACHR (2001). Case of Barrios Altos v. Perú, final decisión of 14 March. San José, Costa Rica: IACHR. Recovered from. Vid. also: Tapia, L. E. (2024, 26 October). Malta endangered the rights of minor aged migrants who suffered discrimination by being detained, resolution in TEDH. Diario Constitucional. https://www.diarioconstitucional.cl/2024/10/26/malta-vulnero-los-derechos-de-migrantes-menores-de-edad-que-sufrieron-un-trato-discriminatorio-al-ser-detenidos-resuelve-el-tedh/.http://www.corteidh.or.cr/casos.cfm. Vid. also: Tapia, L. E. (2024, 26October). Malta endangered the rights of minor aged migrants who suffered discrimination by being detained, resolution in TEDH. Diario Constitucional. https://www.diarioconstitucional.cl/2024/10/26/malta-vulnero-los-derechos-de-migrantes-menores-de-edad-que-sufrieron-un-trato-discriminatorio-al-ser-detenidos-resuelve-el-tedh/.

43 In contrast with ICC jurisprudence, the IACtHR has limited itself to pointing out that victims may sometimes be recognized as a group due to the gravity of the harm. Meanwhile, the ECtHR has emphasized that the community is directly related to socio-legal evolution, and thus, States should not go against it.

In the Ntaganda case, TC VI has also ordered collective reparation measures, such as the construction of community centres for the victims, along with individual measures, such as compensation for psychological harm. In this way, and unlike TC I in the Lubanga case, TC VI has affirmed that collective reparation measures (understood as actions directed towards a particular community) can coexist with individual reparation measures, as a holistic and multifaceted response to the various harms suffered by the victims, and in particular, the forcibly recruited boys and the girls victim of sexual abuse and slavery.

More recently, TC IX has clarified in the reparation order in the Ongwen case (2024) that only collective reparation measures would be applied due to the large number of direct and indirect victims, the multidimensional damages suffered and the need to able to implement the adopted measures. Consequently, TC IX has exclusively focused on two types of reparation measures: (a) those of rehabilitation; and (b) those symbolic or collective satisfaction measures aimed at the community. For TC IX, the latter have an important transformative value because they seek to address the meaning and cultural understanding of violence, thus confronting structural barriers that lead to the stigmatization of victims[44].

Likewise, TC IX considers it necessary to give priority as follows: in the first place, to the direct or indirect victims who, due to their vulnerability, need urgent assistance, secondly, to the directly vulnerable victims, thirdly, to the remainder of the vulnerable victims and lastly, to the non-vulnerable victims. This new order is the result of: (a) the problems experienced in applying the prioritization criteria adopted in the Ntaganda case where there is a substantial number of direct or indirect victims (an argument also accepted by the TFV); and (b) rejecting that the damage suffered by some of the different categories of victims is greater, more important or more significant.

This prioritization therefore rejects the position of the victims' representation, which, after consultation with their constituents, concluded that the prioritized categories should include families caring for

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44 ICC, 2024, Trial Chamber IX, Reparations Order, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-2074, 28 February, paras. 658–660.

minors, as well as children born in captivity (in the same sense, the Office of Public Counsel for Victims (OPCV) has stated that within the people that face conditions requiring urgent medical assistance, are kidnapped minors such as soldiers and children born in captivity)[45].

5.2. The treatment of the special needs of minors by the Trust Fund for Victims in application of its assistance mandate

The TFV, as an independent organism of the ICC, has a dual function: (i) a reparation mandate that seeks the implementation of reparation orders issued by the ICC after a conviction has been entered by the relevant Chamber; and (ii) an assistance mandate, that intends to support all victims and their families, that have suffered physical, psychological, or material harm as a result of crimes within the ICC jurisdiction. It is important to mention that the TFV provides this assistance even in the absence of a conviction, thus, covering a wider range of victims than those who may participate in the ICC criminal proceedings.

Under this latest mandate, the TFV has launched important initiatives in several countries. Thus, in September 2020, the TFV launched a Project in the capital of the Central African Republic (CAR), Bangui, to support the most vulnerable victims and their families, focusing on those that had suffered sexual abuse during the armed conflict[46]. The program includes, among others, the Access to: (a) medical assistance related to sexually transmitted diseases; (b) food security and nutritional support; (c) psychological assistance and education; (d) housing; and (e) financial assistance to launch productive activities[47].

Likewise, between 2008 and 2017, the TFV developed in the DRC the first phase of an initiative to assist victims, which has had 58,439 direct beneficiaries in Ituri and North and South Kivu (TFV, 2014). Subsequently, in 2020, the second phase started, which is expected to have 20,000 beneficiaries and focuses on: (a) supporting the physical rehabilitation of victims of mutilation and survivors of sexual abuse and

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45 Ibid., p. 279.

46 TFV, 2004, Central African Republic.

47 TFV, 2004, Mandate.

gender-based violence; (b) assisting with psychological rehabilitation; (c) encouraging productive activities; and (d) peace and strengthening reconciliation in victimized communities through "non-violence".

It is not apparent, however, that the SCSL has adopted a differentiated approach to assisting and providing reparations to minors, except in cases of victims of sexual violence and/or gender-based violence. This is in stark contrast with the treatment received for the special needs of minors in the reparation orders issued by different ICC TCs in the cases of Lubanga, Ntaganda and Ongwen.

5.3. The contrast between the reparation orders related to minors issued by the ICC and the action of the Trust Fund for Victims.

As we have seen in the previous section, it is possible to observe that the International Criminal Court has attempted to apply a differential approach in order to repair the harm suffered by the most vulnerable victims. It is important to note that in most cases where reparation orders have been issued by the ICC, the crimes committed were primarily suffered by minors. Crimes such as the forced recruitment of children, slavery, and sexual violence were recurrent in numerous cases, making it almost imperative that the Court consider the age of victims so as to design appropriate reparations that would meet the standards the Court itself has set.

The Court has developed novel concepts in the cases analyzed here for the practice of reparations based on the victim`s age. For example, the expansion of the concept of moral harm to include the "loss of childhood" in the reparation orders in the Al Mahdi case allows for the development of a differential status for minors, at least within the compensation categories. Similarly, the efforts undertaken to consider the rupture of children from their communities, which have been seen in cases such as those related to the situation in the Democratic Republic of Congo (DRC) is a recognition that this represents harm to their personal development and an attack on the social fabric of their communities, and has enabled the advancement of truly collective reparations.

Despite these valuable initiatives, it is important to note that the interpretation of what constitutes adequate reparation depends on

each judge, as there is no binding regulation that sets minimum standards to be met, particularly in the context of child victims.

Taking the above into account and placing emphasis on the actions of the TFV in addressing the needs of vulnerable individuals, it is important to mention that, although significant efforts have been made to support victims, either as a result of a conviction or, as in the case of the program deployed in the Central African Republic, through the TFV`s assistance mandate, these efforts are only carried out under certain conditions and/or specific types of harm, such as the presence of sexual or gender-based violence.

Given these limitations, it can be inferred that the measures developed by the TFV do not represent a general practice or standard. In other words, the TFV lacks a specific approach to addressing the particular needs of individuals who require special protection. However, despite the lack of implementation of differential approaches, it is worth highlighting that the execution of reparation programs that include medical and psychological care, among other services, may serve as a positive indicator.

6. THE TREATMENT OF THE SPECIAL NEEDS OF THE ELDERLY IN THE REPARATION ORDERS ISSUED BY THE ICC AND IN THE EXERCISE BY THE TRUST FUND FOR VICTIMS OF ITS ASSISTANCE MANDATE

6.1. The treatment of the special needs of the elderly in the reparation orders issued by the ICC

6.1.1. Reparation orders previous to the Ongwen case

The ICC reparation orders issued prior to the Ongwen case have not prioritized the elderly when determining damages for criminal conduct, The Lubanga case, concerning the mass recruitment of children by the UPC, did not have specific considerations for the elderly, beyond reparations attributable to the relatives of the recruits[48].

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48 ICC, 2015, Order for reparations, ICC-01/04-01/06-3129-AnxA.

Similarly, in the Al-Mahdi case, characterized by the collective reparations measures, there are no specific references to the elderly, beyond the general call to prioritize those most affected (ICC, 2017: 14). Furthermore, although in this case attempts were made to create *memorialization committees* based on different population groups (including one for elder men and one for elder women) (Lostal, 2021), these never materialized as planned.

For its part, in the reparation order in the Katanga case (2017) there are specific mentions of the killing of elderly during the Bogoro attack, but no specific reparation measures are established for this group (only the killing of several elderly people is mentioned)[49]. It is therefore, a new mention to the members of this population group, which does not go beyond recognizing that they were victims of the conflict.

A similar situation can be observed in the reparations order in the Ntaganda case (2017), where there are references to the elderly as a necessary prioritization criterion, associating them with other population groups that face obstacles to participate effectively in the reparations process. These groups include persons with physical or psychological care needs, persons with disabilities, the elderly, victims of sexual and gender-based violence, victims that have lost their home or that are experiencing financial hardship, children born of rape and sexual slavery, and demobilized soldier children[50].

However, when designing the reparation measures, the SPI VIII focused on the Report submitted in October 2020 by expert witness Sunneva Gilmore (which is repeatedly cited in the reparations order), that does not address in Depth the problem of the special remedial needs of the elderly (making, for example, only a passing reference to their difficulties in participating in the proceedings and the problems in being granted the protective measures contained in rules 17 and 86 of the ICC RPE.

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49 ICC, 2014, Trial Chamber II, Decision on Sentence pursuant to Article 76 of the Statute, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, para. 47.

50 ICC, 2021, Order for reparations: situation in Democratic Republic of Congo, The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-2659, para. 53 et. seq.

6.1.2. The reparation order in the Ongwen case

The reparations order in the Ongwen case differs in many aspects from the rest of reparations orders issued by the ICC[51]. Thus, although the high number of victims who participated in the proceedings had generated higher expectations about the realization of justice and the implementation of protection and reparation measures (Gade, 2021), already from the trial it was observed that these expectations would not be fulfilled because only very limited protection measures were adopted for the victims. This generated great disappointment, which would later also extend to the reparation orders[52].

As a result, the legal representatives of the victims and the OPVC sought special recognition for those victims that, due to their age, had suffered severe harm[53] and needed urgent assistance[54].

The particular risky condition they had for being alone, the injuries caused by the vulnerable situations they experienced and the lack of capacity to protect or care for themselves led to the request to prioritize these groups)[55]. In fact, the ICC Registry and the government of Uganda supported the request with their observations,

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51 Massidda, P., Akwenyu, J., & Moffett, L., 2024, Victims' perspectives on participation in the Ongwen Case: Justice in victims' interests. Journal of International Criminal Justice, Advance online publication.

52 Sehmi, A., 2022, Emphasising socio-economic narratives of truth, justice and reparations in The Prosecutor v. Dominic Ongwen, The International Journal of Human Rights, 26(6), 1083–1106

53 For example, in reports A/00432/16, A/00559/16 of elderly people in need of support who were abandoned during Lord's Liberation Army takeovers of villages in Uganda. Reparations Order in the Ongwen case, para. 402.

54 ICC, 2021, Registry Submissions on Reparations in the Ongwen Case, Annex II, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-1919-AnxII, 6 December; ICC, 2021, Annex II: Public Registry Submissions on Reparations in the Ongwen Case, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-1919-AnxII, 6 December.

55 ICC, 2023, Notification of 832 administrative decisions from the Trust Fund for Victims' Board of Directors pursuant to Trial Chamber II's Ninth Decision on the TFV's administrative decisions on applications for reparations and additional matters, ICC-01/04-01/06-3558-Red.

although these were limited to the elderly whose relatives had been killed or forcibly recruited in the conflict.

Similarly, the *amicus* curiae presented by the Center for Transitional Justice (2010) highlighted the importance of protecting the elderly, something which was also reflected in the Acholi community's request for them to be prioritized (ICC, 2021).

However, despite all these requests and allegations, the reparations order issued by the SPI IX in 2024 only puts an emphasis on the risk to life and material vulnerability (ICC, 2024: 280 et. seq.), without specifying if old age constitutes a material factor for these purposes.

6.2. Treatment of the special needs of the elderly by the Trust fund for Victims in application of its assistance mandate

The TFV has been working with different local and international organizations. However, none of them recognizes that the elderly deserve a differentiated treatment[56]. This way, despite supporting the physiological medical procedures, they do not recognize the specific difficulties that the medical treatment of aging bodies has. Furthermore, their vocational support is focused on the education and creation of income opportunities, and not on the generation of a vital minimum for those who, if they had not suffered the material and labor shortages resulting from the conflict, would presumably have the right to receive a pension[57].

The problem is even greater if we take into account that, as has been widely recognized, many elderly people have lost their support networks during situations of armed conflict or large-scale violence in their regions. This is how, in countries like Uganda, there is the

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56 TFV, 2024, First update report on the implementation of reparations for former child soldiers and for victims of the attacks, including for victims in urgent needs, in the Lubanga and the Ntaganda cases, ICC-01/04-01/06-3568-Red.

57 TFV, s. d., Uganda., Retrieved April 27, 2025, from https://www.trustfundforvictims.org/en/locations/uganda

paradox that elders retain the duty to implement certain measures to regenerate the social fabric and reintegrate ex-combatants into tribal structures (through restorative justice processes such as *mato oput*)[58], but they do not have the necessary material or psychological support to repair their own physical, emotional and/or moral wounds. This is especially concerning, considering that: (a) up to 89% of the elderly in this country have suffered some type of abuse[59]; and (b) public policy studies have reported that they suffer from very high rates of extreme poverty[60].

6.3. The absence of a focus on the special needs of the elderly as a common element to the reparations orders issued by the International Criminal Court and to the action of the Trust Fund for Victims: the striking contrast with the recognition of these needs in the Inter-American Human Rights System

Both the ICC reparations orders and the TFV action reflect a worrying absence of specific measures directed to meeting the special needs of the elderly. Despite some decisions include generic references to their particular vulnerability, no clear guidelines or concrete programs have been established to specifically address these needs. Therefore, the elderly continue to receive no response commensurate with the damage suffered or the difficulties they face to access the justice and assistance mechanisms.

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58 Jjuuko, D., 2024, Engaging Survivors in Transnational Justice Governance: Global, National and Local Perspectives From Uganda's Post LRA Insurgency, Doctoral dissertation, University of Massachusetts Boston, ProQuest Dissertations & Theses Global.

59 Gedfew, M., Getie, A., Akalu, T. Y., & Ayenew, T., 2024, Prevalence and types of elder abuse in Sub-Saharan Africa: A systematic review and meta-analysis. Journal of the National Medical Association, 116(3), 292–301.

60 Atim, L. M., Kaggwa, M. M., Mamum, M. A., Kule, M., Ashaba, S., & Maling, S., 2023, Factors associated with elder abuse and neglect in rural Uganda: A cross-sectional study of community older adults attending an outpatient clinic, PLOS ONE, 18(2), e0280826.

This omission is even more serious if one considers the high number of elderly who are victims of violence (up to 89% in countries like Uganda), the rupture of their support networks as a consequence of armed conflicts and the crucial role that they play in the reconstruction of the social fabric, being fundamental in the processes of reconciliation and transmission of historical memory.

This situation contrasts notably with the recognition that the Inter-American System of Human Rights (IASHR) has affected since 2015 of: (a) special living condition of the elderly; and (b) the need to guarantee their fundamental rights and to adopt appropriate reparation measures in case they are violated. All this in a context of accelerated aging in Latin American and the Caribbean.

As a result, the Organization of the American States (OAS) has adopted the Inter-American Convention on Protecting the Human Rights of Older Persons (2015), which is the first binding instrument at a global level focused exclusively on this population group. The Convention establishes specific obligations for State parties, such as guaranteeing the right to health social security, autonomy and active participation in society, promoting a dignified and inclusive life for older persons.

On this basis, the Inter-American Commission of Human Rights (IAComHR) has issued several thematic reports that address the situation of the elderly, highlighting challenges in areas such as poverty, social exclusion and lack of access to essential services. The IAComHR also emphasizes the importance of States implementing public policies that integrate an intersectional approach, recognizing how factors such as gender, ethnicity and disability can exacerbate the vulnerability of the elderly. This is essential to addressing the structural inequalities faced in the region.

The Convention also urges States to guarantee the integration of the elderly into political, social, economic and cultural life, and ensuring opportunities for participation in decision-making that affects their well-being. This implies not only the recognition of their rights, but also the strengthening of their agency and protagonism, promoting a positive image of aging as a productive and valuable stage.

In light of the above, the IACtHR established in the Pablete Vilches et al. vs. Chile (2018) important standards in the protection of the rights of the elderly, by declaring the international responsibility of the Chilean State for the violation of the rights to life, personal integrity and health of Sergio Poblete Vilches: an elderly man that died in a public hospital due to negligent medical care and the lack of adequate measures to protect his life and integrity.

The IACtHR has highlighted the social vulnerability of folder people and the need to adopt differentiated and adequate measures for the satisfaction of their fundamental rights. Consequently, for the IACtHR, when designing reparation measures for the elderly it is necessary to take into account their special needs as a result of their special vulnerability due to their age.

Thus, the gap between the differential treatment of the elderly in terms of reparations in the Inter-American system and the absence of such treatment both in the reparation orders issued by the ICC and in the assistance measures adopted by the TFV show the need to rethink them in order to explicitly design measures that specifically take into account the needs, rights and well-being of the elderly.

7. CONCLUSIONS

Age is a determining factor in the vulnerability of two groups of victims of international crimes: minors and the elderly. In this situation the OECD has highlighted the importance of adopting a comprehensive approach that considers all factors affecting their well-being, while ECLAC has pointed the precariousness faced by the elderly due to the lack of access to adequate pensions and essential services. The lack of protection of these groups not only impacts their development and quality of life but also perpetuates cycles of inequality that extend over time. Moreover, their situation is significantly aggravated when they are victims of international crimes, which is why a differentiated approach on reparations for minors and the elderly is necessary.

However, the special needs of minors and the elderly have not been adequately considered by ICJ so far. No, or very limited, atten-

tion has been paid to them by the ICTY, the ICTR and the hybrid tribunals established in the first decade of the XXI century (the SCSL, the ECTC and the STL). Save for the ECTC, the rest have lacked an effective reparation mandate, resulting in the absence of concrete measures specifically designed for these vulnerable groups. Moreover, despite their reparation mandate, the ECTC has also failed to develop this function.

In the case of the elderly, their situation has been even more marginalized, since specific non-judicial mechanisms have not even been developed in the respective transition processes to address their needs; mechanisms that have existed for minors in some of these processes, as shown in the final report the TRC of Sierra Leone (although the application of reparation measures has been limited and restricted to a small number of victims). In the case of the elderly, their situation is even more marginalized since no specific non-judicial mechanisms have been developed in transitional processes to deal with their needs. These are mechanisms that have existed for minors as demonstrated in the final report of the TRC of Sierra Leone (even if the application of reparation measures had been limited and restricted to a reduced number of victims).

This situation reflects a significant gap between the normative recognition of age-based vulnerability in international law and its lack of consideration when designing and implementing effective reparation measures when children and the elderly are victims of international crimes. Thus, their attention has been limited to fragmented public policies of short scope.

The ICC Statute has established a robust framework for reparations, which does not, however, expressly provide for measures that take into account the special vulnerability of minors and the elderly. However, the reparations orders in the Lubanga, Ntaganda and Ongwen cases (in which most of the victims were minors, mainly former child soldiers) have consolidated fundamental principles such as the prevalence of the best interests of the child, as well as highlighting the importance of psychosocial rehabilitation, access to education and the need to address the stigmatization often suffered by those who have suffered international crimes.

It is not observed, however, that the TFV has so far adopted a differentiated approach to assistance and reparation for minors, unless they are victims of sexual and/or gender-based violence, which contrasts significantly with the content of the aforementioned reparation orders.

The situation is much more complex in relation to the elderly because, despite the formal recognition of age-related vulnerability provided for in the ICC Statute and its complementary instruments, both the reparation orders of the ICC and the action of the TFV show the absence of specific reparation measures aimed at addressing their special needs. Apart from general statements, no clear criterion or concrete reparation or assistance measures have been adopted to date.

The seriousness of the problem (especially in relation to women, the vast who do not have a pension, or whose pension does not cover their basic needs) is evident if one considers: (a) the high percentage of the elderly who are victims of violence (up to 89% in countries such as Uganda); (b) the loss of their support networks due to armed conflict (which hinders their access to specialized medical care and sustainable livelihoods); and (c) their essential role in the processes of reconciliation and reconstruction of the social fabric and the transmission of historical memory.

This situation contrasts significantly with the recognition that the Inter-American System of Human Rights has made (including the 2015 Convention, as well as the reports of the IAComHR and the decisions of the IACtHR) of the special circumstances of the elderly and the need to guarantee the satisfaction of their fundamental rights and to provide adequate measures of redress for their violations. All this in the framework of a context of pronounced aging of the population in Latin America and the Caribbean.

This contrast reflects, without a doubt, the need for: (a) rethinking the reparation orders issued by the ICC and the welfare measures adopted by the TFV in order to specifically address the special needs and welfare elderly; and (b) reverse the disparity on the treatment of minors and the elderly in the ICC reparation orders, despite the fact that age as a factor of vulnerability manifests itself in both pop-

ulation groups. Consequently, for the ICC to fulfill its role from the perspective of the special reparation needs of minors and the elderly, the ICC Chambers and the TFV must: (a) continue to strengthen the minor reparation system; and (b) begin to establish clear guidelines and concrete programs to specifically address the special reparation needs of minors and the elderly. In doing so, they should consider the following criteria:

1. It is not enough to leave the content of reparation orders and assistance measures to the disciplinary interpretation of judges or TFV officials because, although valuable considerations have been given in relation to minors, a set of principles has not yet been established that must be applied in a binding manner in situations and cases where there are victimized minors or the elderly (which generates the risk of future reparation orders and assistance measures that make their basic needs invisible, or unjustifiably emphasize certain measures).

2. In relation to minors, reparation must be comprehensive in nature and prolonged over time, including measures in areas as diverse as Access to health and physical and mental rehabilitation to the development of their training and orientation and integration in the labor sphere (which can sometimes also involve Access to financing to start up and develop productive activities). However, each of these measures (as well as those of a pecuniary nature and those of a collective symbolic nature) must be adjusted to the socio-cultural and personal context of the victims, in order to ensure their positive and lasting impact. Additionally, it is necessary to evaluate whether the minors have a safe family environment where their rights are truly guaranteed, since on many occasions they are revictimized in their private sphere in which case the provision of foster homes where they can live while they complete their training and integration process in the workplace, may be necessary.

3. With respect to the elderly their needs are substantially different from those of minors, so that unimpeded access to physical and mental health services (including medicines), as well as the guarantee of a sustainable income over time (as compensation measure), are indispensable for them (especially if they do not receive pensions or these are insufficient to cover their basic needs). In this sense, it is

important to bear in mind that suffering crimes of this nature at an advanced age leaves permanent consequences that impede the normal development of old age and severely limit their ability to work (often leading to their incapacity), which is why they need special care and income over time. The situation is even more serious when violence and conflict have destroyed their socio-family support networks, so that there is no one to take care of them. These situations of extreme vulnerability are very frequent and cannot fail to be addressed by the reparation orders of the ICC Chambers and the assistance measure of the TFV.

4. Considering its complementary nature of the ICC reparation orders, the assistance mandate of the TFV should be extended to address the special needs of minors and the elderly in the ICC situations and cases, since so far it has only focused on the particular conditions of minors who are victims of sexual or gender-based violence. It is important, in this regard, to develop differential criterion and programs designed specifically for these two groups of victims given their special vulnerability, since each child or elderly person who is part of them has suffered different types of victimization that require attention.

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PART IV
CONCLUSIONS

Chapter 9
Conclusions

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1. INTRODUCTION

As indicated in chapter 1, this is the first of the two volumes of the trilogy that address the role of the ICC from analytical non-positivist perspectives that renounce modernity and its subjectivities. It focuses on the analysis of the ICC's role from philosophical and theological perspectives on the one hand (Part II: chapters 2 to 4), and from international law (IL) and international relations (IR) analytical approaches on the other (Part III: chapters 5 to 7), that help to identify some significant aspects of that role. In contrast, the next volume focuses on two interdisciplinary axes of analysis: (a) critical studies; and (b) subaltern historical-contextual approaches.

As in volume I of the trilogy, dedicated to studying the role of the ICC from positivist and non-positivist approaches that adopt modernity and its subjectivities, the last chapter on conclusions follows a three-fold structure. First, it presents the main conclusions reached in each chapter from the relevant analytical approach. Second, it looks for continuities and discontinuities between the views on the ICC's role put forward 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 role of the ICC is usually understood.

2. APPROACHES FROM PHILOSOPHY AND THEOLOGY

Part II of this volume is comprised of three chapters devoted to the following philosophical and theological perspectives: (a) ethics, praxis and the symbolic (chapter 2); (b) justice as memory (chapter 3); and (c) the theory of emotions (chapter 4).

According to Pérez Vargas, Nieto & Olasolo (chapter 2), ethical reflection guides practical actions that respond to local and global needs, which can also acquire a symbolic dimension. From this perspective, justice is defined as a social construct that energizes life in common and responsibility for one's own well-being and that of others (both in the autonomy of each subject and in the practice of institutions), to guarantee compliance with those primary agreements

that enable life in common and human dignity to be possible. In this context, ethics makes human action reflective, while the function of the symbolic is to link institutionality with real and contextual hope, thereby making it responsible for carrying out justice.

However, national institutions that have the mandate to investigate and prosecute crimes committed within their territories generate skepticism due to their ineffectiveness. As a result, for the authors, it is necessary for international criminal justice (ICJ) to assume the symbolic responsibility of maintaining the hope of the people and doing what national jurisdictions have not achieved. It is in this context, in which the logic and particularities of the States blur or make impossible the application of national justice, in which the analysis of the role that the ICC plays as a manifestation of ICJ has been undertaken by the authors from the standpoint of ethics, praxis and the symbolic.

From this approach, ICC actions symbolically give form to a universal commitment to the investigation, prosecution and punishment of those most responsible for those crimes that most seriously affect the core social values upon which international society is built. Although the political will of some hegemonic States presents obstacles to the full development of the ICC actions, this does not prevent it from fulfilling the responsibility derived from its symbolic dimension.

Accordingly, for Pérez Vargas, Nieto & Olasolo, a central aspect of the role of the ICC is that it constitutes a symbol against the lords of impunity, who can avoid answering for international crimes committed: (a) by virtue of the power they control at the domestic level (top officials acting from the State or in collusion with the State); or (b) as a consequence of the weakness and limited scope of national justice systems (top officials acting from organizations outside the State), which causes national jurisdictions to become largely ineffective. In this way, the force of the symbolic transcends the structures of the political interests of the States, to maintain the hope of the victims who recognize in the symbolic praxis of the ICC the only real alternative for the achievement of justice.

In Chapter 3, Olasolo, Sánchez Sarmiento, Varón & MacLean analyze the role of the ICC from the perspective of the notion of justice

as memory. As the authors illustrate, history shows that the human species has committed violence from its earliest stages, reproducing itself inevitably and leaving behind countless accounts of enormous suffering and oppression. In this situation, the authors explain how some writers emphasize that justice should be directed primarily at satisfying the need of every society to maintain social peace, giving priority to overcoming the memory of a past that generates more pain and resentment (even if this means leaving unsatisfied the demands of people and communities victimized by violence). In contrast, others affirm that the suffering and meaninglessness of victims' lives becomes the central object of justice, which should be directed at rekindling, from the re-evaluation of the past, hope in the face of the oblivion of those who have been condemned by the official history of the victors. In this way, the aim is to promote the reconstruction of the damage suffered by the victims, so that they can overcome, without forgetting, the condition of victim in which history has placed them.

According to Olasolo, Sánchez Sarmiento, Varón & MacLean, those who belong to this second group embrace a notion of justice as memory, which involves looking at the past to try to give meaning to what until then was considered dispossession and oblivion, by reviewing what the victor's memory hides and justifies to the detriment of the victims. In this way, it is required that both institutions and society as a whole integrate victims into the social fabric through their recognition, publicly admitting the damage that has been caused to them, repairing what is reparable, and preserving the memory of what is materially irreparable while promoting reconciliation.

As the authors point out, several of the purposes of ICJ and international criminal law (ICL) can further the achievement of these goals. This is the case of the establishment of a historical narrative of the events that occurred, the recognition of victims through their participation in the proceedings, the reparation of damage and the promotion of social reconciliation between victims and perpetrators as a preliminary step towards a stable and lasting peace. It can also advance the general negative prevention (deterrence) resulting from declaring the international criminal responsibility of those who commit international crimes by instrumentalizing the state structures and

non-state organizations they direct. However, despite the relationship between the goals of ICJ and the concept of justice as memory, the suitability of ICJ enforcement mechanisms to satisfy the latter can be questioned.

This same questioning extends to the ICC because, despite the fact that deterrence and the participation and reparation of victims are expressly included in the ICC Statute as central elements of the role of the ICC, its actions in the last two decades seem to largely agree with those who claim that the ICC Statute does not grant to the ICC the necessary instruments for its effective fulfillment. For Olasolo, Sánchez Sarmiento, Varón & MacLean, the cases against Thomas Lubanga, Bosco Ntaganda, Mathew Ngudjolo, Germain Katanga, Jean Pierre Bemba, Ahmad Al-Mahdi and Dominic Ongwen (the only cases before the ICC whose trial judgment have been issued by November 2023) are a clear reflection of this situation.

Accordingly, the deep dependence of the ICC on the funding and cooperation of the States Parties, and in particular of those States whose situations and cases are the subject of investigation and prosecution by the ICC, prevents effective deterrence with respect to the highest state representatives. Likewise, the mechanisms provided for in the ICC Statute and in the ICC Rules of Procedure and Evidence (ICC RPE) regarding participation and reparation of victims suffer from significant limitations. On the one hand, they prevent them from having a minimum level of impact on the final outcome of the proceedings and on the resulting narrative of the facts considered as proven in the judgment, and, on the other hand, mean that long years of waiting are required for the approval and implementation of the reparation plans proposed by the Trust Fund for Victims (whose execution is also affected by the lack of resources for its financing).

Furthermore, as regards the reconstruction of a historical narrative of the events and the promotion of social reconciliation, not only are they not mentioned in the ICC Statute and in the ICC case law as part of the role of the ICC, but there are important practical arguments that seriously question the suitability of the ICC to achieve them.

As a result, for Olasolo, Sánchez Sarmiento, Varón & MacLean, the practical scope of application of the notion of justice as memory

in the ICC is rather limited. Consequently, they consider that, if the aim is to increase its degree of application, it is necessary to resort (either in a complementary or even alternative manner) to other types of extrajudicial mechanisms.

Buis addresses in chapter 4 the role of the ICC from the perspective of the theory of emotions. As the author indicates, affective circulation (a novel framework of analysis within the social sciences) and neuro-psychology have much to contribute to the understanding of the behaviour of the different actors involved in proceedings before international criminal tribunals. Based on the above, the author studies the emotions inherent in the creation of the ICJ system, and then analyzes the Lubanga, Ongwen and Al Mahdi cases before the ICC. He aims at showing how, behind an apparent argumentative rationality, there are strong emotional imprints that condition the work of the ICC Office of the Prosecutor (ICC OTP), the Defence, the victims, the witnesses and even the ICC judges themselves.

For Buis, the affective plane allows for the identification of certain emotional agendas that justify a certain position regarding the commission of international crimes (this is the case of the affective bias of the judges). Likewise, when dealing with situations that involve events that occurred in geographically and culturally distant spaces (as occurs with the ICC investigations into situations in Africa), an emotional construction of the "other" is observed based on the lack of understanding of social patterns and the absence of trans-civilizational empathy. Furthermore, the importance of emotions can be observed when assessing the scope of repentance, remorse and requests for forgiveness from defendants. Consequently, an adequate understanding of the cultural role of emotions provides tools capable of explaining some particularities in the application of the ICC Statute.

On this premise, Buis emphasizes the fact that the analysis of the proceedings before the ICC demonstrates the importance of: (a) identifying the perceptions that those who participate in them (or observe and interpret them) have of themselves and of the rest of the actors involved; and (b) exploring the physical and verbal, conscious and unconscious exchanges of emotions that occur between those who, in this case, directly intervene in the judicial processes (or observe and interpret them). Thus, the individual handling of

the emotive effect and the circulation of affective narratives aimed at achieving specific ends in the ICC show that, whether it is a matter of making invisible the suffering of those who suffer gender violence (Lubanga case), of assimilating the accused to his victims (Ongwen case), or of generating compassion among those affected (Al-Mahdi case), the administration of justice by the ICC is not alien to human emotions. As a result, despite the rational image that is intended to be installed in, and portrayed by, the ICC, Buis considers that the fulfillment the role of the ICC is always dependent upon multiple emotions in tension, which are present (although sometimes they become invisible) from the first investigations of each situation to the application of reparation measures.

Consequently, in view of what has been stated so far, it can be sustained that the three philosophical-theological perspectives that make up this section leave aside the materialist perspectives and traditional practices of ICJ and ICL, and give way to the consideration of ideational factors in the assessment of the role of the ICC. In this way, the ethical-practical, symbolic, emotional and memory reconstruction elements, which are relegated, if not excluded, in the classic studies of ICJ and ICL, allow an alternative reading of the ICC role and its actions in the situations and cases developed to date.

In the sequence of these three chapters, a transition can be observed that begins with the relevance of the symbolic action of the ICC (understood as a symbol of the realization of justice), which surpasses the structures of the political interests of the States and maintains the hope of the victims as the only real alternative to ending the impunity of those who hold power in the internal sphere or take advantage of the weakness and limited scope of national justice systems.

Closely related to the symbolic level, as a second stage of this transition, is the level of the reconstruction of memory, understood as a look at the past that seeks to give new meaning to the victims by revealing what the prevailing history hides to their detriment. Although the potential of the role of the ICC for the reconstruction of memory is remarkable, multiple factors limit its practical contribution, so that, if the goal is to increase its degree of application, it would appear to be necessary to resort to other extrajudicial mechanisms.

The final destination of this transition is the emotional level of the actors involved in the fulfillment of the role of the ICC. Although this level has always existed, there is a strong resistance to recognizing its influence on the way in which the ICC fulfills its role, in order to preserve a supposedly rational image in its actions. However, although some may wish it, the truth is that emotions are not going to disappear, so this effort to make them invisible only distorts the analysis of the ICC's role, by trying to relegate to irrelevance a factor that is certainly important to understanding it.

3. APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

Having presented the conclusions reached by the philosophical and theological approaches, the contributions of the IL and IR analytical perspectives, which are especially significant for the new understandings they raise about certain aspects of the role of the ICC, are now presented: constructivism (chapter 5), feminist theories (chapter 6) and post-structuralism and queer theory (chapter 7).

In chapter 5, Mahecha, López Velásquez & Jaramillo analyze the role of the ICC from a constructivist perspective, which considers that IR and IL are made up of principles, values, ideas and discourses, understood as a social construction of reality. Consequently, as the authors point out, constructivism presents the following distinctive features: (a) it is premised on the social construction of reality and knowledge; (b) it confers particular importance in its analysis to ideas and beliefs because it considers that concepts and definitions are not fixed, since reality is constantly being constructed and changed depending on the ideas and beliefs of the actors; (c) it considers that the notions of interest and identity are also fundamental concepts, which are constructed and determined according to the self-perception that the actors in a given society have of themselves and the way in which they are perceived by other members of that society (hence its mutually constitutive character); (d) it explains state interests as the result of the relations that States have with other members of international society; (e) it addresses the relations of States with in-

ternational structures (international institutions) and with the actors that act in them; (f) it studies the multiple dimensions that state identity can have, as a consequence of its diverse interactions with other actors in international society; and (g) it analyzes how identities can materialize social norms, understood as appropriate standards of conduct for those actors who have a certain identity.

Based on the above, Mahecha, López Velásquez & Jaramillo indicate how, as ideas and practices vary over time and space, patterns consolidated in the past can change. This is clearly observed in relation to the evolution of the notion of state sovereignty, which, unlike the immutable nature attributed to it by most IR and IL approaches, has undergone a profound transformation in recent decades due to the increasingly intense pressure to administer justice in those situations in which international crimes have been committed. Thus, according to the authors, for constructivism, the ICC is the result of the evolution of the discourse on state sovereignty.

The most palpable proof of this evolution is the way in which States have accepted the change of the political paradigm of "victors' justice" for a series of international legal criteria, thereby granting IOs a greater capacity for action in matters such as the administration of justice which were, in the past, the exclusive competence of state sovereignty. For this reason, although classic theories of IR recognize that IOs are created by States and obey their interests, they are not able to explain the reasons why certain organizations that do not serve, or do not submit to, state interests, continue to be maintained. This is the case in particular with ICJ enforcement mechanisms: their continuity shows that ICJ institutions enjoy autonomy according to the terms of constructivism and play an important role in defining international reality and in the emergence and permanence of certain values.

As a result of the above, Mahecha, López Velásquez & Jaramillo emphasize that the ICC reflects a relative notion of state sovereignty, which, on the one hand, prevents those most responsible for the crimes that most seriously undermine the fundamental values of international society from being able to rely on the traditional system of immunities, and, on the other hand, promotes, through the principle of complementarity, the application by States of their national

jurisdictions to satisfy the main purpose of the ICC: the investigation and prosecution of those most responsible for the crimes provided for in the ICC Statute.

This creates a certain tension between the ICC and States, which is, however, ameliorated by the following two reasons: (a) the ICC was established by a sovereign act of the States Parties; and (b) through the principle of complementarity, a space for dialogue is opened between the ICC and the States (although the ICC has the last word, States are permitted to challenge the admissibility of situations and cases, thus conferring on them a certain level of influence). This favors the fight against the impunity of those most responsible for the crimes within the ICC jurisdiction, and counteracts one of the most important effects of the definition of state sovereignty in absolute terms: the consolidation of impunity.

However, as Mahecha, López Velásquez & Jaramillo point out, the fulfillment of the role of the ICC has so far been very limited because of the continued pressure (typical of IR) from States (particularly the Great Powers), which, regardless of their agreement with the purposes of ICJ and the ICC's role, only allow its implementation when their national interests are not affected. This situation is perfectly reflected in the attitude of the United States (US/USA) in relation to the opening of the investigation into the situation in Afghanistan, which shows how the dynamics of a hegemonic Power that is not party to the ICC Statute (the US) can directly influence the activities of the ICC and the degree of effectiveness in the fulfillment of its role.

Feminist perspectives in IL identify the patriarchal system of oppression on which much of contemporary society and its institutional apparatus have been built. They also reveal how international society, far from being alien to this phenomenon, 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. As a result, Caballero, Quijano & San Juan (chapter 6) state that, for much of Western history, the body has been a territory of occupation, violence and death, due to a patriarchal culture that not only naturalizes violence but which, by subordinating the feminine, puts women in daily situations of risk both in times of war and peace. Thus, feminized bodies

are the main recipients of violence at home, in detention centers, in refugee camps, in attacks on civilians and in forced displacement.

Women are considered strategic targets to terrorize and weaken the opponent or their community and for that reason are victims of widespread and systematic practices of physical, psychological and, mainly, sexual aggression, carried out by both state forces and organized armed groups that oppose them. Likewise, sexual violence is also used as a tactic intended to humiliate men from the enemy group, and as a reward for combatants (linked to the conquest of territory). All of this means that, in addition to physical and psychological trauma, women survivors are stigmatized by the fact that they have had unwanted pregnancies and sexually transmitted diseases.

Although this is a reality known by national and international organizations, sexual violence against women continues to represent a history of denial, which during almost the entire 20th century has remained hidden compared to other consequences of war, coming to be considered as an inevitable consequence of armed conflicts. Such invisibility has allowed sexual crimes to be normalized, especially in the context of war. This has contributed to maintaining the inequality of women before the law and their status as second-class citizens, perpetuating the social role of submission to men that has been assigned to them, and depriving them of the possibility of accessing the same rights and guarantees that men enjoy.

In view of this situation, Caballero, Quijano & San Juan explain how feminist movements have fought tirelessly for equal rights for women before the law and for an end to impunity for the serious rights violations that they systematically suffer in all social contexts. Over time, these movements have succeeded in promoting greater protection for women at national and international levels and the inclusion of the gender perspective in various international instruments, which currently recognize that there are situations that harm women exclusively because they are women. Therefore, as situated, feminism suggests, the study of the role of the ICC requires employing the tools of liberal, cultural, radical, postmodern and poststructuralist feminism, as well as of third world feminist approaches, to the extent that they are useful for its analysis.

ICJ and ICL have also had a positive evolution in the criminalization of certain behaviors, culminating in the adoption of the ICC Statute. According to the authors, the ICC Statute incorporates a much broader gender perspective than those of the international criminal tribunals that preceded it, and with all its imperfections, has represented a great advance in the rights of women who are victims of international crimes. In this way, the ICC Statute has put an end to decades of absence of express reference in IHL and the ICL to sexual violence and gender-based violence. Furthermore, given that 65% of States are party to the ICC Statute, the ICC can also play an essential role as an agent of change to positively influence the deconstruction of patriarchal visions of justice and gender, and of what it means, in a world dominated by men, to be a woman. In this way, as the authors point out, the ICC has the capacity to become a precursor of new changes in ICJ and ICL and in areas as diverse as those relating to the role of women in society and their access and representation at decision-making levels.

However, although since 1990 an important path has been taken in the effort to overcome impunity for sexual violence, Caballero, Quijano & San Juan consider that, to date, the ICC has not addressed numerous issues raised by feminist movements. Therefore, although the ICC is a young institution with a long way to go, it is necessary for it to stop contributing to the maintenance of patriarchy and to evolve in three main areas: (a) the definition of the notion of gender; (b) the effective implementation of its mandate to investigate, prosecute and punish crimes of sexual violence and gender-based violence; and (c) the use of reparation measures as a mechanism for the redistribution of justice and the elimination of gender inequality.

With respect to the first of these, the ambiguity of the notion of gender included in the ICC Statute requires that the ICC develop it through its case law and to promote a common and feminist international notion of gender (which can only be achieved with an active, consistent and shared approach by all the organs of the ICC). In relation to the second, it can be noted that after almost twenty years since the entry into force of the ICC Statute, it was necessary to wait until 30 March 2021 for the ICC to issue its first final conviction for gender-based sexual violence (the Ntaganda case), despite the fact

that this type of violence has been massively seen in numerous situations and cases before the ICC. Thus, after the unfortunate start with the case against the former de facto governor of the Ituri province (Democratic Republic of the Congo (DRC)), Thomas Lubanga, and the acquittal by the Appeals Chamber of the former Vice President of the DRC, Jean Pierre Bemba (both also leaders of two organized armed groups, *Union des Patriots Congolais* (UPC*), Forces Patriotiques pour la Libération du Congo* (FPLC) and *Mouvement de Libération du Congo* (MLC)), the ICC needs to: (a) reinforce the work initiated by the ICC OTP in 2015 with regard to crimes of sexual violence and gender-based violence; and (b) rectify the mistakes of the past so that gender equality and justice become true pillars of its actions. Finally, the ICC has to overcome the difficulties it has encountered in practice in order to use all the possibilities offered by reparation measures as a mechanism for transforming societies, empowering victims and ensuring that there is no repetition of such crimes.

Consequently, Caballero, Quijano & San Juan warn us that if these measures are not adopted, there is the possibility that the ICC could end up emptying of content the transformative norms on gender justice provided for in the ICC Statute and reinforcing the status quo by creating a mere appearance of progress towards gender equality.

In chapter 7, Buitrago, Contreras & García Atehortúa analyze the role of the ICC from the perspective of post-structuralism and queer theory, which shows how classic approaches to IL have not questioned the normative force of the categories of gender-sex-sexuality and impose regulatory mechanisms that exercise power over intersex bodies. In this way, IL has succeeded in silencing human sexual diversity.

For the authors, ICJ and ICL are not immune to this situation because in them sexually diverse bodies are not named, are not subjects of rights and are not protected, which makes their existence irrelevant. The ICC Statute not only reflects but participates in the configuration and delimitation of the concepts of sex, gender and sexuality, perpetuating the binary logic of the sexes and the heterosexual matrix of ICJ and ICL. An example of this situation is art. 7(3) of the ICC Statute, which incorporates a definition of gender limited to the masculine and feminine, thus confirming the heteronormative hegemony in the ICC Statute and the exclusion of human beings

who express non-binary sexual and gender identities. With this, the ICC Statute not only restricts the diverse expressions of human sexuality, but also leaves sexually diverse subjects deprived of protection.

However, as Buitrago, Contreras & García Atehortúa emphasize, due to the central position of the ICC in the international system of the fight against impunity and in the fulfillment of victims' rights, it could play a fundamental role in the transformation of the scenarios of violence faced by intersex persons, by promoting that identities and the approach to violence are socially constructed outside the binary logic of the sexes and the heterosexual matrix of ICJ and ICL.

Nevertheless, according to the authors, to do this it is necessary to leave aside the passive position that ICC case law has had in this matter up to the present and take steps forward to: (a) move away from certain preconceptions of criminal phenomenology, such as the dynamics of the male aggressor and the female victim, the analysis of violence from the perspective of family and cultural roles, and the reductionist vision that limits sexual attraction to individuals of the opposite sex; and (b) promote the recognition and protection of the diversity and fluidity of human sexuality.

In this sense, the requests submitted to the ICC to investigate crimes against sexually diverse people in Iraq and Syria and against the Rohingya community in Myanmar, as well as the trial against Al Hassan for the crime against humanity of gender-based persecution, constitute for Buitrago, Contreras & García Atehortúa good opportunities to put into practice a much more fluid approach to the issues of gender, sex and sexuality. In addition, the document published by the ICC OTP collecting its policy on sexual and gender-based crimes would also appear to present a window of opportunity to challenge the gender roles imposed by the male-female binomial.

In chapter 8, Martínez Agudelo, Freydell, Canizo, Molina & Vacca analyze the role of the ICC from the perspective of the special reparation needs of minors and elderly, as age is a determining factor in the vulnerability of these two groups of victims of international crimes.

The lack of effective protection of these groups not only impacts their development and quality of life but also perpetuates cycles of inequality that extend over time. The problem is particularly seri-

ous in relation to the elderly (especially elderly women, since most of them lack a pension, or such pension as they have does not cover their basic needs). This is illustrated by: (a) the high percentage of the elderly who are victims of violence (up to 89% in countries such as Uganda); (b) the loss of their support networks due to armed conflict (which hinders their access to specialized medical care and sustainable livelihoods); and (c) their essential role in the processes of reconciliation and reconstruction of the social fabric as well as the transmission of historical memory. As a result, for the authors, a differentiated approach on reparations for minors and the elderly is necessary.

However, the special needs of minors and the elderly have not so far been adequately considered by the ICJ. Little or no attention has been paid to them by the ICTY, the ICTR or the hybrid tribunals established in the first decade of the XXI century (the SCSL, the ECCC and the STL). Apart from the ECCC, the others have lacked an effective reparation mandate, resulting in the absence of concrete measures specifically designed for these vulnerable groups. Moreover, despite their reparation mandate, the ECCC has also failed to develop this function.

Moreover, although some specific non-judicial mechanisms have been developed within transitional processes to deal with the needs of minors, as we see in the final report of the Truth and Reconciliation Commission of Sierra Leone (although reparation measures have been limited and restricted to a reduced number of victims), no such non-judicial mechanism have been set up for the elderly.

As Martínez Agudelo, Freydell, Canizo, Molina & Vacca point out, this situation reflects a significant gap between the normative recognition of age-based vulnerability in international law and its lack of consideration when designing and implementing effective reparation measures when children and the elderly are victims of international crimes.

Despite the robust framework for reparations provided for in the ICC Statute, for the authors, this gap has not been breached due to the limited role played so far by the ICC. This is as a result of: (a) the lack of specific measures that take into account the special vulnera-

bility of minors and the elderly in the ICC Statute; (b) the fact that the TFV, unlike the ICC Chambers, has not adopted a differentiated approach to assistance and reparation for minors (unless they are victims of sexual and/or gender-based violence); and (c) the fact that neither the ICC Chambers in their reparation orders nor the TFV have so far adopted a differentiated approach to reparations for the elderly.

By studying the analytical perspectives applied in the four chapters that make up Part III of this volume, it can be stated that they share a decentralized vision of power in international society and of IL. Based on this premise, they focus their analysis on the multiplicity and complexity of IR and IL, leaving the study of their hierarchy and application in the background (the preference for the study of these last two aspects is characteristic of the main currents of IR and IL). Consequently, the four chapters go beyond top-down or bottom-up epistemologies to present a multilevel analysis in which norms, ideas, values and discursive practices can socially construct identities and subjectivities, many of which are rejected by the dominant discourse and/or legal regime.

However, these last four chapters also contain notable differences in their way of understanding international society. Thus, while constructivism values the co-constitution between norms and legal regimes, feminist perspectives, post-structuralism and queer theory do the same with the practices of power and the resistance they generate. In other words, while constructivism adopts the path of co-determination between actors, and between them and the structure (international institution), the other perspectives do not dissect the subjectivities that are produced by the dominant discursive structures (which categorize and normalize any attempt that threatens to deviate from what such structures seek to preestablish).

These differences translate into different ways of understanding the role of the ICC as a relevant actor in international society. So, while constructivism emphasizes the constant difficulties experienced by the ICC, both in applying the relative notion of state sovereignty contained in the ICC Statute, and in fulfilling its role of investigating and prosecuting those most responsible for the crimes provided for in the ICC Statute (as a consequence of the pressure exerted by

States, particularly the Great Powers, so that their national interests are not affected), from a feminist perspective, the importance of the ICC fulfillment of its role to serve as a tool against the oppression of women by the patriarchy is affirmed. To do so, it is necessary that case law promotes a common and feminist international notion of gender, that prosecution of crimes of sexual violence and gender-based violence is more effective, and that the use of reparation measures to promote redistribution and eliminate gender inequality.

In contrast, post-structuralism and queer theory assert that the ICC assumes the binary logic of the sexes by incorporating a definition of gender limited to masculine and feminine, which excludes and leaves unprotected subjects with non-binary sexual and gender identities. However, due to the international relevance of the ICC in the fight against impunity and in the satisfaction of victims' rights, they leave the door open for ICC case law to detach from certain preconceptions and recognize and protect the fluidity of human sexuality, which would undoubtedly promote the transformation of the scenarios of violence suffered by intersex persons.

Finally, the analysis of the role of the ICC, from the perspective of the special reparation needs of minors and elderly, shows that, despite the robust framework for reparations provided for in the ICC Statute, the limited role played so far by the ICC is insufficient to breach the gap between the normative recognition of such special reparation needs in international law and the lack of effective implementation of specific measures designed to address them.

4. CONTINUITIES AND DISCONTINUITIES ON THE ROLE OF THE INTERNATIONAL CRIMINAL COURT BETWEEN APPROACHES FROM PHILOSOPHY AND THEOLOGY ON THE ONE HAND, AND FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS ON THE OTHER HAND

The great richness of this volume, but also its great challenge, has been to combine post-positivist analyses that renounce modernity and its subjectivities, coming from disciplines with little dialogue

among themselves, such as philosophy, theology, IL, and IR. Despite this, it is striking to observe the existence of several elements of continuity such as: (a) the normative considerations of the approaches; (b) the way in which international justice (IJ) and ICJ are socially constructed; (c) the consideration of the levels of analysis; and (d) the role of perceptions.

Along with these common aspects, important elements of rupture are also observed in relation to the ultimate meaning given to the ideational approach. Thus, while philosophical and theological perspectives give greater weight to the spiritual and emotional facets, IL and IR approaches focus more on how discursive structures and systems of thought impact the configuration and reconfiguration of social structures and human material conditions.

4.1. Continuities

Attributing ethical or moral parameters to philosophy and theology can almost be understood as a pleonasm. However, IL and IR post-positivist theories also have an explicit normativity, understood as ethical, moral and ideological orientations. Although theological and, to a lesser extent, philosophical approaches focus on the symbolic dimension, while the focus on IL and IR is on discursive practices, the shared concern for the way in which both influence the ICC actions (and co-constitute each other) offers common ground for understanding the role of the ICC beyond its material elements.

A second common aspect of the disciplinary studies addressed in this volume is that of understanding IJ and ICJ as social constructions. This does not mean, however, that the different disciplinary approaches do not present singularities in the way they understand these social constructions. Thus, in theological approaches in particular, what is socially constructed has a teleological vocation based on the dynamics of life in common that lead to a kind of individual and collective responsibility in light of human dignity. For its part, constructivism envisions the social structures of IR as a set of ideas, values, principles and discourses that are co-determined with the agency of the actors to create the external world. Therefore, the results of what is socially constructed are more closely related to the

decisions of the participants and their interactions than to guaranteeing a pre-established ideal of life.

A third common aspect is the questioning of the levels of analysis employed by traditional IL approaches that link the universal with the State. Thus, the philosophical and theological perspectives that have been analyzed highlight the role of IJ and ICJ to shape the hope of peoples and communities beyond modern nation-states, which have demonstrated their inability to guarantee them the effective enjoyment of their fundamental rights. Similarly, constructivism in IR coincides in questioning the bases of the discourse of sovereignty to break with the idea of the "inside" and the "outside" of state spheres, which leads to a redefinition of normative competence to give more weight to international regimes and social structures.

Finally, it is worth highlighting the ideationalist ontological affinity between the philosophical and theological perspectives analysed and the IL and IR post-positivist approaches that renounce to modernity and its subjectivities. Far from the IL rationalist arguments, which demand an aseptic assessment of legal actors and presuppose objectivity as a given, most of the chapters of this volume focus on the weight of the perceptions of these actors in the judicial decisions. These perceptions are characterized by a double representation: a self-perception of what they are and the cultures to which they belong, and an intersubjective perception in relation to the other social actors involved in the exercise of the role of the ICC (victims, perpetrators, etc.).

4.2. Discontinuities

Although the ideational perspective is a common feature of the different chapters of the volume, there is a significant divergence with respect to the ultimate meaning that is given to it. In the perspectives on justice as memory and the role of emotions, ideas are based on the reflections specific to the universe of meaning of the actors, as memory, remembrance, resentment, pain and hope are the means to deal with the oblivion to which those who write history wish to subject others. In addition, emotions are analyzed because they are considered to influence significantly the way in which cases are handled by the ICC, and, therefore, removing them from the ostra-

cism to which the dominant narrative often subjects them in order to prioritize other material aspects is a pending task for those who manage the ICC (especially in the face of reparation processes).

In contrast, the IL and IR non-positivist approaches that have been analyzed focus on the direct impact of discursive structures and systems of thought on the configuration and reconfiguration of social institutions and human material conditions. This is particularly important in postmodern and poststructuralist-inspired perspectives. As pointed out by these approaches, the desire for normalization in binary categories has led to a series of social institutions aimed at shaping human bodies, especially affecting women and people with fluid sexual orientation. As a result, these bodies become affected by discursive structures and become territories of occupation, violence and death for the satisfaction of a heteronormative patriarchal culture.

This normalization is the result of the tensions between power relations and resistance mechanisms. Precisely, the last significant discontinuity between the philosophical-theological perspectives and the international legal-political approaches is the attention that must be given to these tensions when analyzing the role of the ICC. Thus, the former do not focus their analysis on these tensions, considering the question of power as a secondary implicit problem. On the other hand, for the latter, the macro and micro social dimensions are inextricably crossed by power relations and their constant tensions with the resistance carried out through the denunciation of power practices (hegemonic of the Great Powers, civilizing of the elites and discursive of the law) and the attempts to make visible the perspectives of the subjected communities and subjectivities.

All this ratifies the value of interdisciplinary debates for the comprehensive understanding of a phenomenon such as the role of the ICC.

5. FINAL REMARKS

The present volume has analyzed the role of the ICC from analytical non-positivist perspectives that renounce modernity and its subjectivities. It has focused on three philosophical and theological perspectives (ethics, praxis and the symbolic, justice as memory and the

theory of emotions) and on three IL and IR approaches (constructivism, feminist theories and post-structuralism and queer theory).

As occurred in the first volume of the trilogy, each one of the perspectives from which the role of the ICC has been approached in this second volume 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 role of the ICC 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 come from philosophy and theology or from IL and IR. 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 role of the ICC, 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 that have carried out the research presented in this work over a five-year 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.