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

PART III

Analytical perspectives that denounce modernity and its subjectivities: critical studies and subaltern historial-contextual approaches as interdisciplinary axes of analysis

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

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

Part III

ANALYTICAL PERSPECTIVES THAT DENOUNCE MODERNITY AND ITS SUBJECTIVITIES: CRITICAL STUDIES AND SUBALTERN HISTORICAL-CONTEXTUAL APPROACHES AS INTERDISCIPLINARY AXES OF ANALYSIS

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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Volume 53

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Valencia, 2026

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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: 979-13-7010-843-4
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 the Research Networks *Ibero-American Perspectives on Justice* and *Responses to*

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

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

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

Acknowledgments

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

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

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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AC	Appeals/Appellate Chamber
ACHPR	African Commission on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
AU	African Union
AUASP	Assembly of States Parties of the African Union
BIA	Bilateral Immunity Agreements
BC	Before Christ
CAH	Crimes Against Humanity
CIA	Central Intelligence Agency of the United States
CILS	Critical International Law Studies
CSSDCA	Conference on Security, Stability, Development and Cooperation in Africa
CUPUJ	Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States
DRC	Democratic Republic of the Congo
EAC	Extraordinary African Chambers
EACJ	Eastern Africa Court of Justice
ECOWAS	Economic Community of West African States
FPLC	*Forces Patriotiques pour la Libération du Congo*
GCs	Geneva Conventions
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICC ASP	Assembly of States Partes of the International Criminal Court
ICC OTP	Office of the Prosecutor of the International Criminal Court
ICC RPE	Rules of Procedure and Evidence of the International Criminal Court
ICJ	International Criminal Justice
ICL	International Criminal Law

ICtJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IEL	International Economic Law
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IJ	International Justice
IL	International Law
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
IOs	International Organizations
IS-K	Islamic State-Khorasan Province
IR	International Relations
IRMCT	International Residual Mechanism for International Tribunals
KSC	Kosovo Specialist Chambers
LRA	Lord's Resistance Army
NATO	North Atlantic Treaty Organization
NGOs	Non-Governmental Organizations
OAU	Organization for the African Union
OPCV	Office of Public Counsel for Victims of the International Criminal Court
PTC	Pre-Trial Chamber
R2P	Responsibility to Protect
SADC	Southern African Development Community
SADCAT	Southern African Development Community Administrative Tribunal
SCSL	Special Court for Sierra Leone
SLA	Sudanese Liberation Army
TC	Trial Chamber
TFV	Trust Fund for Victims of the International Criminal Court
TWAIL	Third World Approaches to International Law

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nation Secretary General
UPC	*Union des Patriots Congolais*
US/USA	United States of America

Foreword

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Structure, Activites, Research Networks, Publications and Partners

1. FOUNDATIONS AND OBJECTIVES

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

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

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

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

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

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

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

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

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

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

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

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

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

2. STRUCTURE

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

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

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

Treasurer: In process of renewal.

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

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

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

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

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

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

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

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

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

– Steiner, Sylvia (Brazil): Judge (2003-2016) and President of the Pre-Trial Division (2008-2011) of the International Criminal Court.

– Yañez Barnuevo, Juan Antonio (España): Ambassador of Spain to the United Nations (1991–1996 & 2004–2010); Head of the Delegation of Spain at the Rome Diplomatic Conference (1998) and at the Preparatory Commission for the International Criminal Court (1999–2002).

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

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

3. ACTIVITIES

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

3.1. Annual Activities

The IIH organizes annually the following activities:

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

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

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

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

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

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

3.2. Non-Periodical Activities

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

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

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

4. RESEARCH NETWORKS

4.1. The Ibero-American Perspectives on Justice Research Network

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

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

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

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

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

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

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

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

The current composition of the Research Network is as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. PUBLICATIONS

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

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

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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.

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. 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

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

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

It is published in partnership with:

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

6.8. Dissemination of Publications

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

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

6.9. International Internship Program

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

6.10. Research Stay Program at the International Law Clinic

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

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

6.11. Cooperation Agreements

The IIH has signed Cooperation Agreements with the following partners:

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

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

7. FINAL REMARKS

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

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

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

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

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

PART I
ANALYTICAL FRAMEWORK AND METHODOLOGY

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

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1. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. INTER- AND MULTI-DISCIPLINARITY

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

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

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

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

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

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

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

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

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

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

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

4. ANALYTICAL APPROACHES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2.1. Analytical approaches from philosophy and theology

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

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

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

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

4.2.2. Analytical approaches from international law and international relations

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

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

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

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

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

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

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

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

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

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

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

The situation is especially complex in relation to the elderly. This is because, despite the formal recognition of age-related vulnerability

provided for in the ICC Statute and its complementary instruments, both the reparation orders of the ICC and the actions of the TFV manifest the absence of specific reparation measures aimed at addressing the special needs of these people.

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

4.2.3. Transversal axes of analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

5. METHODOLOGY AND STRUCTURE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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PART II
THE ROLE OF THE ICC FROM CRITICAL STUDIES

Chapter 2
*The perspective of the utopian horizon**

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1. INTRODUCTION

An examination of the International Criminal Court (ICC) from a philosophical perspective is essential if one is searching for a theoretical rediscovery which would allow the fostering of new concepts in

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

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order to rethink and restructure the traditional frameworks through which the ICC has traditionally been analyzed. Accordingly, this chapter undertakes the unprecedented task of exploring the role of the ICC through the lens of Ernst Bloch's reflections on hope and utopia. (Krotz, 2011: 55-73).

For Bloch (2004: 192-203), conscious and concrete hope overcomes the co-option of fear, whether imposed openly or through less apparent ideological channels. It also directs the actions of the hopeful individual towards the committed transformation towards building and protecting human dignity.

As regards to utopia, Bloch proposes the reconceptualization of this concept away from the perspective of militant optimism. His vision is of a world in process that follows a trend of possible but not guaranteed humanization in which the need for human action is assumed (Krotz, 2011: 56).

In applying these ideas of hope and utopia, Bloch rejects stagnant conceptions of the law, and considers that the latter is the path to the realization of social utopia, which consists of the liberation and reaffirmation of human dignity (Bloch, 1980: 209). In this way, the central position of "human" in Bloch's analysis of justice carries with it the need for critical and complex study. Likewise, he demands eschewing any exclusively normative reading, which erroneously omits factors and interests involved in the constitution and application of the law (Olasolo, 2016: 96-104).

Based on the foregoing, this chapter addresses the ICC's role from the perspective of a future understood as accessible hope developed from external sources (apart, therefore, from any egocentric approach that could lead to automatic responses). This allows us to contrast, differentiate and propose a perspective of action for the ICC that identifies with the values that have informed the long and tortuous path towards its creation that it has followed since Gustave Moyner's original proposal in 1864 (Ambos, 2013: 72; Bassiouni, 1999; Kirsch & Oosterveld, 1999; Ley, 1999).

Among these values, the perspective of analysis of the utopian horizon is highlighted as a central element of the process of creating in the ICC a militant optimism, which is based on an understanding

of the purposes of international criminal justice (ICJ) and the ICC's role as a path towards social transformation which liberates the human being and reaffirms his dignity (social utopia), by impelling the individual.

Furthermore, having affirmed the relationship between the purposes of ICJ and the role of the ICC, on the one hand, and the realization of social utopia, on the other, this perspective of analysis delves into the analysis of the question regarding what course of action is proposed from a principle of hope and militant optimism in the face of the confirmation of the ineffectiveness of the ICC in fulfilling, to a great extent, central aspects of its role, which aspects are instrumental for the liberation and reaffirmation of human dignity.

To answer these questions, this work addresses, firstly, the essential aspects of the perspective of analysis of the utopian horizon (section 2) and its treatment of justice (section 3). Next, the close relationship between the purposes of ICJ and the ICC's role on the one hand, and the basic postulates of the utopian horizon, on the other, is studied (section 4). Subsequently, both the criticism of the ineffectiveness of ICJ and the ICC, as well as the gradual decline of their political support in international society, are analyzed (section 5). Based on this, the proposal of the principle of hope and militant optimism is addressed in the face of the more than difficult situation currently faced by ICJ and the ICC (section 6). Finally, section 7 summarizes the conclusions reached.

2. THE UTOPIAN HORIZON

In his exhaustive and profuse work, Bloch proposes thinking about the theme of hope as a principle (Caram, 2017: 132), as well as the reconceptualization of the idea of utopia (Bloch, 2017; Martínez Andrade & Meneses, 2012). For Bloch (2004: 506), hope emerges as the content of the utopian function so that, in contrast to the passive and distressing space of fear, it unfolds as an opening to the world, with all that this implies in terms of humanity and the presence of the "other" (Olasolo, Pinto, Santamaría & Zúñiga, 2019: 95-142).

Being thrown into the world therefore implies a commitment to shared existence (Bloch, 2004: 27). Conscious and concrete hope overcomes the paralysis that fear tries to instill, either explicitly or through its ideological channels that go more unnoticed. From a cultural perspective, the actions of the individual are directed towards a committed transformation with the goal of building and protecting human dignity. This intentionality of the subject, which becomes the authentic driving force of his or her actions, must necessarily be deliberate (Bloch, 2004: 192-203).

The way in which a story is structured, the evidence chosen, and data collected is of great relevance to understanding the world and what one knows about it as something socially constructed (McGlinchey, Walters & Scheinpflug, 2017: 36). Therefore, for Bloch (2004: 150), to speak about the past necessarily implies work that is carried out from the present (Bloch, 2004: 150). Consequently, the way in which a story is built and delimited has a constructive force for thinking about a certain reality. This means that, when one is faced with a piece of information, one necessarily thinks about it in its context.

The same happens with the future that is maintained by the force of utopia (Claussen, 2008: 272; Gimbernat, 1983). In this sense, Bloch proposes a reconceptualization of this term from a concrete and optimistic perspective. As a result, for Bloch, utopia has to be understood as a vision of the world in process that follows a trend of possible but not guaranteed humanization, which therefore requires human action (more particularly, militant optimism) (Krotz, 2011: 56).

Bloch understands that an updated critique of the real social conditions of his time is necessary, as well as a path that allows us to perceive and bear fruit of the cultural surplus (Bloch, 2004: 192-203). If thinking is transcending (Bloch, 2004: 26-29), this act must bring us to a productive hope of human history, where the dreamlike can be grasped from consciousness and no longer as anguish and pessimism (these latter aspects are typical of an era marked by the rupture of ideas and the degradation of values) (Sánchez Sánchez, 2009: 400). Bloch's perspective is thus presented as an anthropological philosophy to which the human act must adapt itself. From there, it is necessary to think about the way in which human products and constructs occupy space in culture.

Based on the foregoing, it can be asserted that it is possible to look towards the future through a lens of hope as a committed act (Mondragón González, 2005: 55-75). Furthermore, as Bloch (2004: 194) points out, only the socially achieved utopia together with the technically achieved utopia can give precision to that pre-appearance in art, and in religion, which is not illusion, much less superstition.

This all presupposes an active individual, who is, at the same time, a conscious product and also a producer of history, and who participates in a process that seeks the consummation of freedom (a social symptom by which the individual, subject to the material determinations of culture, has achieved that, because he has become aware of his personal prominence). This implies a recognition of utopia, the understanding of its content and the anticipation of its achievement.

Reading Bloch allows us to surmount a rationalist view that is incapable of understanding and explaining the complexity of culture. The key to the proposed reading, is that Bloch allows us to think that the institutions that make up society require other discourses in order to be analyzed. At the same time, the proposal of an individual situated and conditioned by his own time requires that his origin cannot be ignored, as such a proposal emerges from a utopian principle that must be considered for the sake of a free community.

One can observe that the content of Bloch's concept of "utopia" is not comparable with the use that other philosophical perspectives have made of this concept. In this way, Bloch tries to separate himself from the pejorative character attributed to the category of "utopian" when it is considered as only having a political aspect. Therefore, disposed towards attributing to it a broader perspective, Bloch highlights not only the static nature that the concept implies, but also its functionality (Bloch, 2004: 116). The concept does not have an unambiguous meaning, but rather maintains a close link with philosophy, which implies a new meaning of utopia (Neusüss, 1970: 18). As a consequence, utopia is now presented from an approach that is multidirectional and multiform and which is difficult to reduce to the merely political and dreamlike. As a result, it is thought of as a space marked by the eschatological, which is capable of being concretized. This position allows for the opening and deployment of the utopian dimension with broader scope, which differentiates it and places it in an enhanced space (Bloch, 2004: 116).

Bloch highlights via utopia an experimental characteristic, mediated by the spiritual imprint of hope, which is presented as something realizable in multiple forms of culture. For this, it is crucial that its philosophical study overcomes the conditions of imaginary contingency so as to specify real conditions of application (Bloch, 2004: 167). In this way, by participating in an essential anthropology in constant fulfillment (which has nothing to do with automatic repetition), the conscious future allows the exercise of a real and possible hope.

3. THE TREATMENT OF JUSTICE FROM THE PERSPECTIVE OF ANALYSIS OF THE UTOPIAN HORIZON

Applying the conceptual tools offered by the epistemological foundations of the utopian horizon, Bloch analyses the concept of justice in order to find a better explanation of the foundation of justice and the complexity involved in the legal universe. Having this objective, Bloch wrote his work Natural Law and Human Dignity in 1961, in which, overcoming an apparent (according to its title) iusphilosophical approach to law, commonly attributed to the most conservative views (Vedda, 2017: 9), he carries out a fierce critique of the social system.

To do so, Bloch uses different areas of knowledge, including natural law, to which he resorts: (a) to identify the components of the critique of existing law; and in this way; (b) to be able to address the question of whether human dignity considers need and misery as a situation that is incompatible with it (Bloch, 2004: 79).

The turn, however, is not regressive, but rather proposes a theoretical update from which to conceive traditional natural law. This proposal is seductive for several reasons. Firstly, because it reaffirms the possibility of interpretations that are presumed to be antagonistic to each other, such as natural law and Marxist criticism (Hervada Xiberta, 1984: 390). Secondly, because it is not limited to a theoretical exposition of the forms of development but proposes new readings and conceptual ideas. Thirdly, because it understands that law is necessarily impregnated with what it calls “legal feeling”, in which

justice occupies a particularly relevant place; an idea that it expresses in the following way: what is just? It is a question that cannot be avoided. It is a question that sharpens the ear, that scrutinizes and judges (Bloch, 1980: IX).

This question has a double intention. On the one hand, it acknowledges that "positive law is not enough" (Bloch, 1980: X), and on the other, it challenges those who maintain a negative attitude towards natural law. Aware of the criticisms (based upon the alleged lack of concreteness and the static nature of natural law) and disagreements, Bloch understands that the questioning of what is "just" frames the decisive themes of humanism (a theme that is central to all his work).

This leads us to his concern for human dignity, the key point from which he amalgamates Marxism and natural law by underlining that that neither is human dignity possible without economic liberation, nor is it possible without the great question of human rights (Bloch, 1980: XI). Consequently, so long as natural law is considered a necessary part of the unremitting transformations of human beings, this mobility allows a deployment of law in a society without classes.

For Bloch, freedom, the diversity of equality, and the peace of fraternity are postulates that must shape human dignity. Therefore, from his dual critical-utopian proposal, he develops a theory of law capable of granting full emancipation and fulfillment to the human being, which leads to the progress of human rights.

This concern does not arise by accident because, as a promoter of utopia, Bloch sees law as a tool of conservation, but also of change. This contradiction allows us to think of the role of legal norms as forms of domination legitimized by the power of the State through its monopoly; but at the same time, it presents law as a promoter of the ideal of justice by the dominated and the defeated in history.

It is from this contradiction that Danilo Zolo analyses the struggles, tensions and forces surrounding the dispute over legal space. For Zolo, the recognition and protection of "collective rights" is an essential condition for the affirmation of individual rights, but at the same time, the former are in tension with the latter, as shown by: (a) the protection of the identity and political autonomy of linguistic

groups and cultural minorities and the weakest peoples (the "stateless nations"); (b) the battle against the economic-social discrimination of entire categories of immigrant workers in national societies; (c) the fight against poverty and epidemic diseases in vast continental areas; and (d) the liberation of countries economically backward because of international debt (Zolo, 2007: 96).

These considerations account for the complexity involved in the legal universe, as a space in which power relations are played out that attempt to render invisible the historical conditions that form the processes of subjugation. Therefore, for a thorough analysis of the legal space, its symbolic dimension must be considered, according to which the juridical forms are part of culture as a social practice: they create fictional worlds, legitimize and delegitimize, form realities, order, prohibit, permit, deny and accept.

In this context, law has a fundamental role for Bloch in that it could allow the possibility of final access to a justice that is absolute, totalizing and all-encompassing. Hence, rejecting a passive and immobile idea of "the legal", he brings together law and the idea of social utopia, in that the legal space is propounded as a space for the achievement of liberation and the reaffirmation of human dignity (Bloch, 1980: 209).

This link between law on the one hand, and liberation and reaffirmation of human dignity on the other, seeks its identification with the absolute idea of justice. Thus, Bloch offers interesting analytical tools to be able to rethink the law and the conception of justice, on the basis of which it is also possible to rediscover the role that corresponds to those who apply the law, including international tribunals such as the ICC (Caram, 2017: 39-64; Mejía & Hincapié, 2019a: 47 et. seq. & 2019b: 95 et. seq.).

In this way, in the face of a panorama marked by the injustice of individuals towards individuals, Bloch offers the following answer to the question of how to reestablish the "upright step" (Bloch, 1980: X): political art in its entirety consists of the coupling of fundamental social situations in the harmonious totality of justice (Bloch, 2004: 31), whose ontological foundation emerges from human dignity.

Consequently, it is precisely in the concept of human dignity that justice finds the justification for its application. This, without a doubt, represents an unfinished formal basis, but it also functions as a guide

(utopian perspective) to think about the way in which institutions conduct their actions around a guiding idea of justice (utopians ultimately try to build a better world, and once again, from the depths of their hearts, they hope to activate wills in that direction) (Bloch, 2004: 146). This is why thinking about justice requires in any case the knowledge of its opposite, the difference which exists and whose exercise, in Socratic terms cannot be ignored (Bloch, 2004: 231).

In short, for Bloch's Marxist-humanist philosophy (Olasolo, 2014: 13), justice maintains for itself a transcendental character, insofar as it transcends mere historical conjuncture and is proposed as a guiding principle of society. In this way, the ubiquitous and timeless perspective is brought into the present from utopia.

Accordingly, justice does not consist only of a recounting of past and existing inequalities. It also consists of a hopeful demand to not repeat certain actions, which infects the critical spirit with optimism. This is because human beings, as producers of cultural accomplishments, must form and sustain these ideals in the institutions that they develop. Its normative bodies, ethical principles and historical paths must therefore be thought of so as to promote human relations recovering a community dimension with a broad sense of justice.

Bloch therefore assumes a value perspective of justice, which not only responds to the formal enforceability of norms, but also functions as a guide to the complex scheme of ideas, imaginaries, principles, rules and guidelines of culture. With this, he presents us with a justice that aims to form and achieve an indubitable axiological hermeticism, so that each human being must recognize others, and recognize him/herself, as the protagonist and architect of a space directed towards the reaffirmation of human dignity.

4. THE CLOSE RELATIONSHIP BETWEEN THE GOALS OF INTERNATIONAL CRIMINAL JUSTICE AND THE ROLE OF THE INTERNATIONAL CRIMINAL COURT, AND THE POSTULATES OF THE UTOPIAN HORIZON

If, as seen above, the principle of hope (which, according to Bloch, emerges as the content of the utopian function) materializes in the

action of the hopeful individual towards a liberating social transformation that reaffirms human dignity (Bloch, 2004: 192-203), a high degree of satisfaction of ICJ purposes and the effective fulfillment of the ICC's role could contribute significantly to the achievement of this social utopia.

What is distinctive about ICJ norms is the dual individual and collective nature of the protected social values. On the one hand, they protect individual social values such as life, physical integrity, sexual autonomy, and freedom. On the other hand, as expressly established in paragraph 3 of the preamble of the ICC Statute in relation to the crimes within ICC jurisdiction (genocide, crimes against humanity, war crimes and aggression), ICJ norms also protect collective social values, such as international peace and security (Ambos, 2013: 55; Luban, 2011: 21; Orakhelashvili, 2006: 46-47; Satzger, 2012: 181; Werle, 2010: 82-83, 468-469) and the preservation of human groups (whether ethnic, racial, national and religious in the case of genocide, or the civilian population in crimes against humanity and war crimes) (Olasolo, 2017: 52-55).

Consequently, given the carcinogenic contamination of political action that underlies the commission of the crimes foreseen in the ICC Statute (Osiel, 2000; Luban, 2011), the materialization of a utopian future requires the effective application of ICJ through institutions such as the ICC. This is the way to overcome state sovereignty in the face of situations of deep crisis of state institutions in charge of regulating sociopolitical interaction, with the goals of: (a) ending impunity; and (b) imposing a punishment proportionate to the seriousness of their conduct to those who are responsible for the most serious attacks against the fundamental values on which international society is built (Cassese, 2003).

In light of the foregoing, the preamble of the ICC Statute states expressly that the ICC was established as a result of the States Parties recognition of: (a) the fact that "millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity"; (b) "such grave crimes threaten the peace, security and well-being of the world"; (c) as "the most serious crimes of concern to the international community as a whole", they "must not go unpunished"; and (d) it is therefore necessary "to put

an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes"

Accordingly, in order to achieve these ends, "and for the sake of present and future generations", States Parties have assumed the commitment to: (a) take measures at the national level and intensify international cooperation to ensure that those responsible are effectively brought to justice; and (b) "establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole" being complementary to national criminal jurisdictions, the ICC will ensure that ICJ is enforced in a lasting manner.

In addition to this, ICJ has other specific goals that are also an integral part of the ICC's role:

1. Punishment through retribution for those most responsible for international crimes seeks to correct, through the elimination of impunity, the imbalance generated in international society (Blewitt, 2007; Gaynor & Harmon, 2007; Mettraux, 2005, Schabas, 2006; Swart, 2008). In this regard, the Appeals Chamber (AC) of the International Criminal Tribunal for the former Yugoslavia (ICTY) has stressed in the Aleksovski case (24/03/2000: para. 185) that retribution should not be understood as the fulfilment of a desire for revenge, but as an appropriate way of expressing the indignation of international society at these crimes. Likewise, in the Delalic et. al. case (20/02/2001: 756), the ICTY has stated that sentencing seeks to restore confidence in the integrity of the administration of justice by imposing sentences that reflect the totality of the negative value of the conduct engaged in.

2. Closely related to the foregoing, positive general prevention seeks to generate universal legal awareness among those who lead state institutions and organizations with sufficient capacity to commit international crimes, by reaffirming ICJ norms, as well as the ICC Statute, and the social values they protect (Ambos, 2013; Cryer, 2005; Damaska, 2006; Duff, 1993 & 2008; Olasolo, 2016; Stahn, 2012; Zedner, 2004). This legal and moral framework presupposes a system of prevention that strengthens the constant struggle for the protection

of human dignity proposed by the utopian horizon. Furthermore, as Reuss (2012) points out, the reinforcement of the fundamental values protected by ICJ can generate courage among human beings to act in accordance with their convictions, refuse to become involved in the commission of systemic crimes, and resist those state institutions that violate fundamental rights.

3. General and special negative prevention seeks to prevent new international crimes by deterring (discouraging) those who might commit similar crimes in the future (including those who have committed the same crimes in the past and might reoffend in the future), by means of adopting the necessary measures to put an end to the impunity of their perpetrators, declaring their individual international responsibility and imposing on them a criminal sanction proportional to their conduct (ICC, Katanga, 23/05/2014: 38; Bemba, 21/03/2016: 10, 11; Al Mahdi, 27/09/2016: 66, 67; Ntaganda, 8/07/2019: 9, 10; Olasolo, 2016).

In this regard, it is worth highlighting that, taking into account Resolution 1534 (2004) of the United Nations Security Council (UNSC) in relation to the ICTY and the International Criminal Tribunal for Rwanda (ICTR), and considering that the ICC Office of the Prosecutor (ICC OTP, 2003; 2007; 2010; 2013a; 2016a; 2016b) has repeatedly stated that its activities must focus on those "most responsible" for the international crimes under ICC jurisdiction, negative general prevention particularly seeks the following: to prevent leaders of state institutions and organizations having the capacity to carry out campaigns of systematic or widespread violence from committing international crimes, by demonstrating as a consequence the high cost that such commission has had for other leaders convicted in the past (Tadros, 2011; Akhavan, 2001; Harhoff, 2008).

4. From the utopian horizon perspective, doing justice to the victims is closely related to the promotion of a continuous process of action directed towards the achievement of an "absolute" justice that reaffirms human dignity. For some authors, international criminal proceedings can generate in victims the feeling that justice has been done by seeing their aggressors sitting in the dock and sentenced to penalties proportional to the gravity of the harm they suffered (Cryer et. al., 2014). In this sense, the ICTY has stated in the Nikolic case

(02/12/2003) that, to the extent that the sentences reflect the victims' requests for justice, they can become a measure of reparation.

Nevertheless, it is no less true that, as Harhoff (2008) stresses, the extent to which criminal proceedings help to restore the dignity of victims depends particularly on the extent of their participation in the proceedings. Thus, the participation of victims as witnesses in criminal proceedings against their aggressors can only be considered a first step in the right direction.

In this sense, unlike the ICTY and the ICTR, which have not provided an adequate treatment of victims and witnesses (Harhoff, 2008), the ICC Statute contains a number of provisions (in particular, arts. 15(3), 19(3), 57(3)(e), 68(3) and 75(1)) which: (a) provide for the participation of victims in ICC criminal and reparation proceedings; and (b) empower the ICC itself to order the seizure of the property of the convicted person (even on a precautionary basis) in order to obtain the necessary resources to restore, compensate and rehabilitate victims. Thus, as Vega (2006), Dwertmann (2010) and Pena (2013) point out, doing justice to victims through fair reparation constitutes a central element of the ICC's role, through which it seeks to reaffirm their dignity, restore their effective enjoyment of their rights and make possible their full reintegration into life in society. This promotes social harmony as a *sine qua non* requirement for the realization of the social utopia proposed by the utopian horizon.

5. The effective participation of victims in the proceedings is in its turn related to the establishment of a historical narrative of what happened that can withstand the passage of time, which, for authors such as Cassese (1998), Drumbl, (2007) and Osiel (1997), constitutes an important ICJ goal and a relevant element of the role of the ICC. Thus, for Boon, Hafner, Huston and Rübesame (1999), O'Connor (1999) and Scharf (1999), international criminal proceedings are an ideal tool for historical reconstruction because the evidence presented is subject to the scrutiny of international jurisdictional bodies within the framework of an adversarial process. They have all guarantees, in which strict rules on the admission of evidence in judicial proceedings, the rights of the defense, the principle of presumption of innocence and the evidentiary standard "beyond all reasonable doubt" are applied. Likewise, for Cryer et. al. (2014: 32) they play

a very important role in combating denialism because they require the presentation of evidence on the patterns of violence or the situation of armed conflict in which the charged international crimes occurred in order to prove their contextual elements[1]. Moreover, if necessary, trials could be restructured to facilitate the creation of a historical narrative of what happened that would be useful to society in the post-conflict period (Osiel, 1997).

Furthermore, it is worth remembering that the Revised Strategy of the Court on Victims, approved by the ICC Assembly of States Parties (ICC ASP) at its eleventh session held in November 2012, stresses that the participation of victims throughout the different stages of the ICC proceedings must allow them, among other things, to contribute to the fulfillment of the ICC's role in relation to the reconstruction of the historical narrative of the situation under analysis and the clarification of the truth. Consequently, although ICC case law has to date not yet exhaustively addressed the issues relating to the participation of victims in the historical reconstruction of the events and their right to the clarification of the truth, this does not mean that they will not be addressed in a more comprehensive manner in the future, since the rights of victims have to be gradually developed by ICC case law.

In this way, as Olasolo, Sánchez Sarmiento and Varón Mejía (2020) point out, the establishment through international criminal proceedings of a historical narrative that stands the test of time offers States the correct tools to strengthen justice and implement it to prevent repetition, while promoting the extension of ICJ over time, both for victims who have already been harmed, and for those who are sought to be avoided in the future (Cassese, 1998; Drumbl, 2007; Osiel, 1997). This aspect also has a direct relationship with the utopian horizon because, for the latter, the way of structuring the story, through a judgement that duly collects and weighs the evidence and integrates victims' perspectives has significant relevance, so that the

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1 See in this regard: the ICTY trial judgment in the Krstic case (2001), which seek to create a historical record in the face of attempts to deny the Srebrenica massacre, and the characterization of the genocide in Rwanda by the ICTR (Drumbl, 2007).

social construction of reality (a central premise of constructivism) strengthens through human action (militant optimism) a progressive humanization.

6. Finally, and closely related to the safeguarding of international peace and security, the promotion of post-conflict reconciliation is also considered by some authors to be a goal of ICJ and an integral part of the ICC's role, because it is instrumental in the path towards liberation and reaffirmation of human dignity, which, for the utopian horizon, are the main components of justice. Thus, for Cassese (1998), Burke-White (2005) and Bensouda (2008), the provision of a certain sense of justice through criminal proceedings for international crimes contributes to establishing the preconditions for a stable and lasting peace. Harmon (2009) and Ohlin (2009) share this view and underline that the existence of a consolidated belief that impunity tends to inspire the commission of international crimes in the medium and long term[2], thus hindering peace processes.

5. QUESTIONING AND GRADUAL DECLINE OF POLITICAL SUPPORT IN INTERNATIONAL SOCIETY FOR THE ENFORCEMENT MECHANISMS OF INTERNATIONAL CRIMINAL JUSTICE AND FOR THE INTERNATIONAL CRIMINAL COURT

Once we have established that attaining a high degree of achievement of ICJ goals and an effective fulfilment of the ICC's role can contribute significantly to the liberating social transformation and

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[2] The UNSC has certainly given a boost to the connection between justice and peace by establishing the ICTY and the ICTR with the aim of promoting reconciliation and a return to peace in the former Yugoslavia and Rwanda. See UNSC Res. 827 (1993) and Res. 955 (1994). This interconnection has been reinforced in the following ICTY cases: (a) Nikolic (2003: para. 60); and (b) 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, together with the acceptance of responsibility for the crimes committed, promote reconciliation.

the reaffirmation of human dignity proposed by the utopian horizon, the question arises as to the capacity of ICJ enforcement mechanisms, and in particular of the ICC, to achieve these goals and fulfill their role effectively.

When answering this question, the first thing that draws attention is the great concern shown by the doctrine on whether ICJ enforcement mechanisms and the ICC have the suitability, the capacity and are equipped with the necessary tools to be able to achieve such goals. Moreover, there are numerous analyses that reveal the gradual decline for more than a decade of the political support provided to ICJ and the ICC by different actors in international society.

5.1. Questions regarding the goals of international criminal justice and the role of the International Criminal Court

There are a number of questions raised by doctrine regarding ICJ goals and the ICC's role. Firstly, from the field of transitional justice, authors such as Branch (2011: 122-134), D'Amato (1994), Guembe and Olea (2006), Moreno Ocampo (2005) and Ward (2004) have questioned whether the investigation, prosecution, and punishment by the ICC of those most responsible for international crimes is an appropriate instrument for promoting peace. Furthermore, based on the impact of the preliminary examinations of the ICC on the peace process carried out in recent years in Colombia and Uganda, they have underlined the difficulties in successfully concluding negotiations between armed actors who have not been militarily defeated, if what awaits their leaders is criminal punishment for the international crimes they have committed through their subordinates.

Secondly, doctrine has raised the question whether ICJ enforcement mechanisms have available the necessary tools to punish those most responsible for international crimes, so as to put an end to their impunity (Roth-Arriaza, 1995; Malamud-Goti, 1990). The actions of the ICC since the entry into force of the ICC Statute in 2002 seem to corroborate this position because, in its more than twenty years of operation, the ICC has barely been able to complete seven trials

against leaders of non-state armed groups at local or regional levels[3]. Furthermore, the lack of convictions against the highest state representatives who use their structures to commit international crimes is particularly striking. For many authors, this is due to 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 being investigated and prosecuted by the ICC (Ambos, 2013; Farer, 2000; Fisher, 2012; Francis, 2010; Golash, 2010; Mullins & Rothe, 2010; Stahn, 2012).

Thirdly, part of the doctrine is suspicious of the emphasis that ICJ and the ICC appear to have placed on the most responsible persons and the definition of positive general prevention based upon them. Their reluctance is based on: (a) the vulnerability of international criminal tribunals and hybrid courts to political instrumentalization by the most influential States in international society, the risk of which is increased when ICJ focuses its attention on a relatively small group of leaders (Zolo, 2007); and (b) the endemic dependence that these tribunals appear to have on state cooperation in order to fulfill their role. This is even more delicate when they have largely been established in a historical period (1990-2010) of the primacy of a single superpower (the US) and its closest allies (Del Ponte, 2009; Margalit, 2010; Peskin, 2008: 170-186; Vilmer, 2011).

Fourthly, there are a number of authors who are skeptical about the level of general and special negative prevention that may result from the action of ICJ enforcement mechanisms and of the ICC itself. Among the many reasons offered in this regard, the following can be highlighted: (a) international crimes are normally manifestations of macro-criminality, which, as the ICTY has underlined in the Kunarac et. al. case (12/06/2012: 840, 843), reduces the preventive effectiveness of ICJ as such crimes are a by-product of the historical context and of the characteristics of those who plan, order and commit them; and (b) negative general prevention is ineffective against those most responsible who act from within state institutions because they are protected by "an organic façade" that inevitably provokes the failure of prevention and rehabilitation measures (the effectiveness of nega-

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3 This chapter was finalized on November 2023.

tive general prevention does not depend so much in these cases on ICJ enforcement, but on the necessary institutional reform that must take place) (Roth-Arriaza, 1995; Malamud-Goti, 1990).

Furthermore, another important part of the doctrine rejects outright any preventive effect in ICJ enforcement and in the actions of the ICC (Farer, 2000; Fisher, 2012; Golash, 2010; Mullins & Rothe, 2010; Stahn, 2012). For Tantos (2013) and Francis (2010), this is because, for them to have such an effect, the ICC and the other international criminal tribunals and hybrid courts that enforce ICJ would have to act quickly and effectively in bringing those most responsible to justice.

Fifthly, authors such as O'Connor (1999) question the capacity of international criminal tribunals and hybrid courts, including the ICC itself, to do justice to victims because their emphasis on those most responsible makes it unlikely that many of the victims will have the opportunity to see the prosecution and conviction of their aggressors. Furthermore, as Stover (2004) points out, in the few cases in which victims have the opportunity to testify in international proceedings, their experiences are not uniform, because while for some it has been helpful, for others the experience has certainly been negative. Likewise, with regard to the right of victims to participate in criminal proceedings beyond giving testimony, this is only expressly recognized in the ICC Statute (it does not therefore extend to other international criminal tribunals), and its content is not comparable to the procedural position of the ICC OTP and the Defense, so the latter are considered to be "parties" in the proceedings, as opposed to the victims who are considered as mere "participants" (Human Rights Watch, 2017).

Moreover, in terms of reparations (another of the characteristic elements of the ICC Statute), both direct reparations, whether individual or collective (as a result of a conviction), and the assistance projects of the Trust Fund for Victims (TFV), are significantly affected in their implementation by the lack of resources to finance them. Moreover, as Balta, Bax and Letschert (2019) point out based on the Lubanga, Katanga and Al Mahdi cases, it takes several years from when the convictions become final, until the reparation plans proposed by the TFV are approved and begin to be implemented.

Sixthly, Alvarez (1998), Minow (1998), and Teitel (2000) stress that international criminal proceedings are not suited to clarifying all the victimizing facts, but only those that are necessary to be proved in order to obtain a conviction. This is why it is difficult to address the history of a certain period of time without going beyond its jurisdictional limits[4]. This is corroborated by the practice of the ICC because, with the exception of the Bemba and Ntaganda cases, the acts of violence charged by the Prosecutor, confirmed by the Pre-Trial Chambers and part of trial proceedings in the Al Mahdi, Katanga, Lubanga, Ngudjolo, and Ongwen cases, comprise only a small fraction of the international crimes provided for in the ICC Statute that have been committed by their respective organized armed groups.

Furthermore, the fact that all seven cases mentioned involve leaders of groups that either clashed with state forces (Al-Mahdi and Ongwen) or came into conflict with other organized armed groups (Bemba, Katanga, Lubanga, Ngudjolo and Ntaganda) is indicative of the difficulties the ICC has in effectively investigating and prosecuting those who act within state institutions while remaining in power. Finally, based on the arguments of Judge Röling in his dissenting opinion on the judgment of the International Military Tribunal for the Far East (IMTFE) (Tokyo Tribunal), where he stated that history had sometimes been distorted for political reasons (Röling, 1973: 600; Bloxham, 2001; Minears, 1971), authors such as Koskenniemi (2002) and Simpson (2004) argue that it is not advisable for international criminal tribunals to become a kind of arbitrator in political debates on the validity of different historical narratives.

Finally, the promotion of social reconciliation is also rejected as an ICJ goal and as part of the ICC's role by authors such as Hayner (2001), who claim that there is no empirical evidence that fully demonstrates the intuition outlined by those authors who defend it.

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[4] The material, temporal and territorial scope of the jurisdiction of international criminal tribunals means, in any case, that the historical account they present in their judgments can never be complete, even if evidence relating to events that occurred outside the temporal or territorial framework over which they have jurisdiction are admitted. See: ICTR, Nahimana, Barayagwiza & Ngeze, 2003: paras. 100-104.

Likewise, there are a number of other authors who, as seen above, claim that criminal investigations, prosecutions and sanctions only encourage the parties to continue with the conflict until one of them is defeated (Branch, 2011: 122-134; D'Amato, 1994; Guembe & Olea, 2006; Moreno Ocampo, 2005; Ward, 2004). Moreover, certain national societies, such as the cases of Spain, Northern Ireland and Mozambique, leave the impression of having overcome the violence of the past without criminal proceedings.

In addition, while the practice of the ICTY has not been consistent in considering social reconciliation as an objective of international humanitarian law (IHL) (Drumbl, 2007), the practice of the ICC has not even been able to promote in a demonstrable way processes of social reconciliation between victims and perpetrators in the only situation (Ituri district in the Democratic Republic of the Congo (DRC)) in respect of which the ICC has so far issued convictions against leaders (Thomas Lubanga, Bosco Ntaganda and Germain Katanga) of several of the parties to the conflict that took place there between July 2002 and the end of 2003. The fact that the reparation programs approved in the Lubanga and Katanga cases have not been able to be fully implemented after more than fifteen years since the beginning of their proceedings and almost a decade after the convictions became final, has also not favored the possible reconciliatory impact of the ICC actions.

5.2. The gradual decline of political support for the enforcement mechanisms of international criminal justice and the International Criminal Court

Following the remarkable development and initial impetus given to ICJ in the period between 1990 and 2010, we have witnessed for more than a decade the gradual decline of political support offered by various actors in international society to ICJ enforcement mechanisms and to the ICC itself (Olasolo, 2017: 156-157).

Thus, since the creation of the ICTY (1993) and the ICTR (1994), the UNSC has created no other international criminal tribunal. On the contrary, what the UNSC has done is: (a) to decree the termina-

tion of their work (ICTR, President, 15/11/2015; ICTY, President, 16/11/2015); and (b) to establish, through Resolution 1966 (2010), the International Residual Mechanism for Criminal Tribunals (IRMCT), which, based in Arusha (Tanzania) and The Hague (Netherlands), has assumed their pending duties.

Similarly, as regards hybrid courts, the pace of their creation has slowed since 2008, so that after the establishment of the Special Tribunal for Lebanon (STL) (2007), over the following decade only the Extraordinary African Chambers (EAC) (2012) and the Kosovo Specialist Chambers (KSC) (2016) have been created.

Regarding proceedings before national jurisdictions, it should be remembered that, even in those national jurisdictions where a greater number of proceedings for international crimes have been carried out, charges have rarely been brought against more than 1% of those potentially responsible (Galain & Olasolo, 2018: 99 et. seq.). Moreover, most of the complaints filed against the main perpetrators under the principle of universal jurisdiction have been rejected (Panakova, 2011: 49 et. seq.; Pérez Cepeda 2015: 10 et. seq.). Consequently, as a general rule, at least 99% of the alleged perpetrators of international crimes have remained with impunity; a situation that, from a quantitative point of view, has not been significantly changed by the actions brought by international criminal tribunals and hybrid courts (between them, barely 300 cases have been completed in more than two decades) (Galain & Olasolo, 2018: 80).

Finally, with regard to the ICC, we must commence by emphasizing that its actions have always presented a significant challenge since its entry into force on July 1st, 2002, because, although it is true that two thirds of the States that make up international society are parties to the ICC Statute, it is equally true that non-party States represent 70% of the territory and population of the world. Furthermore, three of the five permanent members of the UNSC (China, Russian and the United States (US/USA)) and seven of the nine nuclear powers are non-party States (China, India, Israel, North Korea, Pakistan, Russia and the US). Similarly, important regional powers such as Egypt, Indonesia, Iran and Turkey, to give just a few examples, are also non-party States.

Furthermore, the security and defense policies implemented by the Bush administration in the US following the attacks of 11 September 2001 (including the so-called "war on terror", the opening of the Guantanamo detention center and the new detention and interrogation program launched by the CIA on a global scale from 2002, the methods of which were considered to constitute torture by the US Senate Intelligence Committee itself in 2014), led, almost simultaneously to the entry into force of the ICC Statute, to:

1. The withdrawal of signatures from the ICC Statute by the US and Israel (Cacho, 2009).

2. The passage by the US Congress of the American Service Members Protection Act, which authorized the US President to resort, if necessary, to armed force in order to "rescue" any American national who might eventually be handed over to the ICC for prosecution in The Hague (an authorization that remains in force after more than two decades) (Murphy, 2002: 975 et. seq.) (Cacho, 2009).

3. The conditioning of economic aid from the US to a large part of the States Parties to the ICC Statute on the signing of bilateral treaties containing a requirement of the prior consent of the US before the surrender to the ICC of US officials or nationals (in total more than one hundred bilateral treaties of this nature are in force); and

4. The adoption (as a result of the US threat not to extend any of the then existing UN peacekeeping missions) of UNSC Resolution 1422 (2002), renewed the following year by Resolution 1487 (2003), which, according to art. 16 of the ICC Statute, expressly requests that:

> […] the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.

The difficult circumstances surrounding the first years of ICC activity have been further complicated since 2010 as a result of a series of additional adverse circumstances, among which, as pointed out by Olasolo (2017: 138-140), the following are worth highlighting, among others:

1. The drastic reduction in the number of States that become parties to the ICC Statute on an annual basis, and the withdrawal from it of the first States (Burundi (2017) and the Philippines (2019)).

2. The palpable loss of support for the ICC from a number of African countries because all investigations opened until January 2016, and all arrest or summons orders issued until then, were related to the African continent, and some of them were directed against those who were, or had been, the highest representatives of several African States (Omar al Bashir in Sudan, Muammar and Saif al Islam Gaddafi in Libya, Urumu Kenyatta and William Ruto in Kenya and Laurent Gbabgo in *Côte d'Ivoire*); this led several States parties to fail to comply with their obligations to cooperate with the ICC (Chad, Djibouti, Kenya, Malawi and South Africa) and to publicly declare their intention (only consummated in the case of Burundi) to withdraw from the ICC Statute (Burundi, Gambia and South Africa).

3. The increased reluctance towards the ICC by several Latin American countries as a result of communications received and/or preliminary examinations carried out in relation to alleged international crimes committed within their respective territories.

4. The intensification of opposition, even reaching open hostility, by several non-party States that occupy positions of pre-eminence in international society (such as the US, Russia and Israel), as a consequence of the preliminary examinations and/or investigations opened by the ICC OTP relating to the situations in Afghanistan, Georgia, Palestine and Ukraine, and the arrest warrant issued against current Russian President, Vladimir Putin (2023). This has led Russia to, inter alia: (a) withdraw its signature from the ICC Statute (2016); (b) approve a travel ban against current ICC Prosecutor, Kharim Khan (2023); and (c) issue arrest warrants against three ICC judges and the ICC Prosecutor (2023). Moreover, this has also led to the approval by the US of travel restrictions and economic sanctions against senior ICC officials (2019 and 2020).

5. The loss of influence in international society of the European Union (to which, in addition to the ICC Host State, three of its four main financial contributors belong), as a consequence of the departure of the United Kingdom following Brexit. It has also suffered

particularly from the economic crisis of 2008 and the COVID-19 pandemic of 2020, which has caused it to retreat in its global geostrategic positioning in the face of the development of China in the global economy and the political-military resurgence of Russia in the context of the conflicts in Ukraine, Syria and Libya[5].

Given this situation, it can only be stated that both ICJ in general and the ICC in particular are at a real crossroads (Olasolo, 2017: 159-163), which is further aggravated by the growing support for proposals to use ICJ enforcement mechanisms (whose effectiveness is very limited) to prosecute transnational crimes (given the proven lack of efficacy of the criminal prosecution of these crimes) (Smith, 2008-2009: 1111 et. seq.; Paulose, 2013: 66 et. seq.). The Malabo Protocol (2014), which creates a Specialized Chamber in the African Court of Justice and Human Rights to prosecute a range of transnational crimes (including corruption, money laundering, human trafficking, drug trafficking, trafficking in dangerous substances or the illicit exploitation of natural resources), in addition to genocide, crimes against humanity and war crimes, provides a good example of this trend.

6. THE PROPOSAL OF A UTOPIAN HORIZON IN THE FACE OF QUESTIONS AND GRADUAL LOSS OF POLITICAL SUPPORT FOR THE ENFORCEMENT MECHANISMS OF INTERNATIONAL CRIMINAL JUSTICE AND FOR THE INTERNATIONAL CRIMINAL COURT

From the analysis carried out in the last two sections we can draw a double conclusion. On the one hand, section 4 has shown that ICJ goals and the ICC's role are not inconsistent with the achievement of the social utopia proposed by the utopian horizon. On the contrary, the hopeful action towards a liberating social transformation that reaffirms human dignity (Bloch, 2004: 192-203) is certainly found in

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5 China and Russia are also part of the Shanghai Cooperation Organization, created in 2001 with several other mineral-rich States of Central Asia, and in which India, Iran and Pakistan have observer status. See: Asia Regional Integration Center (2015).

their genetic code. In fact, it was no coincidence that the vast majority of delegates at the Rome Diplomatic Conference burst into thunderous applause when the creation of a permanent international criminal court was approved on July 17th, 1998, after the 126 years of vicissitudes since the original proposal by Gustave Moynier in 1872 (Lee, 1999: 24 et. seq.; Yañez-Barnuevo, 2001: 42).

In this way, a Diplomatic Conference was concluded that had begun a month earlier with a new president of the Committee of the Whole appointed just two days before, and to which a draft of the ICC Statute containing around 1.700 points of divergence was presented for debate by more than 2.000 delegates from 161 States, assisted by representatives of 20 intergovernmental organizations, 14 specialized agencies of the UN and a coalition of more than 200 non-governmental organizations. Moreover, the Diplomatic Missions in New York had barely had six weeks to work on the draft of the ICC Statute with their respective Ministries of Foreign Affairs, Justice and Defense (Lee, 1999: 14).

Although Bloch's philosophical approach based on the ideas of hope and utopia emerge at a particular historical moment (Sánchez-Sánchez, 2009: 400-404), this does not prevent his proposals from constituting a solid basis when analyzing the ICC's role. As a result, the ICC's role can be studied in terms of a social utopia aimed at the development and protection of human dignity, which overcomes the reductionism of those looking into the ICC's role only through the analysis of the ICC Statute and its complementary instruments.

On the other hand, section 5 has brought us face to face with the "disheartening" reality that ICJ enforcement mechanisms, including the ICC, are currently experiencing, both in terms of the questions raised by numerous authors regarding their goals and role (including their lack of capacity to develop them effectively), and in relation to the progressive (some would say unstoppable) loss of political support in international society.

However, it is precisely at this point that the utopian horizon reminds ICJ and the ICC that, despite all the difficulties experienced (and even though it took five long years from the opening of the first ICC investigations in the DRC and Uganda until the ICC began its

first trial in January 2009, whose trial judgment would be issued on March 14, 2012 and the appeal judgment on December 1, 2014), it cannot be ignored that today the ICC has 17 ongoing investigations and around 30 cases against leaders of state and non-state structures allegedly responsible for international crimes[6]. Likewise, in more than half of these cases it has been possible to obtain the arrest or appearance of the accused, which has allowed the completion of seven trials[7].

Consequently, even if it is true that ICJ and the ICC are going through very complicated times, the utopian horizon places them before a mirror so that they do not forget: (a) their constitution as a space in which the future takes on ontological characteristics; and (b) their potential as a path that must mark the present, not as a truncated or obstructed dream, but, on the contrary, as a "project" that maintains a concrete coherence between its origin and its ends (Bloch, 2004: 508).

In this way, hope becomes conscious and is recognized as an action for the concretization of that projected utopianism that is found in the deepest roots of the process of creation of ICJ and the ICC. As a result, despite the questions, their low effectiveness, and their loss of a good part of the political support that they had two decades ago, they still have a concrete justification that should drive them to promote the fulfillment of their role with militant optimism arising out of their guiding principles of justice.

7. CONCLUSION

ICJ and the ICC do not only reflect and justify a certain organization of international society aimed at reaffirming human dignity, but they also intervene in its protection. As a consequence, there is a close relationship between ICJ goals and the ICC's role on the one hand, and the social utopia proposed by the utopian horizon on the other.

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6 ICC. Office of Public Information (n.d.). *Situations*.

7 ICC. Office of Public Information (n.d.). *Cases*.

Faced with questions about ICJ goals and the role of the ICC, and in the face of their low effectiveness and the gradual decline of their political support in international society, the proposal of the utopian horizon is to remember its potential as a "project" which is coherent as between its origin and its aims.

This potential, which recognizes the current lack of completion, requires the opening of ICJ and the ICC towards a future self-imposed by its own existence. Faced with this situation, the following questions arise: How can ICJ goals be achieved? How can the ICC's role be properly fulfilled? On what philosophical grounds can their actions be assessed? Faced with these questions, Bloch's utopian horizon offers the following answer: utopia made concrete provides the key to a non-alienated order in the best of all possible societies. *Homo homini homo*: this is what the scheme of a better world means, as far as society is concerned (Bloch, 2004: 194).

Based on the foregoing, when addressing the ICC's role, one cannot think only of its close and visible contents that can be explained through doctrines and theoretical frameworks (Galain & Olasolo, 2018: 139-140), but it is also necessary to think of the margins, the limits, and those spaces where philosophy reaffirms a deconstructive, critical and generative process, even when it is indefinite. These spaces, guarded by external discourses that drive human action and informed by hope as possible happiness (Bloch, 20014: 41-50), present the ICC with a self-realization requirement.

As a result, the utopian horizon of the ICC implies the exercise of the principle of hope from a militant optimism. Given its material configuration, it recognizes its human purpose insofar as it is not reduced to a merely political fact but involves the entire cultural spectrum. As a constituent producer of that space, the ICC exceeds its own spatial and historical structure, and positions itself as an institution that must ensure the protection of humanity as a whole, and the absolute affirmation of the dignity of each human being. To do so and keeping in mind a future marked by the concrete practice of justice, the ICC must act independently in the interest of the concretization and realization of human dignity; the dream of those in international society who hope for a better world (Bloch, 2004: 46).

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Chapter 3
The Perspective of the Mercy-Liberation Principle[*]

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1. INTRODUCTION

Starting from a conception of theology as an open-eyed mystic, we arrive at an understanding of historical praxis as both a field of action and theological reflection in which human events are seen as simultaneously embodying suffering and redemption.

Within this context, typical of a historicized theology, the question of justice arises, as well as questions about the motivations and purposes of international criminal justice (ICJ) and its enforcement mechanisms, especially the International Criminal Court (ICC). This chapter aims at providing a response to these questions from the perspective of the mercy-liberation principle in theology, which, although it does not have an equivalent in international law (IL), does present some elements at which the two meet. Therefore, the analysis developed allows us to recognize the contribution of a theology conceived out of multiple levels and areas of reality, and which involves dialogue with other disciplinary understandings of human events.

This is therefore an understanding drawn from the relationship among the multiple layers of human history, in which one can recog-

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nize the effort of creating a theology of beauty rather than a theology of certainties. As Rupnik points out, beautiful is that which is "multi-layered"; beauty is the organic unity of the different layers of reality (2015: 14).

From this perspective, the understanding of justice is based upon a structural reading of history and society. Therefore, the profound understanding of injustice in human history cannot be approached solely through isolated events. On the contrary, a global understanding is necessary to broaden the horizon of critical analysis towards the conditions of violence and marginalization that sustain the different structural orders of violence and injustice.

Moreover, among the processes that seek a general understanding of the dynamics and complexities that shape the interpretation of justice, arises the recognition of the human faces that converge in the commission of structural crimes. For this reason, international responsibility that derives from the commission of this type of crime will be demanded of those natural persons who effectively participated in its execution. Now, an individual as a natural person can act in a private capacity or in the performance of State/organizational powers. When the person acts in performance of state/organizational powers, the fact that the natural person acts in their name, or on their behalf allows his/her actions to also be attributable to that power (Sánchez-Patrón, 2014: 355).

Hence, there is a close interrelation between the human being whose responsibility for the crimes committed is inescapable, and the responsibility of the State/organization on whose behalf he acts. Thus, the structure is concretized in the individual perpetrator who, in turn, makes it possible to coordinate the conditions necessary for the commission of the crimes.

Likewise, if guilt requires the identification of one or more specific perpetrators, it also becomes necessary to give a concrete face to the victims, even though the victims of crimes against humanity are characterized by their belonging a group (Díaz Soto, 2013: 144).

This dynamic reading allows the understanding of justice founded upon its manifestations in human history, as well as in individual

stories. Human faces enable the recognition that no structure can exist without affecting individuals, whether as perpetrators or victims. Likewise, the erosion of humanity, expressed in the feeling of superiority due to race, language, or religion, among other reasons, allows us in turn to understand the ultimate origin of segregation and violence against humanity.

2. HORIZON OF ANALYSIS: THE MERCY-LIBERATION PRINCIPLE

The lens of the German theologian Johann Baptist Metz is through an open-eyed mysticism that falls within political theology. To avoid misunderstandings and false judgments, he distinguishes politics understood in the classical sense from the new political theology. The first has its origins in Stoicism and continues up until our time. The second is a perspective which has emerged over the past two centuries, and which has not been well received by the Catholic Church, which considers it an ideology close to left-wing social movements.

Nevertheless, according to Moltmann, there is a great distance between political theology and the militancy of the left or right. Thus, for this author, Christian theology should remember the political crucifixion and the resurrection by God of Christ, who was executed as a rebel, and understand the consequences of following him. Remembering the *passionis et resurrectionis Christi* is dangerous and liberating at the same time. It imperils a political-religious church by placing it in solidarity with the suffering of its time. It frees the church from ecclesiastical politics in favor of a Christian-critical politics. The new political theology is not interested in reducing the church to the politics of the right or left, but rather puts all its efforts into the Christianization of its political role in the sense of the freedom of Christ (Moltmann, 1975: 451).

This is very much consistent with the following proposal by Metz, according to whom, political theology is a critical counterweight against a privatizing tendency of current theology. Metz positively understands that as an attempt to formulate an eschatological message taking into account the current conditions of society. This definition

encompasses the two aspects (positive and negative) of political theology. In its negative aspect, political theology is a critical "corrective" to the exaggerated tendency to privatize faith, which is characteristic of modern theology. It insists, then, on the critical task and at the same time highlights the social character of theology. This de-privatization is the primary critical task of political theology (Metz as cited by Gómez, 1973: 81).

To understand the thinking of Metz it is necessary to review his life experiences, which shaped his way of thinking and acting. Academically, he was greatly influenced by the German theologian Karl Rahner, who was his professor. For Metz, the Rahnerian anthropological approach was a foundational starting point for the renewal of pre-conciliar and post-conciliar theology, due to the critical vision and dialogue through which the church opened itself to modernity.

After assimilating the theoretical foundations of Rahner's transcendental anthropology, Metz focused on its application to the understanding of humans as social and historical beings.

Accordingly, for Metz, a task is imposed from which theology can redefine the political-social implications in the structuring of its concepts and fulfillments, that is to say, its critical-practical dimension. To do this, it is important to detach ourselves from the totalizing view of traditional ideal-transcendental theology, which in its categorical translation does not take into account the necessary articulation that must be manifested in the reciprocal and dialectical relations between the fields of religion and society, between faith and social praxis, between God and politics (Garavito, 2010: 439).

The social human being disapproves of situations that dignify neither him nor his peers, so that, from viewpoint of the foundations of Christianity, he intends that these situations change. For this reason, Metz named his theological proposal as "dialectical theology" to emphasize the nonconformity of Christian action in the world. Despite this, Metz's theological proposal has become better known as political theology due to its contrast with stagnant Catholic politics in support of the powerful.

Likewise, Metz's theology is also in line with the modern world in terms of the processes of the secularization of society, in which the

ecclesiastical bourgeoisie, which tends to forget historical processes and active participation in the public sphere, has no place due to its weak attitude of dialogue and excessive imposition.

As a result, this new political theology can be defined more specifically as a praxis in history and society that understands itself as a supportive hope in the God of Jesus as the God of the living and the dead, who calls all human beings to be subjects in his presence (Yasik, 2011: 38). It is for a world with memory (*anamnesis*) of suffering (*passionis*) that raises a merciful, self-giving attitude, far from predatory competitiveness, and very close to acceptance, reconciliation, and non-repetition.

As Yasik emphasizes, memory operates in a constitutive relationship with the past and is capable of carrying subversive content. The memory of those who suffer brings about solidarity with the dead and the defeated. The process of remembering recovers the promises of the past and gives to the church a public role: the opportunity to transform itself into the bearer of dangerous memories, especially those of Jesus. The memory of Jesus, in anamnestic solidarity, accounts for the conflict between divine promises and history. Theology, for Metz, is itself political: its role lies in stimulating an awareness of the struggle for the recovery of the memories of the dead and suffering of history. The Christian faith must, therefore, problematize the suffering of the victims of history again and again in a way that elaborates an eschatological notion of hope (Yasik, 2011: 38).

Concomitant with this is that God is our God. He is not a private God who benefits a few but suffers with those who suffer and rejoices with those who leave behind conditions of indignity, while daring to share what is his with others. That is, the divine perspective of political theology is that of a universal God who shows himself in different ways, but understandable to everyone in different languages and cultures, because humanity interconnects us and justice, equity, peace, dignity, and the recognition of the face of the other are common to all human beings.

Consequently, if one wants to speak about Metz's political theology, it is necessary to overcome the distinction between the private God of a few who have everything, and the God of many who have nothing, for the sake of a universal God, being that of the Lord's Prayer, which under no circumstances can legitimize the violence of one people over

another, nor the oppression of rulers over the other members of society. God is not, therefore, an idea, but presence and action free of any monopoly. Hence, eschatology is the utopian engine for the existence of what is desired for the world and, for this reason, it is, from now, being built so as to make it real in the events of history.

In relation to the foregoing, the Swiss theologian Hans Küng affirms on the subject of peace between peoples and the indispensable role of religion for these purposes, that if there is no peace between religions there will be no world peace (Küng, 1991). Metz is aware of this and that is why his political theology is not only open to modernity and all the good that it brings with it, but also to interreligious dialogue, which is an imperative of our time.

In this sense, Metz demonstrates concern about the approach of Vatican circles to interreligious dialogue, because they always tend to include the Abrahamic religions to a greater extent, while leaving aside Eastern religions, as well as atheism and secularism. Political theology, on the other hand, is directed more towards a dialogue not constrained by institutionalism, which through a lens of freedom works for the common good without any institutional limitations. What's more, he advocates for a reciprocal collaboration between theology and politics, not between Church and State.

Consequently, if a religious institution decides to enter into public debate with the world, it must do so based upon universally understandable assumptions, recognizing that, in the face of diversity what is worked for is fundamentally human and non-monopolized transcendence. In short, it is about recognizing that society is the new agora where the different perspectives of reality meet, without pretense of superiority, to reach consensus. The contribution of Christianity is due to its eschatological identity (Metz, 2002: 141-146).

Indeed, dialogue with the world of non-believers is as fundamental as it is unavoidable, because it means opening beyond the limits of religious men to reach everyone without exclusion. Art and literature help with this purpose, being languages of universal understanding, which contain within them the history of the victims and their sufferings, thus avoiding falling into cultural amnesia, while keeping our eyes wide open.

Specifically, Metz turns to a biblical text to support the mysticism of open eyes, because Christianity is not an invitation to sleep while being unaware of the circumstances of the world or being imprisoned by selfishness and the protection of material goods. On the contrary, to see is to know; it is to have eyes for the other and this generates empathy. To maintain our gaze on poverty is therefore non-conformity, because things should not be like this, and they must change. In other words, it is the reaction of our being to the pain and suffering of the other that challenges us, thus calling our attention to attend to that situation and cooperate in its transformation.

As Metz himself emphasizes, there are many words and parables of Jesus that suggest this, starting with the parable of the good Samaritan (Luke 10, 25-37). On the road from Jerusalem to Jericho, a man had been attacked by thieves. A priest and a Levite passed by and looked, but they did not see. Their religiosity had no eyes for others. Jesus insists: whoever is not alert, whoever does not open his eyes widely, in a word, whoever does not sharpen his vision, will not be prepared for the temple either: from him the divine mystery will be hidden. In seeing the people whom we generally exclude from our daily field of vision and who therefore most of the time remain invisible, the seeing begins; the visibility of God among us starts. It is there where we will find his fingerprint (2015: 56).

In light of Metz's political theology, it is important to point out that all theology must be liberating, because the depositum of faith is the poor and their liberation, as has been affirmed by Latin American theology. Thus, although it is globally responsible for all theological studies and approaches them with intellectual responsibility, theology does not stop there because it always reaches the concrete and specific of the suffering faces of Christ. That is to say, it displays the historical-liberating meaning of the Gospel[1].

Liberation theology, replete as it is with a merciful and liberating component, has undergone two stages of understanding. The first,

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[1] Pope John Paul II, however, did not share this vision. As he expressed it in *Libertatis Conscientia*: "To put the social-ethical dimension before the soteriological dimension is to disrupt and denaturalize true Christian liberation." (1986: 6).

focuses on the historical process of the liberation of the poor, while the second, which does not lose this as a starting point, embraces the entire mystery of salvation. The work of the group of theologians who developed a systematic liberation-based theology integrated these two aspects: liberation and theology[2].

Therefore, the first moment of the practice of theology is the praxis of faith, being a place in which one receives the revelation of God with a compassionate and supportive attitude. It is not that we must choose between God or the poor, but it is God and the poor, because the presence of the first is given in the second as a sacrament.

In this sense, Jon Sobrino, one of the pioneering theologians in the formulation of the mercy-liberation principle, states that, if on the cross God seems to be at the mercy of the crucifiers, in the resurrection he triumphs over them. If on the cross he is a victim, in the resurrection God brings the victims back to life (Costadoat, 2004: 78).

In his treatise on Christology, Sobrino offers a reflection that shows very well the first moment of theology, that is, the reality of the oppressed who have to be liberated. To accomplish this, he founds his arguments on the life of Jesus, who was not petrified by Jewish doctrine or by the theoretical moment of divine revelation; rather, his word was a transformative action in an unjust society, which was structurally justified by the Torah and the institutional precepts of his time. Jesus criticized these doctrines and gave new meaning to them, calling attention of the authorities to this, because they had distanced themselves from the true God by excluding the poor; this led to his death.

In this way, Jesus provides vital testimony for those who, practicing theology from a historical context, are persecuted. As Sobrino points out, they see in Jesus someone who carries out a practice aimed at transforming a society into a society of brotherhood and justice, in accordance with the ideal of the Kingdom of God. The means of

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[2] Due to problems with the Congregation for the Doctrine of the Faith, the planned 50 volumes of the work begun in 1985 were never published. Only individual volumes were published under the title Christianity and Society.

that practice were, above all, his word, but that word was not only doctrine or announcement, but also practice. The denouncing and unmasking word of Jesus is seen as a social condemnation, both of a theocratic society organized around the temple as well as of society imposed by force from Rome. The fact that Jesus died crucified, condemned as a blasphemer and subversive, is in Latin America — where so many are also murdered as blasphemers and subversives— the most reliable evidence that Jesus sought a transformation of his society; that his love was not directed only at poor or rich individuals, but at the poor majority; that his love was, therefore, a political, liberating love (2007: 136).

In short, theological work cannot be done today by turning our backs on reality. This is a relevant contribution to *memoria passionis*, in which the memory of situations of suffering are transformed in the present into actions of life aimed at non-repetition, which, in turn, nurtures mercy as a fundamental Christian praxis. This is only possible through an open-eyed mysticism, that sees the poor and those who suffer injustice, and requires work for things to not remain the same and the Kingdom of God be built historically. This is the commitment of a theology having a reasonable public voice, universal contributions, and hopeful eschatological identity.

Metz and Sobrino are, without a doubt, two reference points who have made it possible to take theology out of the private sphere so as to legitimize its impact on the public stage. This with a view to foster an understanding and praxis of human dignity and of the earth, in which fraternity and justice between peoples take their place as a fulfillment of God's promises and of human utopias.

3. THE TREATMENT OF JUSTICE FROM THE MERCY-LIBERATION PRINCIPLE

Among the questions about the different realities of being and acting as a human, and their connection with theological thought, the question of justice arises. Although responding to socio-political dynamics, this question is seen through the prism of the experience

of faith, so as to propose not only ethical criteria, but deep life convictions.

Since the first centuries of Christianity, texts such as the Letter to Diognetus attest to a sort of moral imperative for Christians to live within their societies without any external sign that visibly identifies them, and only supported by a lifestyle that actively builds the social realities of their environment.

The experience of faith, at least under ideal conditions, is understood as opposed to de facto imposition and proselytism. It therefore becomes concrete as an invitation (which is as subtle as it is certain) consisting of a call conditioned upon the free acceptance of it by the person who receives it (Zegarra, 2013: 281)[3].

Within this context, the question of justice intersects with the question of freedom as the basis of the believers' option for the life proposal contained in the Gospel, as the epicenter of human action. The anthropological understanding of being *imago Dei* also begins with the possibility of thinking of God as absolute freedom; It means understanding God as liberator and the world as a place of freedom (Kasper, 2012: 26). Through this lens of analysis, liberation is therefore not understood so much from the passivity that arises from believing in the figure of a *Deus ex machina* who expels the oppressing party; it is, on the contrary, an autonomous liberation tailored to each historical context.

In its search for justice, the contextualization of liberation does not ignore the strength of the structures that oppress the life of broad sectors of society (frequently the weakest due to their less dignified living conditions). In this way, the possibility of a self-managed liberation recognizes the problem of evil which is immersed in human history and is the protagonist of its dramas.

In this sense, Benedict XVI, referring to the Christian community that inspired the Gospel of John, points out that John identifies the beast that he saw coming out of the sea, from the dark abyss of evil,

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[3] In the Christian tradition, the meaning of the expression "vocation", as being a career, has come from here.

with the characteristics of Roman political power, giving thereby a very concrete form to the threat that the Christians of that time saw coming towards them: the absolute power over the person that was claimed through the cult of the emperor. This took political, military, and economic power to the highest degree of unlimited and exclusive power: the expression of the evil that threatens to devour us (Benedict XVI, 2007: 202).

The Christian proposal is not directed at the institutional levels of society, but rather seeks to be an option for the human beings that elaborate their own history based upon the challenges that the Christian message puts to them. As a result, from the Christian perspective, justice is first a characteristic of personal reality, and only as a result of the latter does it become a social abstraction.

In this sense, as Pagola (2016: 114) points out, the Kingdom of God was not, for Jesus, something vague or ethereal. The irruption of God is asking for a profound change. If he announces the Kingdom of God, it is to awaken hope and to call upon everyone to change their way of thinking and acting. You have to enter the Kingdom of God, let yourself be transformed by its dynamics and begin to build life as God wants it.

This justice, due to its personalized nature, is characterized by the granting of substantive importance to the care of the human being as the ultimate goal of the faith experience. For this reason, the preeminence of welcome, generosity, forgiveness and unlimited donation is valued more than issues related to moral rectitude. In the end, it is a decisive commitment for the preparation of those who have suffered the effects of structural violence (be they as victims or as perpetrators). This generosity is not limited to the rhetorical recognition of the wrongs committed but requires from both parties a higher effort and greater justice, which implies a new insertion into society (Olasolo, Pinto, Santamaría & Zúñiga, 2019).

As Pagola (2016: 276) points out, Jesus thinks of men and women who enter the dynamic of the Kingdom of God with a non-violent heart, to confront injustices in a responsible and courageous way, unmasking the lack of humanity that surrounds society as a whole because it has been constructed upon violence and lives with indi-

fference in the face of the suffering of the victims. Consequently, the vocational path of groups of individuals questions the social structures of each historical moment, since it is neither by force of arms, nor even by the appropriation of proselytizing discourses, where the transforming power of the Gospel is revealed.

Ultimately, the question of justice is framed by the tension between the coercive pressure exerted by the force of power against the highly free conviction expressed in the believers' vibrant attitude who choose to adapt their lifestyle to the limitless generosity of a totally discretionary invitation. The counterpoint of this reading can be found in the scene of the crucified God, in the Gospel that Jesus announced and the Kingdom that he came to establish is the end of the power of man over man. That is why he had to die, because man is afraid of freedom (Galeano, 2012: 57).

4. THE TREATMENT OF INTERNATIONAL CRIMINAL JUSTICE FROM THE MERCY-LIBERATION PRINCIPLE

The mercy-liberation principle allows technical and regulatory elements to be put at the service of a humanized reading of ICJ and the ICC. To do this, it seeks to identify specific human beings inside settings in which structures that seek to dilute the presence of the individual dominate (either by denying the responsibilities of the perpetrators, or by diluting the identities of individual victims in the group).

In the first instance, it is necessary to recognize the strength of the social group, which seeks the dissolution of the individual through the commitment to uniformity, so that differences in class, religion, language, race or ethnicity between groups of the same nationality are seen as obstacles. Thus, internal struggles for the dominance of the strongest, which start from an endogenous perspective, end by subsuming the weaker parties under the hegemonic pressure of each historical moment. This primacy of structures over human beings is even more present in state institutions, whose legality is presupposed, but which under certain conditions become effective mechanisms for the oppression of different social sectors.

However, in a second instance, the mercy-liberation principle also recognizes another possibility, less pessimistic, which responds to the safeguarding and guaranteeing by said structures of the human rights of those who live under them (Botero Bernal, 2011: 181)[4].

From this reading comes the understanding of social structures in terms of two great potentialities that are opposed to each other: (a) the imposition of dominant groups, tending towards a uniform society in which the specific characteristics of individuals and minorities are increasingly fewer; or (b) the guarantee of individual rights (of minorities and majorities), where the individual, identified through systems of meanings, values and norms, preserves his own particular characteristics.

A comprehensive study of history leads to the recognition that ethnocentric readings that recognize the superiority of one group over another have molded our societies. Through this, general conditions have been created that, aside from isolated events, have generated structures which undermine the human condition. These structures have set their roots so deeply that they have become a radical condition of contemporary anthropological understanding.

Likewise, the cycles of revenge in the name of a certain distributive justice (in which each subject, whether individual or collective, abrogates to itself the right to take what it considers to be its own) require for ICJ to have a role that allows it to assert a claim about the damages committed while, at the same time, preventing the spirals of violence that cast shadows upon human conscience.

For this reason, ICJ is characterized by being a response from international society to the conduct that most seriously undermines its fundamental values, and resorts for its application to the creation of international criminal tribunals and hybrid courts and the action of national jurisdictions through the principle of universal justice (Olasolo, 2017: 99).

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[4] Human rights are a concept that brings together the basic needs of the entire human species, in the service of whom all elements of the conception of law proposed under the mercy-liberation principle must be oriented.

In this way, the idea of universality (totality) is reflected in the concept of justice, referring to something more binding than belonging to certain groups: the essence of the human condition as a totalizing scenario in which one may find the convergence of its cruelest evaluations with the fostering of its most brilliant characteristics. This view of the person as the center of the analysis of ICJ guarantees that no one, even if it be the State itself, can deprive an individual or collective subject of their fundamental rights or their dignity.

In this sense, as Olasolo (2014: 18) points out, ICJ addresses in particular all those who have traditionally been above the law by virtue of the European notion of "reason of State". Following Arendt's categories, these are: (a) the "dogmatists" who compensate for their anxiety of living with uncertainty through the strict adoption of an ideal, to the realization of which they subjugate all other values; and (b) the "nihilists" who believe in nothing other than themselves, which leads them to do whatever is necessary to satisfy their own ambitions for social advancement and political and economic power. Both of them employ the levers of power to make "normal citizens" uncritically carry out the most horrific atrocities against their fellow human beings.

This perspective allows us to delve into the tension between state and individual responsibility, which provides a significant support to the reading of ICJ through the theological lens in light of the mercy-liberation principle. Furthermore, the principle of humanizing universality requires that the containment of punitive powers and restraints against infinite cycles of revenge between different groups be carried out in a shared manner in the internal sphere of each State (which may be ineffective due to insufficiency or biases that exist in the reading of the history of the internal conflicts) and in international society.

The universality of justice is materialized in the existence of an organization that acts with the greatest possible neutrality, having as its end the search for the stability in a global scenario by repairing the greatest number of conflicts (having, in the long term, a deterrent effect upon those who might enter into these dynamics). Furthermore, it can also be interpreted as the search for justice for each individual or group that is recognized as having been violated, based upon

a legal truth that clarifies the role and responsibilities of those who have committed the crimes provided for in the ICC Statute.

Through this reading, the dynamic of responsibilities between the State (Bassiouni, 1982: 23) and the individual becomes tangible, since the specific actions that make up crimes against humanity are carried out by individuals with specific names and faces. However, at the same time, for crimes against humanity to be take place, violence must have a systematic or widespread character, thereby excluding isolated inhuman acts from this group, and recognizing policies targeted at the elimination of specific individuals by reason of their membership in a particular group (Ambos, 2013: 113).

The role of the State, or of organizations having similar organizational and military capacity (Díaz & Soto, 2013: 38), must be recognized under two possible scenarios: when the active commission of crimes against humanity have been proved, or when measures aimed at preventing, repressing, and punishing those responsible have been negligently omitted. Moreover, concerning the latter, States have obligations relating to their role of safeguarding human rights. They are an inalienable horizon of its actions and consist of the duties to: (a) put an end to crimes against humanity; (b) prosecute those (most) responsible for these systematic or widespread crimes; (c) dismantle the structures through which they have been committed; and (d) apply effective measures which guarantee non-repetition (Sánchez-Patrón, 2014: 362).

5. THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN LIGHT OF THE MERCY-LIBERATION PRINCIPLE

A reading of the ICC in terms of the mercy-liberation principle must include the human assumptions that sustain its essence, which allows a recognition of the relationship between individual and community spheres that has enabled the ICC to become a symbolic actor of a new view of the world.

At first, it is necessary to overcome the false choice between justice and peace, especially in the way justice is presented as an obstacle to processes of ending armed conflicts. Since one is a *conditio sine que non* for the other, a justice understood as being beyond criminal punishment, and viewed from the complexities that it entails as a human dimension, results in: (a) a possibility of comprehensive reparation and guarantees for all parties to said processes; and (b) the weakening of the structures that promote the systematic nature of the crimes within the ICC jurisdiction, which in turn results in a guarantee of non-repetition.

In this sense, Soto Cremades (2018: 241) underlines that in terms of propositional logic, it is a formula, if not conditional (justice then peace), at least biconditional (peace if justice, and only if justice), which responds completely to the combination of two positively considered concepts. As a result, even if a positive peace were intended to be achieved through a notion of justice identified with criminal proceedings, such an enterprise would be frustrated in its means.

A deeper reading of this phenomenon recognizes the instrumentalization of the civilian population by the actors in armed conflicts, making their indifference to war impossible. Thus, the asymmetric nature of the vast majority of armed conflicts following World War II, has turned the civilian population into the core of the dispute instead of leaving it on the margins of it. The logistically and operationally weaker party has sought by all means necessary (including violence) to obtain the favor of the civilian population, while the party with greater capacity has aimed a large part of its operations against said population in order to deprive the enemy of its support. Both military strategies constitute at their essence a flagrant violation of the principle of distinction that constitutes the basic pillar of modern international humanitarian law (IHL) (Olasolo, 2014: 12). This presents one of the greatest difficulties for processes that seek authentic justice leading to peace.

The search for mitigating factors and the attempt to exclude international criminal tribunals, such as the ICC, are some of the greatest limits that ICJ has confronted, while at the same time manifesting the dynamic, and certainly ambivalent, character that States can have in the treatment of their own schemes of violence and in the main-

tenance of their hegemonic conditions and interests of the moment. Thus arises one of the most critical problems in which the tension between justice and peace takes shape: impunity as an omnipresent risk in the search for peace, the cost of which cannot mean the absence of a reparative process, which requires, in any case, the most complete account possible of armed conflicts and systematic violence.

As Ramírez explains, generally, these actors seek the social and judicial oblivion of their crimes as a condition for their turning the page on violence and carrying out the transition. On the contrary, the victims of these crimes demand that the truth of what happened be known, that justice be done and that those responsible pay and make reparation for the atrocities committed. They demand that, before turning the page, it be read in its entirety. This fundamental tension is the cornerstone of transitional justice and has been represented as an irremediable dilemma between the demands of justice and peace within the contexts of transition (Hazan, 2010: 8; Uprimny & Saffón, 2008: 183; Ramírez, 2014: 28).

In this context, the principle of complementarity of the ICC emerges. This supposes a delicate balance between the competences of the ICC and those of the States, since, in principle: (a) the preference for national sovereignty is recognized in the ICC Statute; and (b) ICC proceedings are conditioned to the inaction, lack of willingness or lack of capacity of national jurisdictions (Leonard, 2009: 98).

Nevertheless, the effective application of this principle is limited by the ICC dependence on the cooperation of States Parties to the ICC Statute (Ambos, 2013: 119). This leaves open the possibility for States to avoid the intervention of the ICC and international society. As a result, national judicial proceedings could become rather long. Moreover, there is a risk of: (a) a denial of victims' rights; (b) a prolongation of their suffering; and (c) the maintenance of hegemonic structures of power and oppression.

In this way justice and peace are recognized as a double horizon for the ICC actions and constitute a process as difficult as it is complex, given the innumerable relationships that exist between concepts, actors, difficulties and procedures. Therefore, it is not about the automatic application of a procedure, but about the fulfilling of

such a symbolic value as the ICC has, in terms of a real possibility of fulfilling hopes for new futures and possible worlds for individuals and groups that have been affected by different forms of structural violence. Consequently, the primary role of the ICC is to be a factor of change in respect to the arbitrariness in the use of force that characterizes the state action (Guerra, 2012: 26).

Accordingly, the needs concerning each stage of ICC proceedings cannot blur the teleological component of the ICC's role. Therefore, procedural questions must always be subject to the "why" in terms of the ICC motivations.

This proposal fosters the understanding of the ICC as a symbol of possible new worlds which are not built out of utopia, but from the wounds of history itself. In this way, the understanding of the ICC as a mere supranational jurisdiction is overcome. This in turn makes it possible to avoid the double risk of: (a) turning the ICC into a new element of hegemonic oppression through the creation of new colonialisms (with the possibility that a good number of States Parties will denounce the ICC Statute for considering the ICC actions too invasive); and (b) limiting ICC action to a set of discretionary recommendations unfit to generate the necessary changes.

The ICC symbolic dimension, as well as the anthropological, sociological and jurisdictional reflection that underlies the ICC's role, call on it to distance itself from those powers that foster the commission of the crimes foreseen in the ICC Statute (Guerra, 2012: 27). Furthermore, this distance is not the result of a claim to a full objectification of the truth, because, otherwise, it would backslide into a one-dimensional reading of phenomena that, due to their human nature, require a multidimensional reading centered on interwoven relationships.

In this way, a core part of the ICC's role is to be a valid interlocutor of States, so as to challenge them in actions that threaten humanity, as well as in their obligations vis-à-vis their nationals and international society (all of which aims at reconstructing social fabrics and providing reparation to victims) (Olasolo, 2014: 15). Consequently, the role of the ICC is not to provide anonymity to States and structures involved in the crimes foreseen in the ICC Statute, but to offer justice

to human beings as victims and perpetrators (Sánchez-Patrón, 2014: 385). Thus, the authentic symbolizations of justice and peace, as pillars of the mercy-liberation principle, take place in human beings.

6. CONCLUSION

The main contribution of ICJ from the approach of the mercy-liberation principle is the perspective provided by the identification of the specific human beings that play the different roles that are part of armed conflicts (including the analysis of their intention as a constitutive element of individual and structural action) (Ambos, 2010: 48). In turn, the main contribution of the ICC is the possibility of healing of both social history as a whole and the multiple individual stories that converge within it.

As a result, the understanding of the ICC distances itself from utopian or transcendentalist considerations because it is from the wounds of these stories —not others— that the prevailing need to build peace is recognized. For this reason, it has been precisely within the framework of those societies, deeply broken and traumatized by extreme violence, where the imperative of achieving peace and reconquering the rule of law has found all its urgency and significance (Ramírez, 2014: 28).

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Chapter 4
The Perspective Of Marxism[*]

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1. INTRODUCTION

Nations have very different characteristics as can be seen, for instance, in their national symbols. However, there is a common implicit element, much less apparent, that is disguised with allegories, although it becomes clear through a closer look at reality: the capitalist mode of production.

Territories recognized as Nation-states have, to a greater or lesser extent, capitalism as the dominant mode of production. With that as a starting point, States, which are recognized by their peers, enter the system of rules, institutions, protocols, and practices that make their interaction possible.

This is the capitalist system of States, in which sovereignty confers on nation States legal personality under international law (IL), which is necessary for the establishment of interstate relations, based upon the formal principles that derive from it: freedom and equality. This

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

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dynamic, known as the Westphalian system, arising out of the pioneering Treaties of Westphalia (1648), has taken on general outlines over the centuries with the consolidation of capitalism throughout the world. In this way, beginning at the end of the 18th century in England, and throughout the 19th century (especially in Northern Europe), the international system was shaped.

From the beginning of capitalism, the first theoretical notions had already been established: the nation-state and international relations (IR), understood as historical constructions resulting from concrete social relations (which means that both notions are forms of the manifestation of capitalism). Although it is possible to find similar characteristics among States and IR in previous times, it is essential to note that these notions lacked the content and centrality that they took on with the advent of capitalism. It is the mode of production that accounts for giving them specificity, so that IR acquired relevance from the moment capitalism consolidated and spread its inherent tendency towards the internationalization of relations of production. Consequently, the trajectory of the notions of nation-state and IR followed the development of the capitalist mode of production throughout the world.

When the first great crisis of capitalism presented itself, with the Great Depression of 1873, debates arose as to how to face the first great challenge of managing capitalism from an international perspective. This would extend within the context of the increase in geopolitical tensions until the beginning of World War I[1]. For the traditional, dominant, Anglo-Saxon and anti-Marxist narrative, it is from this point that IR flourished as a scientific field, based on a spirit that is presumed to be conservative (Souvlis & Andry, 2016). Although it is claimed that IR is limited to dealing with the relationships between government apparatuses (presuming it to be a science that repeats and eventually makes the official discourses and positions of nation-states more sophisticated), in reality, IR ratifies strategies of

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1 IR were conceived as a science following the creation of the Woodrow Wilson Chair at the University of Wales in 1919, which was held by the civil servant and diplomat Edward Carr (1892-1982), one of the main negotiators of the Treaty of Versailles.

domination. It universalizes concepts in abstractions that disguise the interests of singular social classes.

An entire dominant literature exists in IR[2], which has its footings built upon the quicksand of the false debate between idealism/liberalism[3] and realism and its elaborations (Fernandes, 1998: 109-120). By process of exclusion, that which does not fit into this axis is placed in the mixed bag of critical theories. In this way, IR suffers from the same evil of specialization and departmentalization that contaminates all of the social sciences, and in particular law[4].

Within this context, critical theories are the only ones that still strive to emerge from this false debate and to add elements and ideas. This is, however, a very broad universe, which does not say much from the perspective of scientific rigor. As a residual array that houses everything that is not realism or liberalism, it has no defined identity. Notwithstanding the foregoing, what is important for this chapter is to adopt in the midst of this ocean of possibilities a theoretical approach that operates as a tool to open, reach into the core and dismantle the gears of international institutions, including the dynamics of organizations such as the International Criminal Court (ICC).

Hence, the line of thought on which this chapter is built is Marxism (Caldas, 2015), to analyze, from the perspective of the materialist theory of the State and law, justice in a broad sense, justice in IL and, above all, the ICC's role with all its particularities and contradictions.

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2 This literature emphasizes the emergence of IR in the context of a new scenario of British decline and American ascendancy. Thus, IR ignores previous discussions, especially those of the Second International and the polemics between Lenin and Kautsky, among others.

3 Los dos términos no se confunden aquí, reconociendo las distinciones filosóficas entre las matrices del pensamiento idealista y liberal. Sin embargo, siguiendo la literatura especializada en IR, que utiliza las palabras como sinónimos, las dos tradiciones se sitúan en el mismo polo.

4 The two terms are not confused here, recognizing the philosophical distinctions between idealist and liberal thought. However, following the specialized literature on IR, which uses the words as synonyms, the two traditions are situated at the same end.

In light of the foregoing, this chapter is structured into five sections: (a) the first presents the theoretical perspective of the analysis; (b) the second addresses the relationship between law, justice and legal form; (c) the third relates to law and international legal form; (d) the fourth deals briefly with the nuances of the ICC; and (e) the fifth draws the chapter to an end with a succinct conclusion.

2. MARXISM AS A PERSPECTIVE FOR ANALYSIS

The perspectives that use Marx's thought as a starting point are presupposed by two essential vectors for IR. The first is to understand the human and social sciences within the same totality. This avoids analytical encapsulations and reservations of specialization based upon a scientific purism that is incompatible with a full understanding of social phenomena. In this sense, it is important to emphasize that the purism and technicality proposed by the different branches of human and social sciences have been, since the end of the 19th century, the result of a historical moment in the trajectory of scientific and political thought in the world. In other words, before this historical period, the general rule was always that of a broad and general knowledge about the multiple existing perspectives on social phenomena.

The second directly affects the internationalization of the relations of production. Capitalism is essentially an international mode of production, which is not restricted to national borders or delimited spaces. Consequently, Marxism, which seeks to capture the fullness of capitalism, also has an international scope (Bonefeld, 2013: 43-70), because to study capitalism is to encompass the international sphere, and to analyze the law in capitalism is to necessarily address IR. In this way, it is possible to conceive of a broad and systematic understanding of social phenomena.

Within the wide and varied range of interpretations of Marx, this chapter is based on the materialist theory of the State and law. This method is focused on the Marxist pillars of historical materialism and its critique of political economy. This theoretical approach confronts the abstract and purist visions of the State and law, which are shared by most doctrine. It seeks to go further because one cannot take the

State and the law as a given, and only deal with explaining how they work or should work, when in the end both ultimately express an antagonistic and contradictory relationship of socialization. Thus, the importance of revealing the social forms in which the State and law are presented to overcome them.

Social forms are fetishized manifestations (commodities, money, capital, the State, or law) that assume reciprocal relationships between individuals in society, and which are presented as independent of their will and action (Bonnet, 2007: 269). Concerning the State and law, the nodal point is not the functions they perform, but the historical way in which they are configured and act. From this point of view, both are historical, defined, transitory, independent, and correlated forms of social relations (Hirsch, 2010).

In this context, what the materialist theory of the State and law provides is a much deeper vision of the state entity and legal regulation, as reflected in the works of Pashukanis, who is the main exponent of this approach and of the critical perspective of the law (Naves, 2009: 201).

3. LAW, JUSTICE AND LEGAL FORM

Pashukanis (2017) emphasizes the equivalence between legal and commercial form, removing norms, legal personality, the decision-making process, and class struggle from the core of legal science.

Thus, starting from historical materialism, the Soviet author outlines the main lines of Marxist thought as to legal science. He draws a deep connection between law and capitalism based on the commercial form. In this way, law is capitalist in its content, and fundamentally, in its form. Accordingly, it is not pure, ahistorical, or abstract (as legal positivists claim), nor is it limited exclusively to the social relations that make it up (as indicated by sociologists) (Naves, 2000).

Pashukanis (2017) links in concrete law, the abstract to the real, to explain the reality of social relations. He especially investigates why social relations adopt the legal form, when this continues to be a particular form of a specific type of relationship (norms are always

derived from some specific relationship occurring at a particular moment in history). He concludes that the content of the legal relationship is determined by economic relations, derived from the capitalist mode of production, which works and is reproduced through the logic of commercial circulation. This logic shapes relationships of exchange (of equivalents) among the owners of merchandise.

Consequently, law can be seen as a specific social relationship between those who have legal personality exchanging goods. Within this logic, the coercion that provides guarantees in the exchanges (understood as the force that constitutes the general condition for the maintenance of exchange relations) is implicit and is ultimately exercised by the State (Pashukanis, 2017).

In this way, relationships of exchange, when generalized, require a substrate that ensures their unity. Law and State fill this void, since the laws are enveloped in generality and abstraction, applying to everyone, regardless of their willingness or place within the division of labor. Thus, legal personality plays the role of amalgamating the generalized process of commercial exchanges, because, for these exchanges to be effective, individuals must be treated in an isolated manner (Pashukanis, 2017).

This creates the legal fiction of considering that all individuals are equal, regardless of their social class and the place they occupy in the division of labor (whether they are owners of the means of production or workers). The latter are considered free to dispose of the only good they intrinsically possess: labor power, valued by salary. In this way, the core of law is ultimately based on relationships of exchange, while the concept of justice is provided through the values exercised by the capitalist mode of production. It is for this reason that Pashukanis has no illusions about the overcoming of capitalism through the legal form, so that no idea close to a legal socialism gives him false hopes of transformation (Naves, 2012: 9).

4. INTERNATIONAL LAW AND THE COMMERCIAL FORM

Found within this general dynamic of equivalence between the commercial form and the legal form is IL. His concern to unravel

the mysterious knots of the world scene led Marx to detect the inherent tendency towards the expansion of capital, even if he did not conduct a systematic study of IR (Rodolsky, 2001). What he did carry out, however, were several studies of British colonialism in which he denounced the essence of this practice in various places (its global impact in articles published in the press was such that his vision of British experiences overseas ended up prevailing).

When dealing with the relations of production, Marx (2013) highlighted the dynamics between anarchy and despotism that surrounds capital (inside they are arbitrary, but among themselves they are rivals in open and uncoordinated dispute having no spatial limits). In this sense, capital only exists in multiplicity and collectivity, so that it is through the interaction between a great deal of capital that the general laws of capitalism are fulfilled (Barker, 1991: 182). Therefore, its development through competition is one of its characteristic elements, while at the same time it is the source of anarchy in production.

In this context, capitalist social relations also adopt the double form of anarchy and despotism (Marx, 2013). Among many cities there is anarchy, while within each one there is despotism. Each relationship, anarchic and despotic, is the condition of the other. The same thing happens between States: within their borders, and as applied to their nationals (subject to their national law) and their natural resources, they are sovereign and despotic; outside, in the interrelation with their peers, anarchy reigns. A central and hierarchically superior command is lacking.

This anarchy, freedom and absence of a central and superior entity is the great anathema of IL and becomes an indecipherable enigma for the majority of its scholars (Dinh; Pellet; Daillier, 2003). However, the problem is the theoretical starting point of the law. On the one hand, the legal positivist bias anchors law to the norm and as such it is state force that guarantees its effectiveness. Without this guaranteeing element, the risk of losing effectiveness increases to the point that the legal nature of IL comes into question. On the other hand, the sociological or non-positivist approach that links the law to conditions of power, decision, or psychology, affirms the nonexistence or uselessness of the formality of the law, because only power relations are relevant.

The great contribution of Pashukanis (1980: 168) is the idea that the absence of an external coercive order, which so much afflicts internationalists, is not determinative for the configuration of the legal relationship because the guarantee of its fulfillment is not found in coercion, but in the recognition of the bond by those involved in the relationship. Consequently, the absence of externally organized coercion in IL only means that it is unstable, which is very different from rejecting its existence.

Furthermore, the debate on the stability of law is fruitless because no legal area (even in domestic law) can be verified as absolutely stable. As a result, the unstable and precarious nature of IL is also found in other already consolidated areas of law (such as civil or criminal law, for example), in which the majority of relationships develop under the influence of pressures exerted by those involved in them, and not by the state force of the police or the tribunals. What does exist is a difference in hierarchy between the civil (or criminal) and international spheres.

Consequently, the absence of a sovereign does not convert IL into a moral or non-legal field, since the State is the nucleus for the development of law as a whole (national and international), but not for the legal form itself. The political form of the State and the legal form are derivations of the commercial form, but they are not to be confused with each other (Mascaro, 2016). In a regime of self-protection, such as the international one, most legal relations are implemented by the coercive violence of those with legal personality that are part of them. In this way, given the absence of a supreme authority in IL that presents itself as a neutral and impartial third force, violence that, in principle, would be abstract and impersonal, becomes particularized in the legal relationship between two actors with legal personality.

In summary, even if the absence of a convincing organizational force in IL is clear, this situation does not allow us to deny its existence. Furthermore, the only guarantee of legal relations between IL actors with legal personality (States, predominantly) continues to be the exchange of equivalences, under the legal basis of the real balance of power. Within this balance of power, agreements are made, and conflicts are resolved based on law. Compliance must be ana-

lyzed in light of the material disproportions between nations. Consequently, for Pashukanis (1980: 169), the concept of IL is the legal form that the struggle among capitalist States for domination of the rest of the world assumes. It is based on this understanding that IL builds strong ties with imperialism (Miéville, 2006).

According to the changes in capitalism at an international level, it is possible to divide the trajectory and transformations of IL into four periods (Osorio, 2018: 265). The first covers the time between the mid-19th century to the beginning of the 20th century when capitalism began to consolidate itself as the dominant mode of production. In this period, IL dealt with issues related to transport, communications and the standardization of weights and measures (fundamental elements in the logistics of commercial circulation and exchanges) and the threshold for the existence of armed conflicts. For this reason, the first international organizations (IOs) always had specific and technical objectives, focusing on navigation on European rivers after the Congress of Vienna (Rhine and Danube Navigation Company) and on the standardization of standards and measures in trade (International Telegraph Union (1865), International Bureau of Weights and Measures (1875); the Universal Postal Union (1878); and Union for the Protection of Literary and Artistic Works (1883)).

The second period, which corresponds to the interwar period, had a transitory character (its adolescent period) and was characterized by: (a) an expansion of the scope of IL to issues such as international peace and security and the balance of power between large and small powers; (b) the primacy of broader political, economic and social issues over aspects which were merely technical; and (c) strong state cooperation through the establishment of IOs. The League of Nations (1919) and the International Labor Organization (1919) exemplify this period, which contributed to the transformation of the absolute approach to state sovereignty.

The third period, which began at the end of World War II, was a moment of maturity. It was characterized by the multiplication of IOs and their greater structural complexity, given the broadening of their purposes. In the expansion of this institutional universe, some initiatives were broader and others more specific. Not only were new institutions created, such as the UN (1945), the International Mon-

etary Fund (1944), the International Bank for Reconstruction and Development (1944), the International Civil Aviation Organization (1944) or the World Health Organization (1946), but existing ones were also restructured. Furthermore, during this expansion, regional organizations having formal frameworks outlined around concerns for hemispheric security gained prominence. Examples included the Organization of American States (1948), the Council of Europe (1949), the North Atlantic Treaty Organization (1949), the Warsaw Pact (1955) and the Organization of the African Union (1963), among others. Likewise, human rights experienced their first great expansion, consolidating themselves as international issues and extending their regulation from general aspects (such as first and second-generation rights and their integration within the UN system) to more specific issues, such as humanitarian and immigration law.

The fourth period represents the consecration of IL and is characterized by the IOs taking the center of debates. This period is marked by the increase in the prerogatives of the organizations, their thematic variety and the strengthening of international cooperation. It is strongly marked by processes of regional integration (with the leading role played by the European Union and with the birth of MERCOSUR), but also by the dissemination of regional cooperation initiatives not necessarily linked to an institutional structure, as is the case of coalitions and groupings of interchangeable countries (Osório, 2018: 265). In this period, human rights became an essential aspect of the global agenda. However, they are often used as a true "Trojan horse": while they present themselves as attractive and almost unquestionable, they frequently conceal the imposition of models of "development" and "democracy" based exclusively on the accumulation of capital, neoliberal rationality, the endless exploitation of natural resources, individualism and an empty conception of democracy (Back; Mendoça, 2018).

In this context, geopolitical and geostrategic wars have today been transformed into "legitimate" humanitarian interventions for the protection of human rights which, given the ambiguity of their very origin, contain "a humanitarian aggressiveness". This is to say that they tolerate the violation of the human rights of those who violate

them because they neither have rights nor are they considered human (Hinkelammert, 1999: 20-35).

Through these humanitarian interventions, or "shock tactics" after crises which are, more or less, prompted, it is possible to "sell" to international society the need to: (a) attack social protections; and (b) favor the entry of international private companies into areas previously reserved for national public services (Klein, 2007). All of this is in the name of promoting human rights and "effectiveness" in the fight against serious crises, under the direction of legitimate international institutions, which act in a selective manner and, in the end, favor the expansion of the neoliberal economic model.

In this context, the creation of the ICC has given new impetus to those voices that denounce selectivity in the international judicial system, since from that point forward there is the permanent possibility of intervening to seek punishment of those most responsible for genocide, crimes against humanity and war and aggression, particularly when there is involvement of high state representatives.

Nevertheless, as will be studied in the next section, there are still legal and political issues that prevent the real achievement of this system of international criminal responsibility, such as the non-ratification of the ICC Statute by major powers that violate human rights (including China, Israel, Russia and the United States (US)) and the selectivity in the choice of situations to investigate and cases to prosecute, which are always concentrated in non-European regions (Olasolo, 2017).

5. THE INTERNATIONAL CRIMINAL COURT IN LIGHT OF THE INTERNATIONAL LEGAL FORM

The ICC is an idea that has resonated within the international system since the dawn of IL (Pashukanis, 1980:168-182). However, the strict legal positivism that reigned inside the doctrine of the late 19th and early 20th centuries (Mascaro, 2013) impeded progress towards its establishment. The logic was quite simple: since nation-states are the only subjects of IL and therefore the only holders of rights and obligations, only States could eventually be held responsible for in-

fringing IL. Furthermore, since they cannot be subject to criminal sanctions, their punishment would always be restricted to the civil sphere.

With the accelerated process of internationalization of relations of production, the crimes committed also began to transcend national borders, impacting multiple national realities, while even escaping punishment due to lack of legal provisions or evidentiary difficulties. In addition, those most responsible held command, or high-level positions, and were often protected by state immunities due to their role.

Following the path of IR in capitalism, the inflexion point began to occur after the end of World War II and the consensus generated as to the need to hold individuals responsible. The creation of the International Military Tribunal (IMT) (1945-46) and the International Military Tribunal for the Far East (IMTFE) (1946-48) following World War II, marked a crucial change in the relations between States and individuals, because, for the first time, natural persons were investigated and prosecuted at the international level (Klinghoffer, 2002), including the highest state representatives.

For this change to have occurred, new legal principles were applied concerning the scope of international jurisdiction and the recognition of individual responsibility of state agents.

As a result, for the first time, there was a trial of the highest state representatives for war crimes. Moreover, criminal actions for genocide and crimes against humanity and war crimes were also initiated against persons who represented the Axis countries in the domestic spheres of third countries, particularly in Eastern Europe, which was under Soviet domination (Hobsbawn, 1995).

According to Bassiouni (2011), these processes were only possible, both at the international and national levels, because they were directed against leaders who acted on behalf of the powers defeated in the war (other crimes committed by the allied countries, such as bombings of Hiroshima and Nagasaki, and the invasions of African territories, went completely unpunished).

Based on this experience, IL moved towards the predominance of ethical positivism over strict positivism beginning in 1945. This process was not immediate but gradual, and has consolidated since 1990s, with the ICC being its greatest exponent.

Both the collective security system created in the UN Charter, as well as the IMT and the IMTFE, made it quite clear on what foundations the international legal system forged in the postwar period was organized (Seitenfus, 2012). Firstly, the use of armed force and threats to peace and security were prohibited at the international level.

Secondly, the five permanent members of the UN Security Council (UNSC) were capable of authorizing the use of armed force in any circumstances.

With this, what was established in reality was a system in which: (a) only those who acted against the interests of the five permanent members of the UNSC would be subject to IL; and (b) illegal actions perpetrated by any of the permanent members of the UNSC could not be punished or contested due to their veto power.

This fed and reinforced the already existing domination over the countries of the Global South, and legitimized colonial military action in the wars of liberation that were emerging in Africa and Asia, legally exempting the UN from any action (Zolo, 2007).

The end of the Cold War and the intensification of the internationalization of relations of production contributed even more to the paradigm shift. IL and IOs have since then taken on an unprecedented centrality, witnessing an exponential growth in several previously unexplored areas, such as human rights and the environment, and the deepening of others, such as international trade.

Furthermore, after the end of bipolarity, human rights became the center of normative thinking, causing the attention of the international system to focus on them (Douzinas, 2009). Barbaric violations committed around the world demanded a more proactive approach from internationalists. The creation by the UNSC of the *ad hoc* international criminal tribunals for the former Yugoslavia (1993) and Rwanda (1994), strengthened the discussion on the exercise of

universal jurisdiction for the protection of human rights, which was finally applied with the request for the detention of General Augusto Pinochet (1996-1998), who was accused of crimes against human rights in Chile.

However, these developments were not exempt from criticism. Thus, legal positivists were upset by the recourse to *ad hoc* international criminal tribunals (useful, but far from ideal), because they opened gaps in the most basic principles of humanism and ICL (such as, for example, the principle of non-retroactivity and the prohibition of exceptional tribunals). To admit that punishment would be more important than these principles was to flirt dangerously with broader punitivism.

Likewise, betting on and endorsing universal jurisdiction opened a dangerous gap for the relativization of state immunity, exacerbating tensions and conflicts between countries, which might act on their own, having different behaviors and effects, to investigate and prosecute the highest representatives of third States (or those who have held these positions in the past).

Consequently, to balance the demand for investigation and punishment of those most responsible for serious human rights violations with respect to the basic norms of individual guarantees, internationalists sought a viable solution. They found this with the creation in 1998 of the ICC, which represented a turning point in international normativity and included certain innovations.

The ICC Statute consolidates the general idea of relativization of state immunities, concentrating in a permanent international criminal court the exercise of jurisdiction over crimes of genocide, crimes against humanity, war crimes and aggression (all provided for and defined in the ICC Statute, and considered to be of the greatest gravity and non-prescribable) committed after it entered into force on July 1st, 2002 (thus respecting the principle of non-retroactivity). Furthermore, the jurisdiction of the ICC, which has its own legal personality and is not constituted as an organ of the UN (but collaborates closely with this organization), is complementary to national criminal jurisdictions.

The ICC does not have universal jurisdiction, so it can only investigate and prosecute nationals of a State Party, or those who have committed crimes in the territory of a State Party, after the ICC Statute has entered into force for the concerned State Party. Furthermore, the ICC's jurisdiction for a given situation can only be activated by a State Party, the UNSC, or the ICC Office of the Prosecutor (ICC OTP) acting *ex officio*. In the case of referrals from the UNSC, there is no territorial limitation; that is, any high official who commits crimes foreseen in the ICC Statute can be brought before the ICC, even if he is a national and has committed the crimes in a non-party State.

Regarding access to justice at the international level, the hierarchy of States is visible, despite the discourse of equality. On the one hand, powerful States are those that have the political and material capacities to refer a situation to the ICC. However, at the same time, they can act against the ICC when its actions are unfavorable to them, without subjecting themselves to any international responsibility. Thus, for example, the US, in addition to not signing the ICC Statute, has attempted to frustrate the application of its standards by creating the American Service Members Protection Act in 2002 (Human Rights Watch, 2002), which aims to protect US government officials (whether military personnel or elected or appointed officials) from the jurisdiction of the ICC, as well as prohibiting any type of cooperation between US agencies and the ICC. It also authorizes the use of force to obtain the release of any US citizen detained or imprisoned by order of the ICC (Carreira, 2012: 62).

In this sense, it is not to be forgotten that the US, together with Russia and China, as permanent members of the UNSC, have a broad political influence over the actions of the UNSC concerning the ICC. Although the right of veto cannot be utilized to directly prevent an ICC investigation, it is undeniable that permanent member status at UNSC has been used with a geopolitical bias. This is the case, for example, of the criticism of the US government regarding the possible investigation by the ICC of illegal Israeli settlements in Palestinian territories (Crivelente, 2015), or the reaction of the US and Russia regarding the ICC opening of investigations into the situations in Afghanistan (2020) and Georgia (2016), respectively.

In 2010, the Review Conference of the ICC Statute, held in Kampala (Uganda), consolidated another decisive form of influence of the permanent members of the UNSC by establishing that it is up to the UNSC to determine when an act of aggression is involved, for the ICC to exercise its jurisdiction over the crime of aggression (Kowalski, 2011:119). This determination can be made by the ICC itself only if the UNSC does not rule within six months following notification to it by the ICC OTP (Salmón; Bazay, 2011).

On the other hand, less powerful States have great difficulty accessing the ICC for reasons ranging from economic difficulties to the impossibility of bringing a case against more powerful States. However, at the same time, most investigations and prosecutions by international criminal tribunals are carried out against their nationals. In this sense, it is worth recalling that the large majority of the cases pending before the ICC are against African states and non-state leaders. However, crimes within the jurisdiction of the ICC are committed on all five continents, and African countries are not the only ones who are inactive, unwilling, or unable to investigate and prosecute them (Carreira, 2012). This reinforces the idea of selectivity of the ICC proceedings, based on the political, strategic, economic, or cultural interests of the permanent members of the UNSC (Maibashi; Corrêa, 2014).

Danilo Zolo (2007) calls this phenomenon the "dualistic system" of international criminal justice (ICJ) which, legitimized by the comfortable and tolerant position of the UN *status quo*, punishes only the oppressed and defeated, leaving out the great powers and victorious world leaders. In this way, ICJ follows and reinforces the same logic of domination of the world-system (Wallerstein, 1974). According to this, the division of labor is based on structural inequality between central countries, semi-peripheral and peripheral. The former has highly specialized and capital-intensive production and a highly qualified workforce, while peripheral countries have abundant natural resources, few capital investments and forms of production that use intensive and unqualified manual labor.

The materialist critique of law emphasizes two aspects. On the one hand, there is the illusion produced by norms. Thus, although the creation of the ICC was presented as a great achievement of multilat-

eral cooperation, the truth is that it has not inhibited or prevented any of the massacres and other acts of systematic or widespread violence that have taken place over the last two decades. Consequently, it has only reinforced the essence of the dominant ethical legal positivism existing at the time of its foundation, which works with abstract allegories that are detached from reality.

The normative force has once again shown itself impotent in the face of the force of the concrete material relations of our time. The ICC has not produced what was expected but has limited itself to reproducing a common dynamic of international institutions and norms.

On the other hand, the materialistic critique of law affirms the need for the ICC to corroborate the international legal form, both in its formalities and its content. Despite the illusions of normativity, what the ICC shows are the specific material relations of current capitalism and in particular the contest among the great powers for world dominance. For this reason, it only persecutes nationals of peripheral countries. This leads to the conclusion that structural transformation cannot be fostered from within the forms of capitalism, the ICC being just one more example of the many that exist.

6. CONCLUSIONS

The critical view about IR includes elements of politics and economics in the analysis of law, intending to lift the veil of purity that covers the essence of social phenomena. The Marxist aspects of IR and law reveal a horizon eclipsed by the dominant legal positivist tradition that is dominant in most law schools.

After more than two decades, the trajectory of the ICC raises more doubts and criticism than praise for its work. The entry into force of the ICC Statute in 2002, while creating a legal basis for investigating and prosecuting genocide, crimes against humanity, war crimes and aggression, repeats the "victor's justice" patterns of the previous international criminal tribunals for the former Yugoslavia and Rwanda (Zolo, 2007).

Selectivity and limited access for Global South States are characteristics that corroborate the reproduction in ICJ and in the ICC of an inquisitorial and discriminatory standard, similar to that of national penal systems. As a result, such a standard is only applied to state and non-state leaders of the peripheral countries, while leaving the leaders of the central countries shielded from their international criminal responsibility. The unenforced arrest warrant issued by the ICC in 2022 against Russian president, Vladimir Putin, for crimes committed in a particular context of the war in Ukraine does not alter this conclusion.

Furthermore, ICJ and the ICC limit themselves to enforcing individual criminal responsibility of those most responsible for the most serious crimes of international concern, but do not discuss the political, social and economic causes of the crimes, even though only the revelation of such causes could provoke structural changes within the international system (Weitekamp; Vanspauwen; Parmentier; Valiñas; Gerits, 2006: 217-241).

This would also allow us: (a) to see, beyond the norms, a world connected to concrete reality; and (b) to take the necessary distance from unrealistic conceptions of institutions such as the ICC, which only fuel false expectations because to change the current reality it is necessary, first of all, to understand it.

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Chapter 5
The Perspective Of The Helsinki School[*]

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1. INTRODUCTION

Recent decades have presented challenges to the traditional postulates of international law (IL) on several fronts. Two of the main ones are the multiplication of new actors in the international system and the understanding of IL. On the one hand, positivist visions (both from philosophy of law and from perspectives committed to empiricism and scientific nature) have offered explanatory frameworks that have contributed to the constitution of the current international order, with its strengths and weaknesses. The former includes the creation of an institutional framework, having a liberal inspiration, comprised of a plethora of international organizations

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(IOs) and tribunals with limited jurisdiction and binding force granted by the States that established them. The latter include the inability of those organizations and jurisdictions to fulfill satisfactorily the tasks for which they were created; an inability that has led to the perpetuation of an unjust, unequal, and undemocratic system. This situation is sufficient to foster the investigation of other possible ways of thinking about the world, international relations (IR), and IL. Among the variety of options available, this chapter is based on a not so well-known critical vision, whose arguments are certainly interesting: the Helsinki School.

The multiplication of actors in the international system has put them under the microscope, especially those actors upon whom the hopes of a peaceful world where human dignity would be preserved were placed. Without a doubt, one of these actors is the International Criminal Court (ICC). With its establishment at the turn of this century, the underlying promise of a permanent criminal tribunal with jurisdiction over the most serious crimes against humanity as a whole, together with its design as a supra-state entity, capable of providing that human security prevail over national security, presented strong arguments to support the prevailing optimism about the role that the nascent ICC could fulfill.

However, more than two decades after its coming into force, there seem to be more concerns than certainties regarding the role of the ICC. In this way, its tendency to become an instrument of hegemonic powers, which allows their agendas to prevail over weaker States is opposed to its declared purpose of doing justice to those leaders whom their States have covered with cloaks of impunity while denying justice to victims. This is why it is worth examining the Helsinki School's interpretation of the ICC's role.

To reach this goal, the main postulates of the Helsinki School towards international criminal justice (ICJ) and the ICC are compared. The methodology used is that of a documentary analysis with a strong inclination towards theoretical, doctrinal, and jurisprudential texts. Regarding structure, this chapter develops, first of all, the main postulates, the vision of the current international system, the perception of law, and the proposals for an alternative world of the Helsinki School (section 2). Next, it discusses its perspectives and conception

of ICJ and its feasibility in the real world (section 3). Following that, the same theoretical and conceptual framework is used to understand the role that the ICC has played in shaping contemporary IL, the role of international lawyers, and the relationship between hegemonic and peripheral States (section 4). The chapter ends with some brief conclusions (section 5).

2. THE HORIZON OF ANALYSIS: THE HELSINKI SCHOOL

The theoretical perspective that is known as the Helsinki School has been inspired, to a large extent, by the intellectual project of the professor at the University of Helsinki, Martti Koskenniemi. Although his work is, to a large extent, part of the so-called Critical International Law Studies (CILS), authors such as Bianchi (2016) consider that Koskenniemi's work unfolds towards an independent vision. A clear split is seen as a result of the publication of his book Gentle Civilizers of Nations: The Rise and Fall of International Law 1870-1960 (2001), which departs from his previous monographs (more properly part of the CILS, such as, for example, From Apology to Utopia (1989)), due to its emphasis on IL as a synthesis between (political) thought and action. In other words, for this last approach, IL is the indivisible result of international legal theory and juridical practice.

The interesting thing about the conception of IL is its modern origin, namely in the group of researchers enrolled at the *Institut de Droit International* (International Law Institute) in Ghent (Belgium) circa 1873. This idea runs contrary to the incessant discussion as to whether its origin comes from the Salamanca School on *ius gentium* or modern natural law. The reason for proposing an alternative origin is that Koskenniemi conceives the members of the aforementioned institute as men of practice, not philosophers, who thought of law as social progress. Furthermore, the contrast between the state-centric German tradition and the anthropocentric French tradition of IL increases the relevance of understanding IL from the perspective of the politics of the legal profession. For this reason, in the end, Koskenniemi conceives of IL as "what lawyers make of it" (2001).

2.1. The problem of the current international system

When exploring the main questions raised by Koskenniemi as to how the practice of IL is carried out by those who apply it, one inevitably encounters the concept of "managerialism". Managerialism can be defined as a professional mental matrix in which IL is imagined as a particular mode of technical knowledge. This concept is based on the assumption that the dominant discourse in IL is objective and neutral to the extent that it is subject to the guidelines of the scientific method (Bianchi, 2016).

The proponents of this managerialism end up naturalizing the results produced by the international legal system as those that conform to the rigor of this method. This leaves no room to question assumptions such as, for instance, the consideration of States as actors with international legal personality in a system where their territorial possessions are understood as their property, their treaties as their contracts, and their diplomacy as a system of legal administration (Koskenniemi, 2007: 1).

Far from sharing this position, Koskenniemi points out that managerialism, as a strategy which favors the practice of law becoming increasingly technical, is responsible for several contemporary problems that IL and the world currently face, including marginalization, the absence of normative force and the feeling that diplomatic customs are at the base of everything that is wrong with the system (Koskenniemi, 2007: 2).

Despite hiding behind technical knowledge and the neutrality of the scientific method itself, supporters of managerialism cannot conceal that behind this approach to IL vested interests are willing to privilege certain actors or values that occupy hegemonic positions in the dominant institutions. By fulfilling a clear purpose and leaning towards such actors and values, on the one hand, but presenting itself as neutral knowledge on the other, managerialism ends up becoming a discourse that legitimizes the *status quo*. It favors some, while neutralizing others (Bianchi, 2016). In this context, vested interests render the lawyer a cog in the machine, who ends up being instrumentalized by it. This instrumentalization is not, however, something given naturally, but is the product of a constant renegotiation in view of ongoing calculations (Koskenniemi, 2007: 26).

To illustrate this situation, Koskenniemi uses the example of 19th century nationalism in Germany. For him, the concept of "German nation" was, at that time, a conflictive, indeterminate, and open one, far from being homogeneous in dominant discourses. As a result, the German managerialist vision was permeated by these contradictions, even in the imperialist phase of the late 19th century (2007: 26).

Having revealed the illusory neutrality of managerialism, Koskenniemi perceives in the international system a struggle amongst its actors to position their own agendas (a struggle that also affects language).

This struggle is considered by Koskenniemi as a hegemonic dispute defined as the process by which international actors routinely challenge each other by invoking legal rules and principles upon which they have projected those meanings that support their preferences and undermine those of their opponents (2004: 199).

Each party to this hegemonic dispute seeks to convert its own specific view of any issue into the overall view, giving the appearance that its interest is the universal one. The process that led to the adoption of the UN General Assembly (UNGA) Resolution 3314 (1974), on the concept of an act of aggression, clearly reflects this type of dispute. There, the discussion was on determining the licit and illicit forms of use of armed force in a scenario in which each proposed solution affected the position of the other States involved in the negotiation (2004: 199).

Consequently, for Koskenniemi, the problem of the current international system is the way in which an irregular and contradictory process, such as the constitution of managerialism, leads to: (a) a power/resistance dialectic amongst the actors within the system; and (b) a concealment of such dialectic in the name of the naturalization of a legal technique that is presented as neutral and objective.

2.2. Representation of law and its function

Koskenniemi goes beyond the view of IL as a set of rules and institutions. He considers IL as a "tradition and a political project", consisting of a process of articulating political preferences through

legal arguments, which cannot be separated from the conditions of the political dispute within which they were articulated (2004: 197).

This perspective departs from the traditional view of IL as a stable set of norms that is independent of power relations, and positions it as a field of hegemonic contention, that is, a technique for the articulation of political claims in terms of legal duties and obligations. In this way, IL is affected by the projection of particular preferences into universal ones, as has occurred, for instance, with the use of force, the right to peace, human rights, trade, and globalization.

Nevertheless, IL is not limited to hegemonic contention because it also contains in its language some utopian elements that seek to separate political actors from their idiosyncratic preferences to create a legal community (2004: 197). As a result, for Koskenniemi, IL is a field of tensions between actors, values and conceptions; the most relevant being the tensions that exist between universalism and particularism, and between formalism and dynamism (Shaw, 2008: 64).

The tension between universalism and particularism leads to the challenge of fragmentation of IL. To resolve this challenge, international lawyers, especially those from the European tradition, have tried to understand IL in constitutional terms, excluding from their analysis any political and diplomatic assessment, and interpreting IL as a hierarchy of rules and institutions (for which reason they resort to Latin-inspired formulas such as *jus cogens*) (Koskenniemi, 2007: 15).

In contrast to this aspiration to constitutionalize IL, its evolution has taken it far from being able to provide even a glimpse of a unity of the system. This is due to the expansion of the international agenda, which has translated into the need to face new contemporary problems such as those related to the economy, human rights, the environment, organized crime, and international security, which have extended the scope of application of ancient principles and institutions.

Consequently, the recipe has been a departmentalization into branches such as, *inter alia*, international business law, international human rights law (IHRL), international environmental law, international humanitarian law (IHL), international criminal law (ICL), and

international security law. In this context, issues relating to the competent authority to regulate a specific matter, or the bias that its regulation may impose on the approach to other matters, are resolved by imposing the views of certain experts who rely on their power to validate their positions (Koskenniemi, 2007: 4-6). This is how fragmentation ends up becoming a dispute over institutional hegemony.

In addition to the problem of IL fragmentation and its inherent contradictions, there is a tension between formalism and dynamism, which is also related to the inability of the new international legal regimes to establish vertical control. If legal regimes were capable of guaranteeing political control, this situation would be resolved. However, even those regimes founded on traditional sources of IL (such as multilateral treaties) end up leaning towards contextual and *ad hoc* approaches that ultimately reinforce the position of experts. As with norms that aim to have universal reach, those others that focus on preserving formality also end up becoming norms that are too exclusive, or too inclusive, in opposition to the legislator's will (Koskenniemi, 2007: 9).

2.3. Proposal for social and international transformation

Based on the problems of the international system and IL, Koskenniemi returns to his conception of IL as a political project that has repercussions on practical, political, and moral dimensions.

Firstly, by considering IL as "what lawyers make of it", Koskenniemi aims at raising awareness of the need for a shared sensitivity of the profession, intending to reconstruct the politics of the profession. Thus, in Gentle Civilizers of Nations, he reconstructs the intellectual history of the international legal profession to show the historical movement and political struggle of international lawyering (which have even affected the protagonists at a personal level) (Bianchi, 2016). His goal is to recover this knowledge as a political project because, for him, contemporary IL, unlike what some of his colleagues assert, is not limited to transforming its vocabulary to facilitate the coordination of global governance through the empiricism of political science.

By taking this path, Koskenniemi seeks a dual effect: (a) the development of a professional sensitivity that feels at home in all international legal regimes, but is not imprisoned in any of them. This would be what cosmopolitanism can be today: the ability to break and connect, to participate in the politics of regime definition by narrating regimes anew, and by giving voice to those who are not represented in the institutions of the regime (2007: 29); and (b) politicizing governance, in the sense of rethinking the activity of expert institutions not as the technical production of decisions predetermined by some anonymous logic, but as choices of men and women at the various places in which power is found: not only in diplomacy or in IOs, but also, *inter alia*, in transnational companies, interest groups, banks, development agencies and universities (2007: 29).

The reinvention of the practices of international lawyering would then involve unmasking the power relations embedded in international legal regimes, even in the less recognized scenarios of power. This act of unmasking would allow the identification of the interests and values of the producers of international norms. Thus, the possibility of "breaking and connecting" would contribute to a narrative of deconstruction of IL so as to narrate it anew, with the support of the perspective of the marginalized (2007: 29).

Secondly, the value of IL as a political project would assist in the replacement of the naturalization of European particularism (or the perspective of the hegemonic power of the day) as the preferred global vision. Therefore, at this point, it is important to promote the values of a culture of resistance to power. By rescuing the political value of IL, Koskenniemi assumes the position of authors, such as Schmitt and Morgenthau, so as to speak of "the law of the empire" instead of the "rule of law" (Bianchi, 2016).

The consideration of a particular vision as the global vision entails the imposition of a specific agenda for IL, which leaves aside more important problems of the world order (such as poverty). Given this context, the culture of resistance to power requires that opponents be members of a legal, and therefore political, community. This would lead to the establishment of an authentic political community, whose struggle, characterized by cosmopolitanism and solidarity, would take place in the name of "anyone in my position" (Kosken-

niemi, 2004: 213-214). To fulfil this, it is prescribed that power must be limited, the powerful must be held accountable, and the weak must be protected (Bianchi, 2016).

Thirdly, by focusing on the practice of international lawyering, Koskenniemi gives the impression of breaking with Kant's teleological vision of history. However, the Finnish professor exalts the Prussian philosopher's project of critical reason to transform the international legal profession into a practice of political morality. However, unlike Kant, Koskenniemi places particular emphasis on the concrete projects, interests, and ambitions of those who participate in the development of IL (in contrast to their abstract ideas and projects) (Bianchi, 2016).

Accordingly, for Koskenniemi, the true value of Kant's approach is to foster the recovery of IL as the bearer of the idea of a regulator of the international community, independent of particular interests or desires and to return to morality as the axis of application of IL. As Koskenniemi explains, the correct understanding of Kant's cosmopolitanism is that of a project of critical reason that measures the current state of affairs from the perspective of an ideal of universality that cannot be reformulated into an institution, or a technique of government, without destroying it. Thus, the destiny of IL is not a question of re-employing a limited number of professionals for more profitable tasks, but of restoring hope for the human species (2007: 31).

3. UNDERSTANDING INTERNATIONAL CRIMINAL JUSTICE THROUGH THE HELSINKI SCHOOL LENS

For Olasolo (2016), ICJ has three main groups of goals. Firstly, there is the safeguarding of individual and collective social values (among which international peace and security and the existence of human groups stand out).

Secondly, there is the establishment of a historical narrative of what happened; this is a goal which is, however, rejected by an important part of the doctrine, including that of Koskenniemi. Koskenniemi considers it strange that a jurisdictional body would act as an

arbitrator between the different historical versions of the long-term conflicts in which many international crimes are committed, since these conflicts are not easily interpretable through the application of ICL (cited in Olasolo, 2016: 107).

Thirdly, there is the promotion of post-conflict reconciliation, which is a goal that reflects a new doctrinal tension between those who consider that ICJ can facilitate social reconciliation, consolidating the foundations of a lasting peace, and those others who, like Hayner, remember that there is no empirical evidence that demonstrates fully the intuition outlined by the authors of the first group (cited in Olasolo, 2016: 109).

Within the framework of these doctrinal tensions over ICJ goals, one of the great contributions of the Helsinki School consists in affirming the need to rethink these goals as a consequence of: (a) accusing ICJ of being a political project whose narrative is imposed by hegemonic powers; and (b) fostering approaches which portend the possibility of changing the ideas and/or practices that have a key impact on the future of international society.

For Koskenniemi (2002), ICJ manifests a typical trend of the current hegemonic order. This is illustrated by both the ideological and financial support of Western sponsors for the International Criminal Tribunal for the former Yugoslavia (ICTY) and the judicial advantages obtained from it, as shown by the refusal of the ICTY Office of the Prosecutor to open an investigation into the NATO bombings in Kosovo in 1999.

As a consequence, for the Finnish author, ICJ offers a weak and vulnerable strategy for dealing with major crises. The more one insists on its technical nature, the more evident is its intention to impose one narrative over another, thus making evident how its cases serve to ratify the hegemony on which this apparatus of justice is based. As Koskenniemi (2002: 35) puts it, every tribunal finds itself between the difficult choice of accepting some facts as they are commonly known and constructing facts from what procedural techniques reveal. Here, the fine line between justice, history, and manipulation becomes invisible (2002: 35). This manipulation evidently reveals the hegemony in IL.

Based on the foregoing, the Helsinki School criticizes the concept of international responsibility of the individual, which is the foundation of both ICL and the hegemonic vision ICJ. Thus, it raises a set of questions about individual punishment and the establishment of the truth. In regards to punishment, there is an inherent tension related to the danger that these types of prosecutions become "show trials", which, due to their methodology, end up exalting the accused instead of seeking to give dignity to the victims. As Arendt has pointed out concerning the death sentence of Hermann Göring, sometimes a tragedy is of such magnitude that punishment of the individual is not sufficient given the dimension of the crimes committed (cited in Koskenniemi, 2002: 2). This dimension of spectacle can be seen, for instance, in the Nuremberg trial, in the Eichmann trial before the Supreme Court of Israel, in the trials of Klaus Barbie and Maurice Papon in France and in the trial of Slobodan Milosevic at the ICTY.

Concerning the establishment of the truth, ICJ seeks to offer accountability for the past and teach younger generations about the dangers of particular policies. However, there is little information about its didactic effects. In this sense, Koskenniemi provides two examples. The first related to the didactic impact of the International Military Tribunal (IMT) (Nuremberg Tribunal) in Germany. It was treated by post-war German doctrine as an occupation tribunal, instead of an international criminal court, which promoted the hegemonic bias denounced by the School of Helsinki in relation to ICJ. As a consequence, the German population did not support it, as shown by the fact that only 10% had a positive view of it in 1952.

The second example is that of the South African Truth and Reconciliation Commission, whose educational contribution has also been controversial because only 17% of South Africans surveyed believe that the process has had a positive effect. In contrast, two-thirds of those surveyed consider that interracial relations deteriorated after the establishment of the Commission (2002).

Continuing with his objections to ICJ, Koskenniemi considers that trials for genocide or crimes against humanity have less to do with the international responsibility of the individual than with the establishment of the truth about the facts. This is because the establishment of the truth is required to initiate the healing of victims and

the restoration of their dignity (2002). However, ICJ does not have adequate enforcement mechanisms to achieve this goal because in trials for international crimes the there are problems in establishing the truth. As a result, many kinds of truth can be heard in criminal trials (2002: 6).

Furthermore, for Koskenniemi, it is necessary to differentiate between historical truth and legal truth. Although there is a certain relationship between these two types of truth, there are interpretation problems that persist which are difficult for ICJ to solve, given the weakness of its judicial processes to address major events in international politics.

Moreover, not only does ICJ not collaborate in the resolution of the major conflicts in the international system, but it undermines the peace and reconciliation processes themselves by not providing mutual support in finding historical or contextual truth. For Koskenniemi (2002:14), contextual truth is opposed to individual truth. As a result, in his view, only the former can confront the hegemonic vision of ICJ because the meaning of historical events generally exceeds the intentions or actions of particular individuals, and can only be understood from the structural causes, the economic or functional needs, and a broader institutional logic. It is this contextualization that is certainly relevant because memory is a critical evaluation, an interaction with the past from memory and personal experience; a memory that looks at the past, but opens to the future, prepared for transgression, and possibly reconciliation (Koskenniemi, 2002: 35).

Nevertheless, ICJ is not well-equipped to contextualize "normal criminal societies" because this would mean converting the process into a historical lesson, and the underlying dispute into a political debate about the plausibility of historical interpretations (Koskenniemi, 2002: 17).

4. THE ROLE OF THE INTERNATIONAL CRIMINAL COURT FROM THE HELSINKI SCHOOL PERSPECTIVE

All the elements highlighted in the previous section, which reflect the intersection of tradition, the political project and the intentions,

aspirations, and expectations not only of States, but mainly of individual human beings, are presented in this section around a specific unit of analysis: the ICC.

Since it is a permanent international criminal tribunal charged with trying those most responsible for the commission of the most serious crimes of international concern, the discussion on the establishment of the ICC was always framed within a game of political, economic and *status quo* interests. Numerous States have stated that the ICC seriously affects their sovereignty and runs against their national interests. Likewise, the lack of ideological homogeneity between the States and the high economic costs that its maintenance entails have been other arguments used against its establishment (Hernández, 2002: 481).

From the perspective of the Helsinki School, it can be observed that the discussions held during the negotiations of the ICC Statute have a political connotation that answered to the interests and agendas of the participating States. Furthermore, although the initial intention was to achieve universal acceptance of the ICC, this did not happen, because several of the great powers of the time (China, India, Israel, Russia and the United States (US)) rejected its creation (Cryer, 2010: 171), and the ICC Statute only had the favorable votes of 121 States (Rocha, 2018: 6).

4.1. The current challenges for the ICC: (im)partiality, political interests and ineffectiveness

Since the entry into force of the ICC Statute, the ICC has faced multiple situations that have brought into question its role and impartiality. More than twenty years after its coming into force, the ICC continues to confront the acceptance or rejection of States, which understand that their support for it follows their internal agendas and the maintenance of their political interests and the international *status quo*.

As a result of the foregoing, in October 2016, three African countries (Burundi, Gambia, and South Africa) considered the option of withdrawing from the ICC Statute. The arguments of these countries

consisted of the assertion that the ICC was not impartial and had a high level of bias towards the situations and cases occurring in Africa, while ignoring that, in other latitudes, its intervention was also necessary (Cerda, 2017: 128). Despite these arguments, only Burundi ended up withdrawing from the ICC Statute, because in the end South Africa did not send its withdrawal to the UN Secretary General and the new Gambian government withdrew its withdrawal before completing the 12-month period necessary for it to be effective.

That same year, Yoweri Museveni, President of Uganda, during his inauguration referred to ICC members as a bunch of useless people, which led to certain Western diplomats to withdraw from the event. Museveni expressed in this way his annoyance at the delays in the trial against Joseph Kony and the abuses committed by the Lord's Resistance Army (LRA) (Cerda, 2017: 128).

Furthermore, the case relating to former Sudanese president Omar al Bashir has generated great exasperation and dissatisfaction with the ICC in a number of African countries. Thus, following the issuance of the arrest warrant in 2009 by the ICC, Al Bashir stated that the ICC was a neocolonial instrument of the West for the repression of African freedom and sovereignty. Subsequently, the Libyan leader Muammar Gaddafi affirmed that his actions and statements against the ICC were an example of anti-imperialist and anti-colonialist actions of weaker nations against the great powers. Paul Kagame, president of Rwanda, also accused the ICC in 2010 of being slave-owning and colonialist, which operated against the principle of self-determination of peoples, thereby justifying the non-ratification of the ICC Statute by Rwanda. Finally, Uhururu Kenyatta, president of Kenya, upon learning that he would be investigated by the ICC, asserted in 2012 that the ICC was selective and politicized (Campos & Lozano, 2018: 15).

Following from these cases, the Al Bashir case (resulting from the situation in Darfur (Sudan) referred to the ICC in 2005 by the United Nations Security Council (UNSC) (R/1593/2005)) has shown how the lack of cooperation by States (particularly African ones), to achieve his arrest, has prevented further progress in the proceedings before the ICC, and thus significantly hindered the fulfillment of its role.

In this regard, it is worth recalling that, since 2009, two arrest warrants have been issued against former President Al Bashir but, a decade and a half later, it has not yet been possible to place him in ICC custody due to lack of cooperation of numerous States (parties and non-parties to the ICC Statute), which have received him on their territory without arresting and surrendering to the ICC (n.d.A).

After losing power in a *coup d'état* in 2019, Bashir is currently in prison in Sudan after having been convicted in August 2021 for the crimes of corruption and money laundering. As a consequence, ICC proceedings for genocide, crimes against humanity and war crimes have been, to date, unable to move forward.

Concerning Burundi, following the decision of parliament in 2016 to withdraw from the ICC Statute, one of the parliamentarians (Gabriel Ntisezerana) stated that the ICC was a political instrument used by powers to eliminate those who wanted power on the African continent (Cerda, 2017 130). This was the state response to the opening by the ICC, on April 25, 2016 of a preliminary examination on the situation in Burundi (ICC, n.d.B). The statement shows how the relationship of States with the ICC depends on how their interests are aligned with the actions of the Court. Consequently, the moment the ICC becomes a threat, the reaction is usually withdrawal from the ICC Statute and/or ending cooperation with the Court.

As a result of all of this, the president of the 15th session of the ICC Assembly of States Parties (ICC ASP), Sidiki Kaba, stated in November 2016 that a strong feeling of injustice ran through the African continent in which many countries perceived the ICC as the expression of judicial imperialism that wanted to punish its pan-African leaders. This perception had caused an almost permanent tension in relations between Africa and the ICC in previous years, leading to a crisis that had to be quickly contained following the announcement by Burundi, South Africa, and Gambia of their withdrawal from the ICC Statute (ICC, 2016).

On the other hand, the alleged vocation to ICC universality has been harshly criticized due to the non-participation of a number of regional and great powers (including China, India, Israel, Russia, and the US), which have not joined. As a consequence, due to the

lack of adherence to the ICC Statute of these States, it would appear that impunity will continue to spread concerning crimes committed by their nationals (Cerda, 2017: 132).

The situation in Georgia provides another clear example of the tensions generated by ICC proceedings. The main actors involved in this situation, which has been investigated by the ICC from 2016 to 2022, are, on the one hand, Georgia (a State Party), and on the other hand Russia (a non-party State). As a consequence of this tension, when the investigation was opened in 2016, the Russian Foreign Minister stated that, unfortunately, the ICC had not met the expectations of becoming a truly independent and accredited international court. The work of the Court had been primarily characterized as ineffective and unilateral in different forums, including the UNGA and the UNSC. Indeed, in 14 years of work, the ICC had only issued four convictions after spending more than a billion dollars. As a result, the initiative of the African Union to foster a coordinated withdrawal of African States from the ICC Statute was understandable, and some of these States were already carrying out such procedure (The Ministry of Foreign Affairs of the Russian Federation, 2016).

Although this statement refers in particular to African States, the reality is that among the States that have withdrawn from the ICC Statute there are also non-African States such as the Philippines, whose situation under preliminary examination: (a) has as its epicenter the alleged extrajudicial executions committed by the police after July 1st, 2016 within the context of the government's anti-drug campaign; and (b) represents another challenge to the ICC effectiveness (ICC, n.d.C).

Thus, on March 17, 2019, one month after the ICC Office of the Prosecutor (ICC OTP) began its preliminary examination, the government of the Philippines sent its notice of withdrawal from the ICC Statute to the UN Secretary General, becoming effective twelve months later (ICC, n.d.C). In a press release, the ICC regretted this decision and urged the Philippines to remain part of the ICC Statute in order to contribute to the achievement of the ICC mandate based on impartiality and independence (ICC, 2018B). However, the Secretary of Foreign Affairs of the Philippines emphasized that they were leaving the ICC Statute due to the well-orchestrated campaign cre-

ated to deceive the international community and crucify President Duterte through a distortion of the human rights situation in the country (Deutsche Welle, 2018).

The situation in the Philippines constitutes another example of how, as pointed out by the Helsinki School, state political interests are determinant in the decisions of the governments as regards their participation in the ICC Statute and their effective collaboration with the ICC. When the ICC proceedings affect the credibility and stability of a government, the decision is to withdraw from the ICC Statute and/or to stop cooperating with the ICC, to avoid future investigations and prosecutions. On the other hand, when national interests and agendas are aligned with the ideals and proceedings of the ICC, support and membership are not long in coming.

4.2. The role of judges

The ICC has recently faced an internal struggle related to the opening of the investigation into the situation in Afghanistan. Thus, on April 12, 2019 Pre-Trial Chamber (PTC) II rejected the request of the ICC OTP to initiate the investigation into the crimes against humanity and war crimes committed there. This was subsequently revoked by the Appeals Chamber (AC), which on March 5, 2020 decided to authorize the opening of the investigation in Afghanistan (ICC, 2020).

Through these contradictory decisions and their dissenting opinions, it can be seen how different interpretations can be made of the same legal provision through the use of such indeterminate legal concepts as "interests of justice", or by expansive approaches to normative provisions (requiring, for example, the cooperation with the ICC OTP as an essential element for the authorization of an investigation). This is particularly relevant for the Helsinki School, due to the importance it attributes to the role of judges, to the extent that it is they who decide on the social values and legal interests included by the ICC Statute and on the political and legal positions of the States.

ICC PTC II was comprised of Antoine Kesia-Mbe Mindua, Tomoko Akane and Rosario Salvatore Aitala. It decided not to open the in-

vestigation, notwithstanding that the facts presented fell under the jurisdiction of the ICC and the admissibility criteria were met. The argument on which the judges relied was that, in their view, the ICC is not well-equipped to investigate all situations in which the most serious international crimes are committed, and, therefore, it must focus on those in which the perspectives for investigatory success are substantive (ICC, Afghanistan, 04/12/2019: para. 90). For PTC II, the situation in Afghanistan was not among the latter due to the following factors: (a) the significant time (more than a decade) that had elapsed between the alleged crimes and the request to open the investigation by the ICC OTP; (b) the limited cooperation obtained by the ICC OTP (even for a preliminary examination); and (c) the low probability that the relevant evidence and the main suspects remained available (ICC, Afghanistan, 04/12/2019: para. 91).

For PTC II, the ICC OTP preliminary examination of the situation in Afghanistan (2007-2018) had been very lengthy, as around eleven years had passed between its start and the ICC OTP request for authorization to open an investigation. Moreover, for PTC II, the circumstances that generated this delay had not changed or improved, and therefore, they could continue to affect the course of any investigation that was authorized and the availability of evidence about the crimes committed.

Likewise, PTC II considered that recent changes in the political situation in Afghanistan and in other key States had made it difficult for their national authorities to cooperate with the ICC. This generated additional delays, which could continue furthermore, thereby increasing the resources necessary to carry out the investigation (ICC, Afghanistan, 04/12/2019: paras. 92-95).

As expected, this decision generated a variety of reactions at the international level and within the ICC. Four former presidents of the ICC Assembly of States Parties (ICC ASP) stated that this type of decision was a way of telling the US that since it has blocked everything, the investigation is not possible. Similarly, for the first Prosecutor of the ICC, Luis Moreno Ocampo, judges: (a) were providing impunity to suspects who can exercise enough political power to prevent relevant State Parties from cooperation with the ICC; and (b) had transformed a political consideration into a legal requirement, as if it were

a new provision in the ICC Statute, because the lack of cooperation had never been understood as a valid argument for not opening an investigation (Morales, 2019).

The decision to not open the investigation was appealed by the ICC OTP, which argued that PTC II was capable of carrying out an analysis of the interests of justice, but that how it had done so was wrong. Moreover, the legal representatives of the victims, the Office of Public Council for Victims (OPCV), the cross-border victims and the Center for Human Rights at Queen's University in Belfast, argued that PTC II could only review the arguments of the ICC OTP regarding "the interests of the justice" when the latter considered that, due to said interests, it would not be appropriate to initiate an investigation (ICC, Afghanistan, 03/05/2020: paras. 22-23).

In this context, the AC concluded in its decision of March 5, 2020 that PTC II had been wrong in considering that "the interests of justice" could justify the denial of authorization to the ICC OTP to open the investigation. For the AC, the negative formulation of art. 53(1) of the ICC Statute means that the ICC OTP does not have to determine or explain why an investigation serves the interests of justice (as was the case in the situation in Afghanistan); the ICC OTP should only do so when it considers that the possible investigation does not serve said interests, and, therefore, only in the latter case may the PTC review the arguments about the interests of justice (ICC, Afghanistan, 03/05/2020: para. 49).

Likewise, the AC considered that reasoning of PTC II on the interests of justice had been superficial, speculative, and was not supported by sufficient information. Furthermore, for the AC, the decision of PTC II took into account neither the seriousness of the crimes allegedly committed, nor the real interests of the victims involved (ICC, Afghanistan, 03/05/2020: para. 49).

In any case, and regardless of the underlying issue, the foregoing reflects that, ultimately, it is the judges who are in a position to significantly contribute to the fulfillment of the ICC's role; or, on the contrary, they may choose to interpret their mandate in favor of national or international political interests.

5. CONCLUSION

The Helsinki School offers multiple possibilities for analysis to those who are interested in understanding the current dynamics of IL, ICJ and especially the ICC. Thus, in the first place, it considers the ICC as an instrument of the hegemonic position of powerful States Parties and the individuals who represent them. This means, in practice, shielding them from ICC proceedings, while, at the same time, the ICC focuses its investigations and prosecutions on state and non-state leaders of peripheral States, especially African States.

Furthermore, several regional and great powers (such as China, India, Israel, Russia and the US), despite not being States Parties, also exercise influence in the fulfillment of the ICC's role, either directly or through their influence on the national agendas of those States Parties with which they maintain a relationship of subordination.

Secondly, the Helsinki School provides a warning as to how the ICC is perceived, depending upon the circumstances, as an ally or enemy by States Parties and non-party States. It can be an ally to the extent that the ICC decisions are aligned with their national interest and can be indirectly influenced (as the US did in the debates on the definition of the crime of aggression in the 2010 Kampala Review Conference). However, it can be an enemy, to the extent that ICC decisions do not align with their national interests, or those who hold political power in such States are investigated (the opening of the investigation in the situations in Georgia and Afghanistan are good examples of this issue). As a result, some State Parties, such as Burundi and the Philippines, have decided to withdraw from the ICC Statute when the ICC proceedings no longer aligned with their political interests.

In short, the Helsinki School allows us to reveal how, behind the legal arguments, are hidden the political preferences of the States which see in the ICC's role an opportunity to emphasize or prioritize their interests on the international stage or to consolidate a national government against growing pressure by the opposition. The fact that the ICC has to constantly deal with the political interests of States (which consider that their participation in the ICC is due to their national agendas, the need to support their interests at the international level and the maintenance of the international *status*

quo), complicates, to a large extent, the ICC goal to have a universal reach, as well as the fulfillment of its role without its independence being continually put into question.

Finally, to transform this situation, the Helsinki School attributes particular importance to the ideas and practices of international lawyers, who try to enforce the national agenda of the States they represent, and of judges who are, ultimately, those who have in their hands the ability to foster the correct fulfillment of the ICC's role through the interpretation and application of the ICC Statute and its complementary instruments.

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Chapter 6
The Perspective Of Social Idealism[*]

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1. INTRODUCTION

The predominance of the Westphalian model and the centrality of the State as the main actor in international relations (IR) and international law (IL) has emerged as a dominant idea for over three centuries. This assumption has been useful to operationalize domestic law and IL.

Running contrary to this model, many other entities have seen their agency and powers limited by an international structure that is often so rigid that their rights and interests are set aside by imperative values of the world order such as sovereignty and national interest. This line of thought has led to the assumption that only once

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

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national security is guaranteed, will human security be affirmed par excellence. However, over the last three decades, there have been a number of situations that show the opposite. Thus, the inability of a large number of non-hegemonic States to enforce the fundamental rights of their populations and to deter the proliferation of irregular armed actors and criminal organizations that directly attack the most vulnerable due to the omission, acquiescence, or even active support of state agents and/or the state apparatus, are some of the patterns that have been repeated throughout different continents.

The frustration that the architecture of the international order has left, and its permissiveness of the injustices perpetrated by States, or those who run them, raise fair questions not only about their actions, but even more so about the ideas that justify this imbalance. Positivist visions and, in general, the main theories of social discipline are judged to have been jointly responsible for the oppression that is experienced every day by those less fortunate. The locks and chains used massively in the past have given rise to the manipulation of ideas as the tools of contemporary slavery. For this reason, emancipation can no longer be a physical act of rebellion, but rather a revolution launched from the plane of ideas. This visualization of another possible world comprises part of the intellectual project of one critical theory of IL: social idealism.

In determining the actors in the international system that could contribute to the fulfillment of this purpose, focus be inevitably placed on the ICC. The establishment of a permanent international criminal tribunal, whose purpose is to set aside state international responsibility to concentrate on individual responsibility for crimes that offend humanity as a whole, half-opened the door of hope to understanding international justice (IJ) in another way: one that is detached from state-centrism and its consequent dissolution of individual responsibilities which has, for many years, facilitated the impunity of their leaders for the alleged commission of international crimes.

Although the promise with which the ICC was created has found many obstacles in its path of enforcing international criminal justice (ICJ), the relevance of having an international criminal tribunal that seeks to complement state jurisdictions to investigate and prosecute

their leaders for the most serious crimes of international concern cannot be discarded.

As a result, it is worth asking what interpretation does social idealism have regarding the role of the ICC? The goal of this chapter is, therefore, to analyze such a role from the analytical horizon of social idealism. To attain it, the main postulates of social idealism on ICJ and on the role played by the ICC since its establishment in 2002 are compared. The methodology used is that of a documentary analysis with a strong inclination towards theoretical, doctrinal, and jurisprudential sources.

Regarding its structure, apart from the introduction, this chapter consists of five sections. Firstly, a debate is presented around the perspective under study, starting with its main postulates, its vision of the current international system, its perception of law and its proposals for an alternative world (section 2). It then focuses on the approach of social idealism to ICJ and its feasibility in the real world (section 3). Next, the theoretical and conceptual framework identified in the previous section is used to understand the role that the ICC has played (section 4). Finally, some brief conclusions are presented (section 5).

2. THE HORIZON OF ANALYSIS: SOCIAL IDEALISM

Social idealism is mainly the result of the work of the British professor Philip Allott. Allott's unique way of writing has led other authors such as Iain Scobbie to facilitate the work of making his texts more easily understandable. The objective of this perspective could be summarized as fundamentally changing the world's social organization by reshaping the ideas on which it is based (Scobbie, 2011: 168). For Scobbie, the principal features of Allott's social idealism are limited to believing in the capacity of the human mind to transcend itself in thought, taking control over the human future and making it conform to our ideals (understood as our best ideas of what we are and what we might be) (Scobbie, 2011: 168).

2.1. The problems of the current international system

For Allott, the divorce between the State and society has created an international scenario which he calls "unsociety." This is a scenario in which greed, selfishness and evil have emerged as the central values. In the unsociety, the State, and in its name the elites that direct it, impose themselves on the individuals whom they claim to represent. Inspired by the ideas of the 18th century Swiss philosopher Emer de Vattel, Allott emphasizes that this reality is generally accepted by the political and administrative leaders and the ruling classes in Western Europe. This is because it allows them to have more control over the shaping of social reality (including the theoretical conceptions of society and the shaping of social reality beyond the territorial limits of Western Europe) (Scobbie, 2005: 302). This ruling class has boasted of being able to talk to each other, and compete with each other across state borders, always with the satisfaction of being safe within their autonomous national systems.

For Allot, it is this ruling class or the elites that comprised it, as agents that provoke the disconnect between the domestic dimension of social life and the unsociety, that cause the "evil" suffered in contemporary international society. Although the imposition of the State on the social body is a capital element of the unsociety, this does not necessarily mean that the State is an evil entity. On the contrary, the State has an important role in fostering the interaction and reconciliation of individuals, social organizations, and the common interest. It is the elites that have made the State a hierarchically superior entity, and are even opposed to other forms of political power and private interest. In the evil of unsociety, elites make the State an external entity, which lacks any concern for becoming democratic or for being an integral part of its society. This causes the world governed by this specific form of State and its elites to prioritize the survival and prosperity of each State rather than of an international society of the whole human race (Scobbie, 2011: 180-183; Scobbie, 2005: 305).

Unsociety, as an expression of the absence of correspondence between individuals and constituted organizations, leaves in its wake a puzzle whose composition needs to be reorganized. To achieve this reorganization, the arrangement of the pieces of the puzzle within

the international system, as it is currently self-organized, must consider the fields of public order (relative to the possibility of a system of universal law), diplomacy and war, territorial politics, the relationship between the national and the international, public IL and the feasibility of establishing universal values (Allott, 1999: 40-42).

Likewise, the reconfiguration of this puzzle goes through what Allott called the "insane trinity", which involves: (a) society and how a man's capacity for self-creation can be harnessed for cooperation between humans; (b) the State thought of in terms of an organic relationship with society so as to shape it within the public sphere; and (c) the nation and its ability to create a unique identity (1992: 239-240).

In opening up the option of self-creation of the human being, society and the international system, social idealism seeks to address the obstacles that the international system has faced: (a) the degradation of universal values; (b) the hegemony of the economy; (c) the poverty of politics; (d) the poverty of philosophy; and (e) the tyranny of the real (1999: 47-50).

2.2. Representation of law and its function

Following Allott's marked ontological predilection for ideationalism, due to its view that society does not exist outside the human mind, he considers law to be one of the three dimensions in which societies constitute themselves together with ideas and practices. Moreover, law is not only a means of social restraint but also the most reliable means of social liberation, because distributing social power in the form of legal power sets out the legal limits of social power. Law also embodies and protects social values, whose function is to control its substantive and procedural content (Scobbie, 2011:186).

Consequently, law is not considered a system of legal rules, but a system of legal relationships that create a parallel legal reality, in which legal meaning is given to language, personal status to people, and legal character to human and natural events. For Allott, law is an intermediary between power and ideas. It is the embodiment of social dynamics pursuing an ideal; it is a morality which is erected with purpose at the systemic level (Scobbie, 2011: 186-187).

According to Allott, the role of law in a society is to insert the common interest among its members, rather than being simply a proxy for the speech that governments expect to hear. The law, then, is the bearer of society's self-interest which, although it may conflict with the individual interests of its members, harmonizes with their interests as members of a society. The common interest is not limited, therefore, only to the sum of particular interests. It is formed at the intersection between the real and the ideal, as society responds to its present and potential circumstances in light of its ongoing purposes, values, and theories (Allott, 1999: 36). Law is simply a way of visualizing social relations, as an application of human conscience and the power of the human mind to determine the destiny of human affairs (Scobbie, 2005: 306). It is the systematic form of organization of social interaction, establishing networks of legal relationships between human beings, who are designated to act for the benefit of social purposes (Allott, 1992: 226).

According to Allott's view, IL is self-constituted law for all humanity and contains three systemic levels: (a) the constitutional IL, which provides legal entities with the ability to act as parties in international legal relations, and determines both systemic relationships between the other two levels and horizontal relationships among the rights of States; (b) public IL, which is the branch of IL that regulates the interaction of the subordinate domain of the "public" with the domain of the "public international"; and (c) the law of nations, whose scope of action is the regulation of social relations amongst the individuals who make up a specific community. In this scheme, public IL is the product of the combination of constitutional IL and the law of nations (Allott, 1999: 37-38).

Beyond all that, for Allott, law and IL do not only self-constitute at the spatial and analytical levels of analysis, but also at the temporal level. This self-constitution between temporalities is focused on three types of analysis: (a) how society was in the past, with its needs and duties (legal constitution); (b) how is society in the present, in terms of current affairs and action (this requires studying the daily life of the individuals that make up the society, summing and integrating the activities they carry out to pursue their own goals) (real constitution); and (c) how society can be in the future, as an aspiration that

should guide its development (ideal constitution) (Scobbie, 2011: 174).

According to Allot, these constitutions fulfill a function for the society in question: (a) the function of the legal constitution is to carry the structure-system of society from its past to its future (for this purpose, it uses the artificial necessity of the law to constrain social will in the present); (b) the function of the real constitution is to enact the social will in the present by which society achieves its social goals in relation to the infinite and unique specificity and complexity of the current, using actual actors generating actual events (including events in the natural world of the universe of all-that-is and events in the inner world of the human individual); and (c) the function of the ideal constitution is to lead society to become the society imagined by its social goals and its social values, to give to a given society an idea of its possible self (1992: 225).

The transition of these three constitutions perceives law as that which establishes possible futures for society in accordance with its theories, values and purposes. Law is therefore a process of permanent co-constitution, of development between the social forces that create it through their perceptions and the social events that it generates through its application (Scobbie, 2005: 307). In this way, IL finds its place in the self-constitution of international society as an essential part of the self-creation and self-perfection of the human species (Allott, 1999: 50).

2.3. Proposal for social and international transformation

For Allott, there is clarity in that the revolution begins at the level of the human mind. Because international society, and consequently IL, is the creation of consciousness, individuals and humanity must take responsibility for it. As protagonists of this revolution, individuals, as opposed to States, are called upon to determine the substantive content of IL (Scobbie, 2005: 313).

IL is currently based in almost all its aspects on disorder, incoherence and containment, which produces a pain that has brought society to the brink of mental collapse. It is a pain that, when lament-

ed, welcomes the possibility of change, and of remaking IL and with it restructuring human society towards a new order (1992: 246). As agents of change creating this new order, it is necessary to find lawyers who are willing and able to make possible the social constituting of a truly universal human reality within which humanity can and will act in the present to transform its past into the future, which is the potentiality of the self-creating human species (Allot, 1992: 252).

In addition to the revindication of law as a scenario for the visualization of other possible worlds, Allott prescribes other fronts of action in which one must intervene to reverse the current international unsociety and achieve "eunomy" (good social order), which seeks to reimagine the human world by proposing a new ideal of international society: the society of all humanity, the society of all societies.

Eunomy is associated with a comprehensive utopian project which includes the task of reconceiving how our ideas, our values and our purposes are formed. Likewise, along with the eunomic and utopian projects, there is a "eusophic" project, which focuses on reimagining the universal, that is, religion (Scobbie, 2011: 170). As the first phase of the project of social transformation, eunomy is the reconstruction of the structure of IL and IR based on the power of ideas to structure and restructure the world. It is ideas that have the power to change institutions and the human world and with them the human future and its trajectory towards survival and prosperity (Scobbie, 2005: 301-303).

As regards the obstacles to achieving this, Allott summarizes his proposal in what has been called "the path to redemption". This path postulates a reissuance of the intellectual project of illustration and of the pending issues that need to be revisited. The author prescribes as his general plan: (a) lower the profile of the primacy of the economy; (b) the restoration of politics to its fundamental and dignified function of producing values, ideas and practices for international society; (c) the empowerment of philosophy as a means of transcending the current state of affairs in the international field; and (d) the imagining of new futures, showing that the current one is neither necessary nor unavoidable (Bianchi, 2016).

3. THE INTERNATIONAL RESPONSIBILITY OF THE INDIVIDUAL AND THE PURPOSES OF INTERNATIONAL CRIMINAL JUSTICE FOR SOCIAL IDEALISM

From the perspective of social idealism, its teleology of history entails a more optimistic perception of law and justice, in which law serves as a vehicle for the insertion of the common interest of society into the behavior of its members. Accordingly, law establishes possible futures for society, in accordance with its theories, values and purposes. That is why, for Allot, the main message has to do with the never-ending quest for the ideal, as the human mind has the power to form the future by imagining what that future should be. The mind then uses reason to implement this idea. In this context, law has the task of transforming social reality and history, human conscience and the sense of responsibility (Scobbie, 2011: 175).

In this order of ideas, social idealism can also be considered to criticize the international responsibility of the individual and to rethink the purposes of ICJ in relation to the function of language in its construction. Thus, the main question that social idealism poses to ICJ is whether the State is divorced from the society to which it gives its formal expression.

For Allot, the elites' conception of intra- and interstate relations provides the philosophical underpinnings of a world governed and adapted to the interests of the States, or better stated, to the interests of the elites, to the detriment of the needs of humanity (Scobbie, 2011). As a result, an IL that marginalizes humanity is far from what it should be, that is, as law is a core institution of society (an integral part of the whole activity of consciousness, individual and social), in the current circumstances, an alienated IL cannot play its proper part in the realization of eunomy (cited in Scobbie, 2011: 183).

However, it is important to note that Allott differentiates legalism from law. From his perspective, legalism is a perverted law. This is a characteristic of current international unsociety. Law is different from legalism because it plays an important role in the transformation of this unsociety. Thus, according to Scobbie, law is the way to make the ideal and the common interest real. A society constitutes itself simultaneously in three dimensions (as ideas, as practice, and

as law), but, in this process of self-constitution, law transforms ideas into practice while ensuring both social continuity and change. (2011: 186). And it is in this process of co-constitution that one can think about the possibilities of law.

Allot considers that international society can be realized through a direct relationship with individual conscience, since this is what should be responsible for the content of the law. With this hope, Allot proposes a continuity between the morality of national society and international society, which does not exclude the realization of evil as a contingent possibility of corrupt conscience linked to private interests (Scobbie, 2011: 187).

Public evil cannot, therefore, be attributed to individuals since this type of evil is social and systematic in coherence with social systems. Conscience is formed by the elites and when it is adopted it is followed by the masses (this idea was initially formulated by Arendt concerning the case of Adolf Eichmann). Consequently, Allott is reluctant to conceive an idea of ICJ because our moral outrage is clouded by the charade of judicial retribution, even though the causes and the effects of extreme social evil remain (Scobbie, 2011: 193). In this way, as seen by social idealism, the responsibility of the individual can reproduce unsociety in international society because he does not realize the potentials of the law, but rather evades them.

However, social idealism is optimistic in seeing the renewal of law and international society as something possible through the revolution of the minds of human beings. As Allot (2011: 185) explains, the notion of the ideal allows us to transform societies, and we have a moral duty to make a better human future. The bridge between the past and the future lies in the present, which thus is pivotal in influencing the move from the actual to the potential. Living in the present entails responsibility: the permanent and inescapable burden of choosing the future.

In short, the main reformulation of social idealism with respect to the purposes of ICJ has to do with the reformulation of historical truth, from the potential of language as a construct of truth. Both history and language are central themes in Allott's work because, from his perspective, language constructs the world (the human world is thus a world of

words). However, we are limited by our capacity to communicate. This limits our possibilities of constructing social reality. We can see the role of truth and value as structural focuses in the building of human reality, as we become conscious that language can be used, in a limited way, as an ambivalent and biased reproducer of evil, but also as a revelation of the potentiality of providing a blueprint for the formulation of an ideal moral order (Scobbie, 2011: 173).

4. SOCIAL IDEALISM AND THE ROLE OF THE INTERNATIONAL CRIMINAL COURT

4.1. The International Criminal Court and the values it promotes

When analyzing the role of the ICC through lenses of social idealism, the goals and values that the ICC aims to achieve show the power of ideas. Thus, the creation of an eonomic society seems possible in light of the proposal developed by the ICC since its establishment.

Without ignoring the political interests of the States in the creation of the ICC, it was also born out of a desire to establish a new society capable of understanding that: (a) conflict and the commission of the most serious international crimes cannot go unpunished; (b) peace and security are necessary values to achieve a harmonious coexistence; and (c) consolidation of a good social order is possible by reimagining the world and international society.

The Preamble of the ICC Statute establishes the role of the ICC. In particular, it seeks that the commission of the most serious crimes of international concern do not go unpunished because they constitute a threat to the peace, security and well-being of all humanity. The creation of the ICC therefore promotes the adoption of national and international measures for the prevention and punishment of these crimes, thus fostering international cooperation so that justice can act effectively.

The context in which it was decided to establish the ICC was one marked by the end of the Cold War and by the recent conflicts in the former Yugoslavia (1991-1995) and Rwanda (1994), which demonstrated that international society must protect and restore minimum

values of coexistence and respect for the dignity and rights of people around the world (Felter, 2020). As observed in the Preamble of the ICC Statute, the aim is to create, through the ICC, a less violent society, which rejects acts that destroy humanity and seeks to establish mechanisms that permit a more harmonious society. In this sense, the former president of the ICC, Judge Sang-Hyun Song, has stated that:

> The Rome Statute system can help us advance towards a safer world in which people in all the world can live and prosper in peace. However, this is not a task exclusive to the justice sector. It is a goal that can only be achieved with the simultaneous strengthening of democracy, development and the rule of law (Song, 2018).

Through the ICC, national jurisdictions have adopted standards of protection and have promoted mechanisms to prevent violent events at the domestic level (Song, 2018). In addition, the ICC has fostered the compliance of States Parties with their *erga omnes* obligations in terms of investigating, prosecuting and punishing those responsible for the crimes provided for in the ICC Statute, thereby reducing impunity and fulfilling the role of preventing the commission of new crimes (Jessberger & Geneuss, 2012: 1087-1090).

Furthermore, the ICC provides for a system of reparation to victims based on the principles of restitution, compensation and rehabilitation, as set out in art. 75 of the ICC Statute. Moreover, to strengthen assistance to victims of crimes under the jurisdiction of the ICC, art. 79 of the ICC Statute provides for the creation of a Trust Fund for their benefit, which has implemented various programs in favor of victims and their families (Trust Fund for Victims, 2018). In this way, over the years, the position of victims before the ICC has been strengthened (Song, 2018).

4.2. The International Criminal Court and the notion of unsociety

According to social idealism, the ICC's role could also be relevant in light of the disconnection that may exist between society and the State, because the commission of international crimes is based on the superiority of the interests of the ruling elites over the well-being and interests of society as a whole.

One of the situations investigated by the ICC, in which the consolidation of unsociety can be observed, is the situation in the Republic of Kenya. This case involves the investigation of the crimes against humanity committed in the post-election period of the December 2007 elections, in which Mwai Kibaki, with the support of Uhuru Muigai Kenyatta, emerged victorious. He prevailed over Raila Odinga, who then had the support of William Ruto Samoei. Immediately following the election, waves of violence began in Kenya, prompting the ICC to open an investigation into this situation and to initiate cases against Kenyatta (President of the Republic of Kenya between 2013 and 2022) and Ruto (current President of the Republic of Kenya since 2022) for the commission of acts constituting crimes against humanity (murder, persecution, deportation, rape, among others).

In the 2007 election campaign, Kenya's political and cultural leaders affirmed their willingness to strengthen the identity of the new generations and help youth to find employment. Likewise, the presidential candidates and their political teams sought through their speeches to dilute the existing cultural and class tensions (generally the result of unequal possession and access to land), to unify the population, and dilute their differences (ICC, Ruto & Arap, 2014: 26- 27).

However, despite these electoral intentions, the panorama in Kenya was very complex due to its land tenure structures and how it was acquired. During the post-colonial period, land in Kenya was given to the State for administration and control, and in turn, the State transferred it only to "white people", small businesses and land-buying companies. Thus, the State could exercise control over the entire population by controlling the companies that carried out land transactions. As a result, most of the territory was headed by the Kikuyu group, which in turn was very close to the State. Consequently, not all sectors of the population benefited from this distribution, and when the distribution of land was opened up to other groups it was done in an inequitable manner, or was a strategy to calm political emotions, as happened with the Kalenjins (ICC, Ruto & Arap, 2014: 48-51).

The Kenyan police forces also constituted a weapon of political and electoral control. These forces sought to maintain balance in favor of the elite, while guaranteeing the safety of people in the city

and countryside in non-electoral times. However, the police in Kenya were used during electoral periods by the politicians who financed them so that they became an extension of their interests and the strength of the party they represented (ICC, Ruto & Arap, 2014: 64-65).

As a result of the mismanagement of land and resource distribution in Kenyan society, political leaders were traditionally focused on maintaining their interests and those of their cultural, ethnic and political groups. Although an attempt was made to maintain a discourse of national unity during the 2007 electoral campaign, in reality the powerful elites of the most important groups sought only to maintain the status and power they had held for decades. As a consequence of this, a condition of unsociety was created, that is, there was a disconnect between the State and its elites, and the rest of society.

On the one hand, the vast majority of the Kenyan population sought and needed better working conditions, with better opportunities for youth and with land reform that would improve access to land and redistribute resources more efficiently. On the other hand, however, the power groups had consolidated their interests with companies and security and police groups, leaving ethnic groups behind and repressing them. In this scenario of unsociety, violent confrontations and the commission of crimes against humanity were not far behind. As a result, Kenyan society suffered the consequences of the clash of interests of the elites and predominant groups in the country; sexual abuses, murders, forced displacements, among other acts, were carried out against civil society.

In this context, the ICC should have, in principle, contributed to reducing or reconciling the interests of Kenyan society on the one hand, and its rulers and the political elite on the other. To the extent that ICC proceedings were carried out effectively, on time, and for the benefit of victims, they could have contributed to ending impunity. In this way, unsociety could have been reduced or eliminated and the ICC could have been perceived as an impartial legal tool that contributed to justice, respected the rights of the most vulnerable and reestablished peace and order.

However, although the opening of the cases against Kenyatta and Ruto (who, after being charged, joined in an electoral formula that won the 2012 elections) constituted, from the perspective of social idealism, a very good indication that a different society could be achieved through the actions of the ICC, the closure of these cases denoted a setback to the achievement of this goal.

Thus, the ICC Office of the Prosecutor (ICC OTP) requested on December 5, 2014 that the charges against Kenyatta be dropped due to the lack of evidence and cooperation on the part of the Kenyan authorities, which made it difficult to prove the responsibility of the accused beyond a reasonable doubt (ICC, Kenyatta, 2015: para. 4). Some months later, on March 15, 2015 the ICC Trial Chamber (TC) V(B) considered the ICC OTP decision to have been appropriate and recalled that, although the proceedings against the accused had been terminated, they could be resumed if new evidence was obtained. (ICC, Kenyatta, 2015). The following year, on April 5, 2016 TC V(A) decided by majority that the case against Ruto should also be terminated due to the lack of evidence, largely resulting from the violence exercised against the witnesses in the case (ICC, n.d.D).

In the face of situations such as these, the ICC has very few practical tools with which to respond if it does not have the cooperation of States or the participation of witnesses. The presentation of evidence will always be necessary to comply with the evidentiary standards provided for in the ICC Statute. Furthermore, the early termination of proceedings for political and evidentiary reasons can even generate a situation of even more intense unsociety, and a feeling of rejection by civil society and victims towards the ICC.

5. CONCLUSION

Although social idealism can be qualified as a theory critical of IL, its problematization of the ICC's role may result in it being more benevolent towards IL than other similar perspectives. This is since it manages to shed some light towards eunomy through the ideal that the ICC represents, envisioning its potential to provide an alternative to unsociety.

The prevalence of ideas and their creative power towards the institutions that guide international society from a perspective of social idealism offers a range of analytical possibilities to those interested in understanding the dynamics of IL, ICJ and the ICC. Moreover, the prevalence of individuals as units of analysis, above the abstract state entity, facilitates the understanding of IL, ICJ and the ICC beyond the matrices of thought that have dominated international legal theory and practice until today.

Finally, an important challenge for future research interested in continuing along this path lies specifically in the necessary ontological weighing between materialism and ideationalism. To lose sight of the fact that the ICC is a concrete body, comprised of people having specific interests, specific power relations and links with States and international organizations (IOs), can generate a vacuum in the analysis developed by social idealism. It is therefore important not to neglect the material elements in approaching the ICC (and also IL and ICJ) from a multiplicity of approaches that enrich their appreciation. Otherwise, we could be falling into the exaltation of utopian discourses having little connection with the outside world, legitimizing an unjust and unequal social order in the name of the universal and democratic values contained in the dead letter of the law.

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PART III
THE ROLE OF THE INTERNATIONAL CRIMINAL COURT FROM SUBALTERN HISTORICAL-CONTEXTUAL APPROACHES

Chapter 7
The Biblical Historical-Contextual Hermeneutical Perspective[*]

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1. INTRODUCTION

Elucidating the conception and application of justice is relevant in those contexts that have suffered the impact of structures of oppression, serious violations of human rights and violations of international humanitarian law (IHL). Accordingly, this article proposes a theological interpretation of the role of the International Criminal Court (ICC) from three main dimensions (structural, retributive and restorative) and based on the different conceptions of justice that underlie the Judeo-Christian tradition of the Old and New Testaments. This necessarily implies its interpretation through the dynamics of

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God's Covenant with Israel through Mosaic law, its reiteration in the message proclaimed by the prophets given the structure of sin and oppression prevailing in Israel and its resignification in the mission of Jesus based on his experience of the "First Commandment".

The historical-contextual theological interpretation criterion places the compassionate and merciful character that accompanies the triple dimension of justice (structural, retributive and restorative) within the biblical context. This approach centers its interest on the reality of the victims, which, in order to review the ICC's role, requires the analysis of justice through the lens of the reality of those victimized by structures of sin/oppression.

Based on these arguments, this chapter analyzes the meaning and purpose of international criminal justice (ICJ) in light of its enforcement through the ICC, on those most responsible for the most serious crimes of international concern (referred to in this chapter as *ius cogens* crimes). This allows us to discern both the tensions derived from excessive centrality applied to the perpetrators to the detriment of the victims by investigatory and prosecutorial practices, as well as the ideological contradictions that exist among States Parties.

2. HORIZON OF ANALYSIS: THE BIBLICAL-THEOLOGICAL TRADITION OF JUSTICE

The interpretation of the ICC's role opens horizons of possibility to re-signify the theoretical and practical conception of ICJ. Doing so from the perspective of Christian theology means establishing a direct relationship with the sense of justice that is present within that theology, which is included in Sacred Scripture (Gálvez, 2016: 272-279; Aranda, 2015: 96-100).

Biblical tradition makes explicit a justice emanating from God in the face of the situation of oppression suffered by the people of Israel, whether at the hands of the religious and political power that governs them, or of the sin that resides within them when they separate themselves from their main precepts: observance of the law, faithfulness in worship and the practice of mercy (Sivatte, 1982: 13-34; Alegre, 1982: 35-58). Therefore, when proposing this horizon of

analysis, the idea of justice that is expressed implies: (a) highlighting the compassionate and merciful character of God's actions in freeing his people from slavery (Ex 3, 7- 12); (b) understanding why God's precepts guide the life of Israel along the path of forgiveness of sins, conversion and faith (Ex 22, 23-23-33); and (c) updating his Covenant through the "First Commandment" (Mt 22, 34-40, Mc 12, 28-34, Luke 10, 25-28) as a praxis that makes his Kingdom and his justice effective through the historical mission of Jesus (Mt 5, 1-12).

Analyzing the ICC's role from this perspective also implies: (a) recovering the historical-contextual character upon which this form of justice for Israel is founded; and (b) highlighting the meaning that it assumes today in accordance with the historical and political dimension of Jesus' actions (Ellacuría, 2000: 13-31). In this sense, it is a justice that is understood as compassionate and merciful in the face of the realities of victimization that prevail today (Pope Francis, 2013, 2015; Santamaría, 2017: 410-411). Moreover, at the same time, it has a character that is preferable for the victims whose historical strength offers truth, liberation and salvation.

To address biblical justice for the purposes of this reflection, it is appropriate to turn to the Israelite prophetic movement and to the historical mission of Jesus, all within the framework of the historicity of God's actions in favor of the liberation and salvation of his people. Thanks to this interpretative criterion, the reality of the victims is established as the start and end point for the fulfillment of the role of the ICC, because it is in the victims that the mercy and compassion of God is manifested, challenged and transformed.

According to the foregoing, a historical-contextual interpretation, from the biblical tradition, of the ICC's role constitutes an ellipse with two *foci* (Schickendantz, 2013: 96, 104). Assuming a dialectical character, the first of these expresses the biblical identity of justice, while the second emphasizes its normative character. Likewise, the first focus permits us to interpret the second, which consists of the application of ICJ by the ICC.

The criterion of historicity that is proposed from the theological perspective forces us to think about the possibilities that it offers to update the ICC's role. Moreso, it allows for an eventual reconfigu-

ration of its principles which would allow an application of justice that gives priority to the reality of the victims. This is how the "historical-contextual" approach generates a dynamism (Ellacuría, 1991: 59-60; Arango, 2009: 410), as the theological perspective promotes a conceptual and praxis turn based upon victims' position in historical reality.

This interpretative approach takes place, therefore, within historical reality (Santamaría-Rodríguez, 2018: 12-22; Pérez, Nieto, Santamaría-Rodríguez, 2019), which makes it possible to understand the ICC's role in order to re-signify the way in which it provides justice through its "universal vocation" and the legitimization of such a role by the States Parties (Martín, 2014: 306-362). This means appealing for reparation for the victims rather than accepting the political and diplomatic guarantees of the States, given the ideological tensions prevailing amongst them (Chinchón, 2015: 127-129). Furthermore, under any circumstance, the recognition of the international responsibility of individuals for the crimes within ICC's jurisdiction is imperative as an element indispensable to their retribution and for the development of practices of restitution.

3. FIRST FOCUS: THE HORIZON OF JUSTICE IN THE BIBLICAL SENSE

The horizon of biblical justice can be inferred from the characteristics it assumes in the prophetic movement of Israel (Old Testament) and in the mission of Jesus announcing the Kingdom of God (New Testament). Consequently, its meaning emerges in the historicity that accompanies the way in which: (a) the prophets denounce the structure of sin and oppression being committed in Israel at the hands of the political and religious power that governs there, and announce a hope for salvation from punishment as a result of the recognition of sin, conversion and faithfulness to God according to his precepts (Ex 22, 23-23-33); and (b) in the way Jesus updates the Covenant between God and his people by making explicit the "First Commandment" (Mt 22, 34-40, Mk 12, 28-34, Lk 10, 25-28) through which God's Kingdom is established (Jn 13, 34).

3.1. The prophetic movement in Israel

In the Old Testament, the people of Israel established their relationship with God based on compliance with Mosaic law and its precepts (Ex 20, 1-21)[1], especially those established in the Pentateuch (Gálvez, 2016: 274-276; Sicre, 2000: 65-127). After settling in the land promised to them by God following their liberation from slavery in Egypt (Joshua, 1, 1-5), the prophetic movement emerged in Israel towards the end of the 11th century BC. with Samuel and the emergence of the monarchy (Sicre, 1998). Its mission lay in updating the way in which Israel had to maintain its Covenant with God and, above all, in ensuring that its people were aware of it (Sicre, 1998: 249-260).

The "prophet" is one who responds to the call of God. Likewise, it was the prophecy who, throughout the history of Israel, acted to announce his messages. An example of this is Jeremiah and Ezekiel: "You will go where I send you, and you will say what I command you" (Jer. 1, 7); "[…] you will communicate my words to them, whether they listen or not" (Ez. 2, 7). Thus, the prophet is the one who stands before the community to speak the message that God has addressed to his people (Botero, 2012).

It was the prophets who, under an ecstatic religious experience at the beginning (Pikaza, 2008: 838), followed by a vocational commitment (Pikaza, 2008: 839), communicated the message of Yahweh to Israel. In this way, prophets appear as men and women whom God has called to speak his word. They are not representatives of the priestly institution, nor delegates of any social group, but bearers of the God's word (Pikaza, 2008: 839).

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[1] References to Mosaic law, indicate the Decalogue, which, according to the Judeo-Christian biblical tradition, was revealed by Yahweh to Moses during Israel's journey towards the promised land. Some authors note that this code has similarities with the legal codes established in ancient Semitic societies. Thus, for Vegas (2004: 119), modern research has highlighted the marked similarities of the Babylonian code of Hammurabi (around the 18th century B.C.E.) with the Sinaitic legislation attributed to Moses. However, there is no unanimity on whether the former should be considered as the source of the latter or it only formulated legal concepts common to the Semitic peoples of antiquity, without direct dependence upon it.

The prophetic movement in Israel was broad (Sicre, 2012: 169-178). Multiple prophets emerged in Israel prior to its consolidation as a nation (Sicre, 1998: 219-248), during the monarchial period, and during and after the Babylonian exile (Olasolo, Pinto, Santamaría & Zúñiga, 2019: 118-124). This being the case, it is necessary to focus the attention on those prophets that biblical tradition recognizes as the prophets of justice: Amos and Micah, one located in the Northern kingdom (Israel) and the other in the Southern kingdom (Judea).

Both prophets were part of the golden century of Israelite prophecy (Sicre, 1998: 261-300). Their work had a hinge effect as between oral and written prophecy. It is thanks to them, together with the prophets Hosea and Isaiah, that prophetic literature began to develop as a form of recording of what had been announced to Israel, which was facing eventual misfortune as a result of the absolutization of the political and economic power of its rulers, as well as of its separation from divine precepts (Sicre, 2000: 220-223).

Amos and Micah carried out their work in approximately the 8th century BC. Standing out within their work was their announcement regarding the situation of those socially marginalized (Amos) and the oppression of the peasants of the Shephela by the landowners and the authorities of Jerusalem (Micah) (Sicre, 1998: 262). Witnessing the way in which the kings of the Northern and Southern kingdoms squandered resources in their sumptuous palaces, they denounced the oppression of the poorest due to the poor distribution of wealth in the midst of the political and economic peak that existed at the cost of their work and sacrifice (Sicre, 1998).

Amos developed his prophecy by denouncing the arbitrariness of the opulent classes against the subaltern classes: embargo, falsification and unjust wages (Botero, 2012: 57). Likewise, he pointed out the corruption of judges and the consolidation of a ruling elite that was oblivious to the pain of the poor. Consequently, it is a prophecy that constantly insisted upon Yahweh's punishment of his people for the injustice and opulence of their rulers and for their forgetfulness in complying with his precepts (Sicre, 2012: 195):

> Thus says the Lord: For three crimes of Israel, and now four—I will not take it back. Because they hand over the just for silver, and the poor for

> a pair of sandals; they trample the heads of the destitute into the dust of the earth, and force the lowly out of the way. Son and father sleep with the same girl, profaning my holy name (Am 2, 6-7).

The prophecy of Amos is characterized by its denunciation of the sins committed in Israel: social sins (luxury, injustice and oppression of the weak) and religious sins (hypocritical worship and false religious security) (Jaramillo, 1997: 326). Throughout his prophecy it is possible to recognize how the people are victims of the injustice that befalls them. According to Sicre (2012), in Israel, while some oppress, others are oppressed; some hoard and others impoverish; some sell and others are sold; some benefit from the bonds and taxes, others must pay them (194-195). In short, it is a prophecy that rises against the oppression that the people suffer at the hands of the monarchical, cultural, and legal power that impedes the life of Israel.

Micah prophesies against the abuses to which his peasant brothers are subjected: the small farmers are victims of the pressure of the landowners, taxes, wars and forced recruitment (López, 2001: 35). It is a prophecy that denounces injustice by those who own the land and the sins committed there. Hence his complaint is against them:

> Ah! you plotters of iniquity, who work out evil on your beds! In the morning light you carry it out for it lies within your power. You covet fields, and seize them; houses, and take them; You cheat owners of their houses, people of their inheritance. Therefore, thus says the Lord: look, I am planning against this family an evil from which you cannot free your necks; nor shall you walk with head held high, for it will be an evil time (Mic 2, 3).

Micah's prophecy is an action that claims social justice for the people. Standing out in his message is his enormous concern about the wide gap between the rich and the poor, and about the structures of inequality that prevail there. The possession of land becomes one of the central axes of his thought. As with Amos, he denounces the sin of oppression and the forgetting of Mosaic precepts when entering into relationships with foreign religions. According to Jaramillo (1997: 345), the prophet Micah is pained by the injustices of the powerful, the complicity of judges, the deceit of professional prophets, the false piety that covers the religion and that causes a false security in the face of the judgment of God.

Micah confronts not only a series of injustices, but a theology of oppression. Moreover, this way of acting and seeing life is embodied in something very specific: Jerusalem. Breaking with all previous traditions and promises, and particularly with the enthusiasm expressed in some Psalms, the prophet announces that Jerusalem will be a ruin and the temple mount a hill of overgrown with thickets (Sicre, 1998: 299).

The prophecies of Amos and Micah expose a perspective of justice that seeks to reiterate the roadmap defined by God for Israel: interest in and affection for the weakest people (Sicre, 2012: 395). Their actions in Israel and Judea point out two central aspects of the Israelite prophetic movement: (a) denunciation of the sin being committed in the Northern and Southern kingdoms and the oppression that falls upon the people at the hands of the political, legal, and religious authorities; and (b) the announcement of their liberation and salvation, which comes from God and has conversion as its fundamental criterion.

The contexts in which Amos and Micah prophesy are characterized by the state of oppression of their people. They communicate God's punishment that is to come amid the economic boom. They also do so in spite of the fact that it was not legal to go against the established order and being fully aware of the instrumentalization that was replacing the religious tradition and laws of the people of Israel. Consequently, these prophets had knowledge of reality, moral credibility, and the solvency to involve themselves in social affairs. Furthermore, they were determined to offer a life project capable of guiding society towards a goal of justice that truly constitutes a good model to encourage ethical regeneration and social commitment (Pongutá, 2008: 46).

Both prophets also announce to their people that a new day is coming in which everyone will have their own plot of land, and no one will expel them, nor exploit them, to plunge them into poverty, abandonment and oblivion (López, 2001):

> I will restore my people Israel, they shall rebuild and inhabit their ruined cities, plant vineyards and drink the wine, set out gardens and eat the fruits. I will plant them upon their own ground; never again shall they be plucked from the land I have given them—the Lord, your God, has spoken (Am 9, 14-15)

> Who is a God like you, who removes guilt and pardons sin for the remnant of his inheritance; who does not persist in anger forever, but instead delights in mercy; and will again have compassion on us, treading underfoot our iniquities? You will cast into the depths of the sea all our sins. You will show faithfulness to Jacob, and loyalty to Abraham, as you have sworn to our ancestors from days of old (Mic 7, 18-20).

The announcement of this hope came accompanied by the possibility of an exit from the circle of oppression as long as the people remained faithful to God in order to restore justice, love, fraternity, and solidarity. The mission of both prophets therefore had a clear intention in the face of the political and economic oppression in the Northern and Southern kingdoms upon their people. However, behind their message, the conversion of the people and the return to justice in ethical terms was seen as necessary (Jaramillo, 1997: 326), whereby equality of conditions would be established in Israelite society. With this, they revealed the true nature of the religious ideology that assumed power in Israel in order to justify its actions (Sicre, 2012: 417).

3.2. The mission of Jesus

In the New Testament, the concept of justice is updated in the mission of Jesus. Its subsequent development through the other books that make up this part of Holy Scripture (Pauline letters, Catholic letters, pastoral letters, letter to the Hebrews and Johannine tradition)[2] cannot, however, be ignored. The analysis of the idea of justice that underlies the historical action of Jesus recounted by the Gospels allows us to identify its meaning in light of God's relationship with Israel since the Mosaic law and the prophetic movement of Israel.

The historical context in which Jesus lived was a reality overlapped by religious oppression, economic injustice and political and military domination, aggravated by high taxes and submission to the Roman Empire (Trevijano, 1995: 70-71). Furthermore, in the Jewish society

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[2] The Johannine tradition refers to the Gospel of John, the Johannine letters and the Book of Apocalypse (Revelation).

of this time, a model of religious domination was imposed sustained by an economic system revolving around worship and the temple, to the detriment of the true meaning of observance of the Torah and compliance with the law (Mt 21, 12-17; Mc 11, 15-19; Luke 19, 45-46; Jn 2, 13-22) (Meier, 1998).

The testimony that the Gospels present of the person of Jesus allows us to infer his ability to recognize the suffering and misery of those who were marginalized by these religious, economic, and political structures which prevailed in the Israel governed by Herod (Trevijano, 1995: 72-78). Examples of this are the following Gospel passages:

1. The healing of the sick or possessed[3]:
   - *Healing of the possessed:*
     - Mc 1, 23-28, Lc 4, 31-37; Mc 5, 1-20, Mt 8, 28-34, Lc 8, 26-39
     - Mc 1, 32-34, Mt 8, 16, Lc 4, 40-41.
     - Mc 9, 14-29, Mt 17, 14-21, Lc 9, 37-42.
   - *Healing of Simon's mother-in-law:* Mc 1, 29-31, Mt 8, 14-15, Lc 4, 38-39.
   - *Healing of lepers:* Mc 1, 40-45, Mt 8, 2-4, Lc 5, 12-16.
   - *Healing of the centurion's servant:* Mt 8, 5-10, Lc 7, 1-10, Jn 4, 46-53.
   - *Healing of paralytics:*
     - Mc 2, 3-5, Mt 9, 1-8, Lc 5, 17-26
     - Mc 3, 1-6, Mt 12, 9-14, Lc 6, 6-11.
   - *Healing of a hemorrhagic woman and the resurrection of a girl:* Mc 5, 21-43, Mt 9, 18-26, Lc 8, 40-56.
   - *Healing of the sick in Gennesaret:* Mc 6, 53-56, Mt 14, 34-36.
   - *Healing of the daughter of a Syrophoenecian woman:* Mc 7, 24-30, Mt 15, 21-28.

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[3] Only Biblical passages that are included in both the synoptic gospels (Mark, Matthew and Luke) and the Johannine tradition are mentioned. It is important to note that, in each Gospel, including that of John, there are other specific passages that recount numerous healings of other human beings.

- *Healing of a blind man in Jericho:* Mc 10, 46-52, Mt 20, 29-34, Lc 18, 35-43.

2. The relationships with those who were considered to be sinners in Israelite society:
   - *Dinner with sinners:* Mc 2, 15-17, Mt 9, 10-13, Lc 5, 29-32.
   - *Dinner with a Pharisee and a sinful woman:* Lc 7, 36-50.
3. The discussions with scribes and Pharisees regarding religious authority, the interpretation of Jewish law and its application:
   - *Discussion over Pharisaic traditions:* Mt 15, 1-9, Mc 7, 1-13.
   - *Signs asked for by Sadducees and Pharisees:* Mt 16, 1-12, Mc 11, 8-21, Lc 11, 16-12, 1.
   - *Controversies over authority:* Mt 21, 23-27, Mc 11, 27-33, Lc 20, 1-8.
   - *Paying taxes to the authorities:* Mt 22, 15-22, Mc 12, 13-17, Lc 20, 20-26.
   - *Controversy with Pharisees and scribes:* Mt 23 1-12, Mc 12-38-40, Lc 11, 39-52.
   - *Discussion with Pharisees and lawyers:* Lc 11, 37-54, Mt 23, 6-7, Mc 12, 38-39.
4. The confrontation with religious authorities at the time of Jesus' arrest and trial:
   - *Arrest of Jesus:* Mt 26, 47-56, Mc 14, 43-52, Lc 22, 47-53, Jn 18, 2-11.
   - *Prosecution before the Sanhedrin religious authorities:* Mt 26, 57-68, Mc 14, 53-65, Lc 22, 54-71, Jn 18, 15-18.

The issues addressed by the Gospel passages set out above recount actions of Jesus in direct relationship with those who were subjected to the structures of marginalization, oppression, and exclusion of the Jewish society. Although it is true that the Gospel texts do not provide a historical and chronological account of the life of Jesus, the theological character they contain, based upon the narrative of those who wrote them, allows for an interpretation of: (a) the messianic character of his historical action; and (b) its meaning as a realization of God's plan of salvation for Israel.

Thus, it is necessary to point out that Jesus' perception and interpretation of his reality leads him to assume political and religious positions that contradict the norms and structures established by a totally verticalized society (Botero, 2012: 67). This leads him to denounce the oppression and injustice of the Roman-Jewish system which prevailed in his time.

However, his message also announces liberation and salvation just as did the Israelite prophets. In this order of ideas, a prophetic character can be inferred in his mission whose start point and end point is his reality, with respect to which he denounces everything that oppresses the society.

At the base of this prophetic role, the Gospels show how Jesus updates the perspective of justice coming out of the biblical tradition of the Old Testament. Such update is based on an understanding of the "First Commandment" as the engine that drives the being and the actions of individuals and society (Meier, 1998: 32). This is understood as a praxis of love-faithfulness to God, passing through charity, compassion and mercy with one's neighbor and oneself. It is a mandate that confronts the rigor of the religious authorities of his time in their interpretation of the law and the message of the prophets:

> There was a scholar of the law who stood up to test him and said, "Teacher, what must I do to inherit eternal life?" Jesus said to him, "What is written in the law? How do you read it?" He said in reply, "You shall love the Lord, your God, with all your heart, with all your being, with all your strength, and with all your mind, and your neighbor as yourself". He replied to him, "You have answered correctly; do this and you will live" (Lk 10, 25-28)[4].

The texts about the "First Commandment" that are present in the Synoptic Gospels emphasize the same content in their own way. In the case of the Gospel of Matthew, the dialogue takes place with a Pharisee who asks Jesus about this commandment, and to whom he responds by stating the following: "Upon these two commandments hang all the Law and the Prophets" (Mt 22, 40). On the other hand, in the gospel of Mark the dialogue is with a scribe, who also questions

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[4] In the tradition of the Synoptic Gospels, this Biblical passage is also found in Mt 22, 34-40 and Mk 12, 28-34.

Jesus about this norm, and to whom he indicates: "You are not far from the Kingdom of God" (Mk 12, 34).

Being aware that laws are not enough (Botero, 2012), the mission of Jesus is cloaked in humanity, hope and commitment to seek the fulfillment of the Kingdom of God, which is built upon a basis of love, charity, mercy, and compassion. It is not in vain that the Gospel of Matthew includes twice the following expression of Jesus: "I want mercy, not sacrifices" (Mt 9, 13; Mt 12, 7). In both cases it refers to the fact that God's command does not imply a rigorous religious practice but rather the experience of it through one's humanity and reality. In this way, it can be understood how Jesus promotes a paradigm shift and carries out concrete actions in which he returns dignity to those who have been denied it. With this, he updates and reinstates the First Commandment of the divine law as revealed to Moses (Ex 20, 1-21).

From this perspective of mercy and compassion, the concept of justice that underlies the Gospels is clothed with humanity so as to grant to those who have been excluded the place they deserve, so that they can recover what is most precious: their life, which has been taken from them by a regulatory system that ignores their humanity and dignity due to the political, economic, and religious interests of those who govern.

The Gospels exalt the prophetic role and messianic action of Jesus in relation to justice, as an element that confronts society (Massimo, 2011). Expressions such as "blessed", "mercy", "forgiveness", "Kingdom of God" are characteristic of the message of Jesus. They are part of his language and action for justice that seeks the dignity of Israel under the compassionate will and mercy of God.

The occurrence *par excellence* that confirms the above is the "Sermon on the Mount" (Mt 5, 1-12, Lk 6, 20-23). The "Beatitudes" stated there are God's option for the poor, the meek of heart, those who cry, those who hunger and thirst for righteousness, the merciful, the pure of heart, those who work for peace and those who are persecuted for demanding justice and for proclaiming the message of God. In short, it is through this Gospel passage that the concept of justice that underlies the tradition of the New Testament makes explicit: (a) the compassionate and merciful character of God towards his people

who are persecuted by different orders and structures; and (b) the hope that comes to his people on the occasion of the establishment of the Kingdom of God; in reality nothing different from a desire for a just and dignified society (Santamaría-Rodríguez, 2017: 500-504):

> Blessed are those who hunger and thirst for righteousness, for they will be satisfied (Mt 5:6).
> Blessed are those who are persecuted for the sake of righteousness, because theirs is the Kingdom of Heaven (Mt 5:10).

Thus, in the New Testament, justice is a necessary condition for the realization of the Kingdom of God and his participation in it. The prophetic and messianic role of Jesus, through which he denounces oppression and injustice in his society, and at the same time, announces hope and salvation, does not have an explicit legal framework (Botero, 2012). Jesus transcends boundaries in the search for a justice that is involved in the commitment and radicality of love, compassion, and mercy for those who, in his time, were excluded. His historical force is that which transforms their situation of oppression and injustice into a reality of salvation and liberation.

It is in this way that, Jesus assumes a radical option for justice and for life itself (Massimo, 2011: 14). The integration of love into justice is the navigation chart by which Jesus launched the project of the Kingdom of God. From there, he reconfigures a new model that included a normative system oriented towards the meaning and exaltation of humanity around justice (Debergé, 1998).

Jesus seeks the inclusion of the marginalized Israelite society in the face of the exclusionary character of its political and religious elite. It is a means based on the relationship of God with his people and of the latter with God, whose merciful and compassionate significance fosters justice in terms of equality, restoring dignity to those who have had it taken away from them and liberating those who have been oppressed (Santamaría-Rodríguez, 2017).

3.3. Inferences from a perspective of biblical justice

The prophetic movement embodied in the figures of Amos and Micah describes a concept of justice linked to the situation of op-

pression of the people of Israel by the political, legal, and religious power prevailing in the monarchies of the Northern and Southern kingdoms. It is, therefore, a justice that underlies the suffering of the people and generates the demand of the prophets to the kings who govern and to the people themselves to return to the experience and observance of the Mosaic law, because such law is the foundation of the Covenant between God and Israel (Ex 3, 7-12) and contains ethical codes that seek a dignified and equitable life for all its members. Consequently, in accordance with the Semitic identity of prophetic work and the Jewish cosmovision concerning it (Sivatte, 1982: 13-14), Mosaic law includes a multifaceted concept of justice with structural, retributive and restorative dimensions (Botero, 2012: 62-65).

The structural dimension implies searching for ways and means for the victims of actions of oppression and violence to initiate and develop processes to recover the trust and dignity lost due violations of rights or situations of injustice (Botero, 2012: 64). In turn, the retributive dimension implies sending these situations to the legal mechanisms authorized to counteract all violations of human rights (it is, thus, the State, that, in the name of the law, supplies and imparts justice by prosecuting the perpetrators of the crimes committed against human dignity) (Botero, 2012: 62). Finally, the restorative dimension seeks to establish a context in which it is possible to restore and create a space where reconciliation processes are generated between victims and perpetrators (Botero, 2012: 64).

In this way, Israelite society is required to convert and transform its structures of oppression, sin, and marginalization, as an indispensable condition for maintaining its Covenant with God. It is not only about reestablishing a just and dignified relationship with God, but with the victims. Hence, a comprehensive justice is sought that aims not only to avoid impunity for the sin committed, but also to the reparation and restoration of those affected.

The Synoptic Gospels reflect in the preaching of the Kingdom of God and the actions of Jesus (healing the sick, relationship with sinners and confrontation of power) the "compassionate" and "merciful" character of God with those marginalized by the political and religious power. In fact, the "Beatitudes" (Mt 5:1-12) make it clear that it is to them that the hope of salvation is primarily intended.

Furthermore, Jesus reiterates that the "chief commandment" is the foundation of God's justice: "You shall love the Lord, your God, with all your heart, with all your being, with all your strength, and with all your mind, and your neighbor as yourself" (Lk 10, 27)[5].

The element that updates the Mosaic law and the message of the prophets is, therefore, the anthropological implication of the message of Jesus in the face of the legalism of the Pharisees, scribes, and legalists. This is the way to establish the Kingdom of God (which in any case has a preferential character for the poor and excluded). Furthermore, it contains a conversion criterion for those who are on the side of the structure of power and oppression. With this, the structural, retributive, and restorative dimensions of justice in the Israelite prophetic movement are maintained (Botero, 2012: 68-70).

4. SECOND FOCUS: INTERNATIONAL CRIMINAL JUSTICE AND THE ROLE OF THE INTERNATIONAL CRIMINAL COURT

The characteristics of ICJ and the role of the ICC according to the ICC Statute make up the second focus of the proposed elliptical movement. Its analysis, from the perspective of biblical justice, allows us to think about an epistemological and practical turn in such a way that ICJ moves the center of its action from the perpetrators and their structures of oppression to those who suffer them in their condition as victims.

4.1. International justice from the perspective of biblical justice

ICJ has been characterized as constituting a response of international society to the most serious crimes of international concern (genocide, crimes against humanity, war crimes and aggression) (Mejía, 2008: 187-189; Olasolo, 2016). Consequently, ICJ seeks to end

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5 In the tradition of the Synoptic Gospels, this biblical passage is also found in Mt 22, 40 and Mc 12, 34.

impunity for those most responsible for such crimes for the purpose of: (a) strengthening universal legal awareness about the importance of the affected social values; and (b) preventing their future commission by showing what can happen to those most responsible for these crimes (Olasolo, 2016).

To this end, international criminal tribunals and national jurisdictions acting under the principle of universal justice have been resorted to (Olasolo & Carnero, 2012). However, the limited scope of the jurisdiction of international criminal tribunals and the political and ideological tensions that underlie the cases against those most responsible for international crimes limit their effectiveness, since ICJ is highly dependent upon state cooperation (Olasolo, 2016: 99; 120).

Carrying out a "historical-contextual" theological interpretation of ICJ on the basis of biblical justice allows us to confront its normative framework and its application with the structural, retributive, and restorative dimensions that underlie the notion of justice in the prophetic movement of Israel and in the mission of Jesus. In this way, the interpellation that is made to ICJ from biblical justice offers tools to help expand its understanding and application and rescues anthropological elements that are not part of ICJ or are considered irrelevant.

With ICJ and biblical justice having the common objective of providing an effective response to crimes/sins, they differ in the way they do it. While ICJ focuses on the application of punishment based on the investigation and prosecution of those most responsible, and on the preventive effect that this can generate (Olasolo, 2016), biblical justice not only exposes the guilty/sinners through the denunciation of the prophets and the mission of Jesus, but also concentrates its efforts on restoring dignity to those who have suffered the violence of sinners (who, for the most part, are the marginalized of Israel) (Botero, 2012).

As a result, ICJ has focused on reaffirming the positive order of international criminal law (ICL) by conducting exhaustive investigations into those most responsible for the crimes therein contained. However, throughout long, exhausting, and ineffective proceedings (Olasolo & Galain, 2018), ICJ ignores the human dimension of the

victims, because it leaves in the background the generation of processes aimed at the restoration of their dignity.

Thus, while it is true that bringing justice to victims constitutes one of the goals of ICJ (the scope of their participation in criminal proceedings being an essential factor to determine to what extent ICJ helps to restore their dignity) (Cryer et. al., 2014; Harhoff, 2008), it is no less true that the international tribunals that preceded the ICC (in particular, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)) are far from having been exemplary in the treatment they have rendered to victims and witnesses (Harhoff, 2008).

Unlike the statutes of the ICTY and the ICTR, the ICC Statute contains a number of provisions that provide for the participation of victims in criminal and reparation proceedings. Furthermore, as Dwertmann (2010) has emphasized, doing justice to victims through just reparation constitutes one of the purposes of the ICC. To achieve it, art. 75(1) of the ICC Statute empowers the ICC to order the seizure of the assets of the convicted person in order to obtain the necessary resources to restitute, compensate and rehabilitate victims (Olasolo, 2016: 131-133). However, the processes to restore victims' dignity have not, so far, been a priority in the work of the ICC (Olasolo, 2016: 132).

ICJ also aims at creating a universal legal awareness of the relevance of the social values protected by ICL norms (Olasolo, 2016: 134). Indeed, this is a key component of the ICC's role. However, biblical justice challenges the relevance given by ICJ to this goal because, according to biblical justice, the focus should not be only on those who commit the crimes. Although it is important to investigate, prosecute and punish those most responsible for international crimes, restoring the dignity of the victims is more than just relevant (for both Israelite prophetism and Jesus' mission, the recognition of the injustices committed, as well as conversion and restoration, are the epicenters of justice). Only from here, justice, understood as love for one's neighbor, that is, the recognition of the other by the fact of his/her existence (especially, when that other has suffered the effects of a structure of victimization that has oppressed and dehumanized him/her) is possible (Mt 22, 34-40, Mk 12, 28-34, Lk 10, 25-28).

Consequently, for biblical justice, and appealing to the historical and political character of the Christian faith (Ellacuría, 2000: 13-31), ICJ cannot focus exclusively on the perpetrators (Botero, 2012), as this will lead to both ignoring the suffering of victims and legitimizing the legalistic nature proclaimed by the religious authorities of Israel (Pharisees, Scribes or Sanhedrin).

Faced with this situation, biblical justice speaks of a transformative action that humanizes the lives of those who oppress and are oppressed. Thus, in the face of the ideologization and lack of balance of ICJ, it is necessary for it to operate legitimately and freely to confront the dogmatisms and uncertainties that surround it. This means understanding that the identification of those most responsible for international crimes and of the power structures from which they operate, is nothing more than a step prior to making possible the processes for the restoration of dignity to those who have suffered them.

This epistemological and practical turn opens a possibility of freeing ICJ from all ideological bias arising out of the political influence of the hegemonic Powers, the States Parties or the States where the crimes are committed. Furthermore, it promotes autonomy in the determination of punishment within the established legal framework, so that ICJ enforcement mechanisms (direct (international criminal tribunals), indirect (national jurisdictions) and mixed (hybrid tribunals)) can have a decisive impact against on the structural nature of the crimes, their actors, and their intentions (Olasolo & Galain, 2018).

Nevertheless, despite being dialectical, ICJ and biblical justice have the possibility of re-signifying their praxis as a result of their mutual implication. This implies a double movement. First, updating and creating capacities in ICJ, so that it can manage to autonomously balance itself against dogmatism and ideologization. Second, a theological dynamism that understands justice as the operating reality of a project that: (a) seeks humanization based on love as a principle; and (b) must take into account the dignity of human life at both an individual and collective level.

4.2. The role of the International Criminal Court from justice in, from and for victims

When analyzing from a "historical-contextual" theological perspective the ICC's role as a mechanism for the application of ICJ, it is necessary to keep in mind the following: while biblical justice has structural, retributive and restorative dimensions, as well as a "compassionate" and "merciful" character for those who convert and carry out charitable actions, the application of ICJ by the ICC aims at safeguarding the social values protected by ICL by putting an end to the impunity of those most responsible for the crimes provided for in the ICC Statute.

Using as a take-off point the ellipse with two *foci* (Schickendantz, 2013) established between biblical justice and the application of ICJ by the ICC, what emerges as fundamental is that the latter should not only be assessed in terms of its normative identity, but also in relation to its independence and effectiveness.

As regards biblical justice, its historicity reflects the way by which God's justice is incarnated and operates in the historical reality of his people and in their possibility of conversion in the face of the structure of sin that reigns among them. This is where his "compassionate" and "merciful" character takes place (since his concern is always the conversion of his people and faithfulness to his mandate), as opposed to the casuistry of the legalistic structure on which ICJ is based.

Concerning the ICC's role, the discussion about its content focuses on the excessive importance placed on those most responsible. Thus, although, as stated, for example, in art. 75 of the ICC Statute, the ICC concentrates some of its efforts on victims' protection, legitimation and reparation, its main axis is linked to the investigation, prosecution and punishment of those most responsible for the crimes under its jurisdiction.

Furthermore, the ICC lacks independence from a procedural and institutional perspective, which prevents it from fulfilling its role more effectively. In this way, regardless of its jurisdictional limitations, its dependence on the cooperation of the States Parties, or on the will of the UNSC when it comes to crimes committed in non-party

States by their nationals (Olasolo & Carnero, 2012: 86-107), reflects the significant difficulties the ICC faces to fulfill its role of doing justice independently (Anello, 2013: 49-55).

The epistemological and praxic turn suggested by biblical justice reveals that the ideological tension that delegitimizes the ICC's role presents characteristics that are articulated to complex systems of oppression which are so consolidated that, at times, they come to obscure the symbolic character of the law (Segato, 2003: 122-126), and especially of ICL. This has a negative impact on the creation of a universal conscience of rejection of international crimes that violate human dignity and the most fundamental values of the international community (Olasolo, 2016: 123- 129).

State cooperation is fundamental for these purposes. However, the ideological character that permeates the political and diplomatic relations of States Parties and non-party States with the ICC, together with the interests of each of them in ICJ matters, show that the ratification of the ICC Statute is not sufficient as it does not guarantee the effective cooperation of States Parties with the ICC (Anello, 2013: 55-56).

Therefore, while it is true that the ICC is not intended to affect the legal structure of States Parties, it is no less true that the fulfillment of its role from the perspective of biblical justice requires that the ICC: (a) demand compliance of States Parties with their obligations under the ICC Statute to cooperate to guarantee expeditiousness and dignity in the proceedings (especially, given their importance for victims' restoration); and, when necessary for these purposes, (b) show the structures of victimization and the systematic and widespread nature of the crimes that have occurred (this could even be done through extrajudicial reports).

Nevertheless, given the absence of a more explicit regulatory framework for the fulfillment of the ICC's role (Olasolo, 2016: 134-135), biblical justice proposes a conceptual and praxic turn based on victims' position in historical reality. Thus, the start and end point of the ICC's role should be the historical reality of the victims (Santamaría-Rodríguez, 2018). As a result, the ICC actions would acquire a more human, ethical and equitable character, which would allow the

question about the "neighbor" (the victims) to be explicitly articulated in such a way that it would become a central axis of the ICC's role. Only then could the ICC recover its symbolic character (Segato, 2003) and acquire full independence in the promotion of the legal rights protected by ICL and in the design of protocols that guarantee victims' visibility and restoration of their dignity.

5. CONCLUSIONS

The concept of justice presents various nuances according to the perspective from which it is approached. This does not prevent, however, that the dialectic between biblical justice and ICJ enforced through the ICC having complementary elements (even though they have opposite objects of analysis).

The perspective of biblical justice, interpreted from a historical-contextual approach, considers as the fundamental factors: (a) the historicity of God's action in favor of his people; and (b) God's demand for their conversion in the face of the structure of sin and oppression that subjugates them.

The action of the prophets, and its definitive manifestation in the person of Jesus, as shown by his preaching, his denunciations, his announcements of liberation-salvation and his constant reiteration of God's Covenant with his people, fosters the latter's appropriation and experience of his precepts; all of them articulated and in force as a result of the "First Commandment" (Mt 22, 34-40, Mc 12, 28-34, Luke 10, 25-28).

For its part, the criteria defined by ICJ, and its enforcement by the ICC, foster a justice based on positive ICL, which aims mainly at: (a) the investigation, prosecution, and punishment of those most responsible for the crimes within ICC's jurisdiction; and (b) the generation of a preventive effect by creating a universal awareness of rejection of such crimes. As a result, an excessive centrality is given to the imposition of punishment, the role of the perpetrators to the detriment of that of the victims and the different ideological and political tensions with party and non-party States and the UNSC, that limit the autonomy of the ICC in the effective fulfillment of its role.

The epistemological and praxic turn suggested by biblical justice (interpreted from the historical context of God's actions in the reality of Israel), suggests that ICJ should place its attention on both the perpetrator and the victims. This implies guaranteeing its independence and autonomy, both to investigate and prosecute the crimes foreseen in the ICC Statute, and when processes of a structural, retributive, and restorative nature are promoted in favor of the victims.

Legal norms by themselves are insufficient for the application of justice. They must include a criterion of humanity applicable to the contexts and areas they claim to protect. Furthermore, they must be operational in the face of realities that threaten human dignity and life. The messages announced by the prophets and the testimony that the Gospels present about the mission of Jesus corroborate this. It is a justice that requires recognition of sin by the sinner, involves his conversion and assesses his faithfulness to the divine precept, which: (a) contains ethical codes that seek to ensure a dignified and equitable relationship in Israelite society; and (b) provides a life itinerary for the Christian community from its historical and political dimension (Ellacuría, 2000: 13-31).

Consequently, from a biblical justice perspective, ICJ and the role of the ICC require a turn in their structure. When seen from a symbolic perspective (Segato, 2003), this turn should assume a prophetic and historical character that would have as its main axis the reality of the other in its vulnerability and victimization (Caram & Leguizamón, 2019). In this way, law, and morality, as a set of duly articulated discursive norms, must be driven by ethical sentiment in the direction of a greater good understood from the perspective of the victimized other (Segato, 2003: 125-126). Ultimately, from the perspective of a love-charity for one's neighbor (Mt 22, 34-40, Mc 12, 28-34, Lk 10, 25-28, Jn 13, 34), this turn must respond to the principle of compassion and mercy as manifested in God's action on behalf of Israel.

Based on these elements, the complementarity of both notions of justice can be declared, particularly because their interest is to recover the ethical nature of the relationship amongst people. Now, it is up to ICJ and the ICC's role to appropriate the epistemological and praxic turn proposed by biblical justice, so that the concept of justice they embody encompasses structural, retributive and restora-

tive dimensions. Otherwise, they will not only continue to focus their attention on the investigation, prosecution and punishment of those most responsible, but they will deprive the victims of the necessary mechanisms for the full restoration of their dignity.

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Chapter 8
The Perspective Of Emancipatory Legal Pluralism[*]

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1. INTRODUCTION

International Law (IL) and the institutions that regulate it have generated numerous social expectations since the mid-20th century. Even if it is considered that these expectations emerged as a smoke screen created to hide the atrocities committed by Western Europe, the truth is that the United Nations (UN) (1945) and its Universal Declaration of Human Rights (UDHR) (1948) offer better prospects

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

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for the protection of life and the relativization of the notion of sovereignty of the modern State (until then, the veil of sovereignty had been used to commit all kinds of crimes with impunity).

As a result of its formal commitment to the protection of life and human dignity in its territory, the modern State, founded on the denial of other ways of being, doing and living, has been forced to change its legal, political, and economic foundations to a certain extent. This does not mean, however, that the economic effects of colonization have disappeared because, beyond the historical process of plunder and denial, the institutions and structures of the former colonies have not been decolonized, and through their actions and omissions they reproduce practices of genocide, crimes against humanity, war crimes and aggression.

In this way, a significant gap can be observed between the ideal of International Human Rights Law (IHRL), which promises all people the enjoyment of their fundamental rights and provides for the establishment of a system of protection against their violations, and political practice. The latter reflects a world in which violations of human rights continue leaving more and more people excluded from the enjoyment of human rights and allowing for the existence of manifest difficulties in accessing national and international justice. As a result of the foregoing, those dehumanized during colonization continue, in the 21st century, to see their right to a dignified life limited by the practices of a modern State which was designed under the unfulfilled promise of freedom, equality and fraternity.

In this context, the purpose of this chapter is to analyze to what extent emancipatory legal pluralism, which has emerged out of the struggles and mobilizations for justice expressed by subaltern voices (in particular, the voices of victims of human rights violations and their families) is relevant to the fulfillment of the ICC's role. To this end, the chapter is structured into five sections, in addition to this introduction. Section 2 presents the starting point of the analysis: a world marked by the coloniality of power, being and knowledge. Sections 3 and 4 then address the central elements of emancipatory legal pluralism, both nationally and internationally. Next, section 5 studies the relevance of emancipatory legal pluralism in the fulfillment of

the role of the ICC, and the potential it presents. Finally, section 6 contains the main conclusions of the analysis carried out.

2. STARTING POINT: A WORLD MARKED BY THE COLONIALITY OF POWER, BEING AND KNOWLEDGE

The modern State has not always existed, although the monoculture of knowledge tries to instill this organizational idea as the only viable form. For centuries, especially in America and Africa, other social arrangements existed beyond the European way of considering territory as part of States and nations. Consequently, the civilizational project of modernity and the rationality that underlays the structure of the modern State is carried out through Western European epistemologies and ontologies (Hroch, 2000: 85). In this way, even if nation States are "new" and "historical", the peoples to whom they give political expression have an immemorial past and, which is more important, glide into an indefinite future (Anderson, 1986: 20).

Through a violent stratification of race, gender and ethnicity, and the regulation of the purchase and sale of private property and labor, the European civilizational project divided the world in a homogeneous, binary, antagonistic and conflictive way, which generated a whole set of new categories: East-West, primitive-civilized, magical-mythical-scientific, irrational-rational, traditional-modern (Hroch, 2000: 85). These categories matured with the development of the capitalist economic system and provided it with its ideological, social, and cultural foundations, generating a process of exclusion and violence. The capitalist economy of the modern State focuses on the monoculture of land, territory, and life; and all of this is based upon plunder, exploitation and massacre, regardless of human or non-human lives. In this sense, it can be stated that the modern State has been consolidated, in both the metropolis and the colonies, through dynamics of violence constitutive of the crimes included in the ICC Statute.

The administration of the territory of a people through colonization over a period of centuries and the impact of its negative effects in time and space through the coloniality of power, knowledge and being, have promoted dichotomous structures of the civilizing/

civilized, male/female, developed/underdeveloped, urban/rural, national/international, literate/uneducated, heteronormative/homosexuality and west/east types. Within these structures, the supposedly "stronger" side needs the "weaker" side so as to guarantee its existence, because the tension between both poles guarantees its dominance.

As Bauer (2000: 77) points out, the impetus for the movement in favor of the nation State was undoubtedly driven by a demand for the rejection of external domination. When such domination means, at the same time, the oppression and exploitation of the entire nation, the demand to reject it requires no explanation. However, while at the same time that the internal struggle against external domination was successful, the territory of the nation States that the former colonies became remains full of contradictions and class struggles, due to the fact that the subaltern subjects of the 16th century (indigenous, blacks, women, homosexuals, rural workers, "*quilombolas*" and many others) remain in the same situation in the 21st century.

3. EMANCIPATORY LEGAL PLURALISM

The modern State, historically promoted by the European bourgeoisie as the dominant social class (Rocha, 2012), seeks to limit the law to centralized and monistic norms, based upon the separation between the concepts of individual and society on the one hand, and citizen and State on the other. In contrast, and as a result of the people's resistance to the process of colonization, emancipatory legal pluralism rejects the State becoming the center of political power and the source of all legal production. In this way, it departs from the old structure linked to liberal-bourgeois democracy because is not associated with the individualism of the social world, but rather to the union of various individual and collective daily interests.

Emancipatory legal pluralism emerges out of the conviction that cultural models are insufficient to encompass the many ways of being, doing and living of human beings. Under this scenario, social movements, and their actors, especially those who fight for land, become leaders in the search for the satisfaction of their fundamental

demands and basic needs. In this way, participatory social practices guarantee the legitimacy of non-state norms created by these new actors who present their own needs and demands (Wolkmer, 2001). As a result, the law cannot be limited to what emanates from the State, because if it does, it becomes obsolete and incapable of responding to multiple social demands.

Within this context, emancipatory legal pluralism has as its object the simultaneous coexistence in the same socio-political context of several systems of social regulation which create rights and establish dispute resolution mechanisms, without the need for recognition or validation by the State (Fariñas Dulce, 1997: 12-13). The State is, therefore, one more, among many others, having the power of creation and normative application, although in recent centuries it has been the most important and has managed to impose itself, to dominate and to make the rest invisible (Fariñas Dulce, 1997:12-13).

As a result of the foregoing, emancipatory legal pluralism is made up of a multiplicity of manifestations, experiences and normative practices that exist in a defined context (Wolkmer, 2001). These practices may or may not be recognized by state norms, overlap with them, or even complement each other. In this way, the resulting rules go beyond the legal production of the State. They may include other manifestations based upon the democratization of the process for the creation and application of law, interculturality and the existence of a plurality of institutions and social actors. This promotes, a political review of legal production that is linked to the criteria of a new emancipatory legitimacy that comes from below (Santos, 2002).

Within emancipatory legal pluralism, the social paradigm of normative production that appears to be most appropriate for our object of study is participatory community law (Wolkmer, 1994). This concept covers the social practices of those who are excluded, which contemplate five assumptions: two are material, which refer to their contents and constitutive elements, and three are formal, which refer to issues of practical application and procedure.

Thus, unlike the individualistic logic consecrated by modern rationality as the form of legal expression, what must be taken into account are, first of all, the emergence of new collective subjects of

rights. These are dynamic actors that express the symbiosis between the individual and the collective in subaltern groups within a defined historical, social, and economic context.

Secondly, what underlies the action of such actors is the search for the satisfaction of fundamental human needs, and not compliance with abstract norms. In this way, the foundation of the initiatives coming from within this type of legal pluralism is the satisfaction of the real and concrete needs (social, political, economic, cultural, spiritual, and psychological) of the new collective actors.

Thirdly, the implementation of these initiatives must be democratic, in that they have as their object the reorganization of the public sphere through policies of decentralization and community participation.

Fourthly, the activities carried out must be based on an "ethics of otherness", which, for Dussell (1973), constitutes the recognition of oneself in the "other".

Finally, the initiatives must be understood as processes that seek the construction and exercise of an emancipatory rationality of the actors, as opposed to a rationality of simple conformity and submission.

For Wolkmer (1994), the democratization and decolonization of justice must necessarily imply the overcoming of the legal and philosophical paradigms of the institutionality of the modern State, while at the same time promoting the action of social movements and the political commitment to popular participation. Consequently, the simple act of "opening the legal canon" to non-state practices of justice does not necessarily imply a rethinking of the state-centered modern/colonial model of justice. It is necessary, therefore, to confront this model and its symbolic institutional apparatus so as to be able to talk about solutions that break with the exclusionary logic of state law (Icaza, 2018: 203).

4. THE TREATMENT OF INTERNATIONAL JUSTICE BY EMANCIPATORY LEGAL PLURALISM

Although emancipatory legal pluralism is generally focused on initiatives which are inserted into the sphere of the nation State, noth-

ing prevents its perspective from being applied as well in international society.

In this sense, it is worth highlighting that both the consideration of IL as a field of state action and the privileged access to international justice (IJ) that States, international organizations (IOs) and transnational companies enjoy have contributed to the failure to recognize the different contexts of legal production beyond the activities controlled by such actors. As a result, IL promotes a systemic invisibility of other forms of normative production derived from secondary, non-universal and residual expressions of justice, which neither conform to the "traditional" assumptions of Western justice, nor emanate from officially recognized institutions.

This is the case, for example, with the customary law of indigenous peoples, who need the recognition of IL institutions and norms in order to "exist". However, by "recognizing" these legal systems, which are found on the "margins" of international legality (and represent the affirmation of excluded and invisible social groups), international society "domesticates" them and makes them part of a system of domination and monetization of power and justice (Icaza, 2018: 204).

Consequently, it can be asserted that IL contains ideological and symbolic mechanisms of social and political domination, which promote the differentiation between those who make up part of the official legal and political system, and those who are condemned to illegality from the beginning and are placed outside this equation (Lauris, 2013: 41). Therefore, to expect that those actors privileged by the system (and who constitute and co-constitute on restrictive and exclusive bases) will be the ones to provide the answers to expanding access to justice would seem to be, at the very least, incongruous, if not an empty discourse that does not really aim to transform reality.

Thus, for Santos (2007), the answer is found in a "subaltern cosmopolitanism", which rejects the universal concept of neoliberal globalization as the only possible alternative and is manifested through initiatives and movements that constitute globalization against the hegemony. As a result, resistance against political, social, economic, cultural, epistemological, and legal exclusion is organized in

networks, composed of different social movements with the aim of creating an alternative thought of alternatives. This entails the redistribution of material, social, political, cultural and symbolic resources based upon the principles of equality and recognition of the "difference". In this way, subaltern cosmopolitanism rises above the West's understanding of the world, while recognizing a deep sense of incompleteness because the more non-Western understandings are identified, the more evident is that many others remain unidentified (Santos, 2007).

According to Fariñas (1997), in light of the strong crisis that both globalization and localization are causing for nation States (especially, in their role as promoters of societal well-being), a global restructuring around communities represents a propitious terrain for the resurgence of legal pluralism, since it obliges us to rethink the functions, role and reach of state structures. In this way, the tension between globalization and localization should lead to a reinvention of legal rationality which, rather than being based upon a single universal, abstract, totalitarian, and self-sufficient rationale, is instead the result of a plural and complex rationale. This would presuppose the existence of a polycentric legality with a multiplicity of legal decision-making centers within the same legal system (Fariñas, 1997: 12-13).

In this sense, the following three factors reflect how legal pluralism is already a reality in IL: (a) the development of the law of integration, which is related to domestic law according to the model of integration adopted, with more or less autonomy of the States that participates in the integration initiatives; (b) the proliferation of different international legal regimes, such as that promoted, for example, by the World Trade Organization; and (c) the progressive creation by transnational companies (private actors within the international system) of an entire legal regime in parallel with the interstate legal system (composed of substantive norms, informal decision-making mechanisms and arbitral tribunals for the resolution of controversies) aimed at guaranteeing the effectiveness of the global financial economic system (denoted by Fariñas (1997) as "conservative legal pluralism").

This means that, although until recently States were the only actors that could act with full legal personality before the bodies of IL (IOs, transnational companies, NGOs and individuals themselves had very limited possibilities of taking initiatives within IL, with high costs, and, most of the time, run by States), the current political incorporation into international society of other actors with legal personality under IL and full capacity to sue or even create norms is palpable (transnational companies provide an example of this trend; in addition to leaving the orbit of state control, they have managed, through legal and political agreements, to avoid the consequences of the harm that they cause as a result of their human rights violations).

In this context, the question arises about the possibility of creating public spheres of access to IL for individuals, groups of people and peoples. Thus, if at the domestic level they have managed to ensure that law is not confused with state law (which is why the narratives of States as hegemonic actors are questioned) (Byrnes & Simm, 2018), it would also appear to be possible to make a different reading of IL at the international level that allows greater access to IL in specific cases (Sousa Junior, 2011: 58).

The search for alternatives for access to IL has brought to the discussion perspectives that seek to reinvent social "protagonisms" as part of a bolder and broader arc of solidarity. They are more appropriate to the new conditions of social exclusion and can give a sense of "greater solidarity" to political action (Sousa Junior, 2011: 31).

The result of this way of conceiving the struggles for the satisfaction of necessities, for autonomy and for the recognition of rights, together with the spirit of filling the legal vacuum left by the system, is the emergence of legal and political spheres in which social practices that enunciate rights are developed. Thus, within the context of a democratic and institutional deficit, the struggles and mobilizations for justice expressed by subaltern voices (and in particular, by human rights victims and their families) find a response in international tribunals of social mobilization. These tribunals constitute spaces which can foster critical thinking, that is, an opportunity to think, debate and present alternatives to the crisis, to how to confront it and to the democratic deficit (Sabariego & Matos, 2018).

Therefore, international tribunals of social mobilization provide an example of a break with positivism in IL, and at the same time demonstrate that punitive responses are sometimes not the best when it comes to dealing with massive violations of human rights. In these tribunals, the goal is to make IL an instrument, not for the maintenance of the established order, but for: (a) the emancipation of historical actors who have traditionally been subjected to repressive norms; and (b) the redefinition of the construction process of the dominant legal discourse.

Furthermore, the alternative legal practices of the international tribunals of social mobilization manifest the tension between the established power and a "counterpower" that challenges it. They demonstrate that the application of justice is not limited to traditional international tribunals and state entities but is extended through social protest and the collective action of human beings (Moita, 2015).

In this sense, the characteristics, and procedures of international tribunals of social mobilization invite us to reflect and understand IL from a critical perspective, which presupposes a position of confrontation and resistance, but also a willingness to think in alternative ways. In this way, they have the potential to put IL at the service of social transformation, to increase the power of subaltern classes and groups who are discriminated against, and to promote the self-organization and autonomy of such groups. Consequently, for Dussel (1973), the goal of these alternative legal practices is the liberation of law and the search for the true validity of human rights.

Among the examples that can be cited, the Russell Tribunal and the Permanent People's Tribunal stand out. They have guided the formulation of a general conception of international tribunals of social mobilization based upon the following characteristics: (a) they are initiatives of organized civil society; (b) they were developed through participatory processes in which jurists, academics, intellectuals, local social movements, foundations, religious representatives, worker organizations and human rights activists intervened; (c) they are technically based upon IL and human rights standards; (d) they seek to overcome the limitations of the institutions and of the enforcement mechanisms of IL thereby demonstrating the symbolic, political and

ideological instrumentalization of international legal norms and institutions which favor the maintenance of inequalities between States and the reproduction of the logic of submission and exploitation of the populations of the Global South; (e) they denounce and condemn serious crimes against human beings and peoples; and (f) they seek to raise awareness in public opinion and, through that, within the established powers (Klinghoffer & Klinghoffer, 2002). Likewise, it should be noted that these tribunals have a clear emancipatory intention (Moita, 2015) and are based on the belief that individuals can make a difference through the creative use of information and the employment of innovative strategies of legal and political activism in their demands (Keck & Sikkink, 1998).

Despite the characteristics that unify these initiatives of organized civil society in a definition that is more or less homogeneous, each international tribunal of social mobilization has its own peculiarities. This is because, by considering these tribunals as forms of social resistance against the most varied forms of oppression and violence, organizational dynamism and originality are essential in order to maintain their transformative potential and to demonstrate that it is possible to reflect and act in different and alternative ways.

In this sense, it should not be forgotten that struggles for social justice are also struggles for political visibility which, in addition to making public demands for justice, have as their object to demonstrate the close relationship between the various forms of material oppression and epistemic discrimination against subaltern populations. This means that, in addition to being excluded from access to the material and immaterial goods necessary to achieve dignity, large social groups are also excluded from being able to claim their rights and from creating new justice alternatives (Santos, 2007), such as said international tribunals of social mobilization.

As a consequence, from a pluralist legal perception, IL can also be understood as a dynamic and developing language that changes with its speakers (Icaza, 2018), and which allows various groups apart from States, IOs and transnational companies to organize for the production of legality, the mobilization of law and the construction of grammars for the interpretation and application of IL and human rights.

It is within this context that the question arises about the role that emancipatory legal pluralism plays in the ICC, and what role it should play in a context that seeks more democratic access to justice for individuals and the recognition of new grammars for the interpretation and application of IL and, in particular, international criminal law (ICL) and human rights.

5. THE RELEVANCE OF EMANCIPATORY LEGAL PLURALISM IN FULFILLING THE ROLE OF THE INTERNATIONAL CRIMINAL COURT

The relationship between legal pluralism and the ICC is not new. Thus, many authors have described the challenge posed to the ICC by the need to clarify where legal pluralism can be acceptable or beneficial for international criminal justice (ICJ) and ICL which, although diverse by their nature, have been permeated by a kind of rigidity and strict application of its legal norms (Stahn, 2012).

It is within this context, that this section analyzes the field of action of emancipatory legal pluralism in fulfilling the ICC's role. To this end, it is first analyzed the extent to which community justice models are relevant in matters of criminal prosecution so as to avoid ICC action by application of the principle of complementarity provided for in the ICC Statute. Subsequently, the degree to which community reparation processes for victims have a place among the reparation modalities provided for in the ICC Statute is studied.

Regarding the first question, it is necessary to point out that the ICC is a body with a vocation for permanence, but the exercise of its jurisdiction is subject to compliance with the requirements of the principle of complementarity provided for in art. 17 of the ICC Statute. According to this provision, national jurisdictions have formal primacy in the criminal prosecution of crimes under the ICC Statute. It is only under certain circumstances (inaction, lack of willingness or lack of capacity of national jurisdictions to investigate and prosecute those most responsible) that the ICC can act in exercise of the material primacy attributed to it by the ICC Statute (Olasolo, 2009).

In the exercise of their formal primacy, national jurisdictions must comply with minimum standards. Among them, Ambos (2010) highlights a standard regarding investigations and prosecutions conducted by state bodies, in the understanding that the duty to carry out criminal proceedings rests mainly on the State (Ambos, 2010). Likewise, the investigation must be limited to the facts under examination in order to determine the responsibility of the accused leaders. That is to say, contextual investigations or mere historical reconstruction, since they do not have such quality and purpose, do not prevent the ICC from exercising its jurisdiction (Kleffner, 2008). In this way, community justice models, as forms of administration of justice through which a social group processes its conflicts according to its identity and independently of the state legal system (Ardilla, 2000), do not appear to meet these requirements.

This conclusion is reinforced by observing that the community justice models that have been developed in Rwanda and Uganda have been focused, mainly, on reparation to the victims, the reconstruction of the facts, reconciliation, and the reintegration of the perpetrators into their communities. As a result, they have neither applied criminal norms nor declared responsibilities of that nature; at most, they have included the voluntary recognition of the commission of certain acts in order to promote reconciliation within the community (Minow, 2019).

Both the first ICC prosecutor, Luis Moreno Ocampo, and the second ICC prosecutor, Fatou Bensouda, have spoken of this in this same sense. For both of them, community justice practices in relation to the crimes provided for in the ICC Statute do not provide sufficient grounds for the ICC to stop acting, in application of the principle of complementarity. In fact, Moreno Ocampo himself has stressed that it is highly unlikely that a situation will be declared inadmissible if the actions of national jurisdictions or their alternative community practices do not include criminal prosecutions (ICC OTP, 2007-2017).

It can therefore be stated that, within the framework of criminal prosecution itself, the emancipatory legal pluralism embodied in the community justice models mentioned above does not appear to have been relevant to date for the exercise of the ICC's role of putting an

end to the impunity of those most responsible for the crimes foreseen in the ICC Statute.

From the perspective of emancipatory legal pluralism, this situation is certainly dysfunctional, particularly if one considers that the expectations of purging the flawed structures of the modern State, generated by the establishment of the ICC, have been frustrated by it proving to be incapable of providing an effective response to the numerous acts of violence committed in and by States against their own people.

The situation is very different, however, with regard to reparation for victims because in this area community justice processes have taken on special relevance for the international community (UNSC, 2014). In this sense, the contribution of the processes carried out within the *Gacaca* community justice tribunals in Rwanda is worth mentioning.

Clark and Palmer (2012) have highlighted the views of victims on the relevance of the Gacaca tribunals for the reconstruction of the social fabric of their communities:

> The Gacaca Courts are important for us, the survivors, because they help us live and work again in the community. […] All of we survivors get together and talk about what has happened. We realize that we are in the same situation, that we have all had family members who were murdered. We understand each other and we find that we are not alone.

Likewise, in relation to the victims of the crimes set out in the ICC Statute that occurred in Northern Uganda, emphasis has been placed on the fact that, in order to recover their human dignity, they require, beyond a judicial sentence, the implementation of the alternative model of reparation that is characteristic of their communities.

Thus, Acholi culture has a traditional process called *Mato Oput*, where victim and perpetrator meet, followed by a reconciliation ceremony in which the perpetrator not only admits his participation in the act of violence that occurred, but also provides reparation to the victim through traditional methods, such as the delivery of animals. Although these types of processes do not correspond to the reparation models that can be found in Western legal systems, they are

fundamental for the communities that live in Northern Uganda and respond to their values and moral norms (Lamony, 2014).

Based upon the foregoing, the ICC, in the reparations order in the Katanga case, has indicated that reparations must, to the extent possible, reflect and take into account local practices and customs (typical of the culture of the affected communities), with the exception of those that may be discriminatory, exclusionary, or harmful to the rights of victims (ICC, Katanga, 04/24/2017).

Moreover, the reparation measures typical of community justice practices could be complemented by and executed jointly with the ICC, and particularly with the ICC Trust Fund for Victims, both as part of its reparation mandate after the conviction of the accused persons, as well as within the framework of its broader assistance mandate (Giraldo; González; Hernández; Restrepo; Sánchez; Vargas & Villarraga, 2020).

6. CONCLUSIONS

The emancipatory legal pluralism paradigm is an undeniable reality. Its recognition and reception in contemporary national and international judicial practice constitutes a necessity if the goal is to vindicate the role that historically marginalized populations have occupied.

In this context, if the ICC, as Kofi Annan has affirmed, wants to become "the cause of all humanity", it must attribute the necessary relevance in the fulfillment of its role to the emancipatory legal pluralism embodied in the models of community justice existing in the territories where the crimes covered by the ICC Statute are committed (Annan, 2003). As we have seen, this is already happening in the area of reparation to victims. However, the situation is very different in the area of the fight against impunity of those most responsible for the crimes provided for in the ICC Statute, due to a strict interpretation of the principle of complementarity.

Therefore, from the perspective of emancipatory legal pluralism, it is necessary that a different approach to this principle be devel-

oped in order to attribute due relevance to the justice practices of victimized communities. This is an urgent need because the strict interpretation of the principle of complementarity has been contributing for over two decades to frustrating the expectations of numerous communities around the world that the ICC can provide an effective response to the frequent acts of violence committed in and by States against their own people.

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Chapter 9
The Perspective Of Post-Colonialism And The Global South[*]

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1. INTRODUCTION

When the ICC Statute was adopted, concerns were raised that the International Criminal Court (ICC) was created by a small number of States in the "Global North" but with little support from countries

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in the "Global South"[1]. This situation generated great concern in international society about a possible postcolonial bias that could affect the number of ratifications necessary to bring the ICC Statute into force (Schabas, 2013: 548).

The concern was greater because the predecessors of the ICC, the International Military Tribunal (IMT) (Nuremberg) and the International Military Tribunal for the Far East (IMTFE) (Tokyo) had been established at the end of World War II under a logic of winners and losers, therefore remote from any ideal of a community of nations acting jointly at the international level. As Brook (2001) has stated, the nations that established these tribunals did so in the hope that, through them, the narrative of the victors would constitute an official history of the war that could dominate the historical consciousness of the victors and of the losers alike (Brook, 2001: 675). Therefore, the enthusiastic reception of the results achieved by both tribunals in North America and in some European countries contrasted with the cold reception they received in numerous States of the Global South (Schabas, 2013: 547).

In this sense, Radhabinod Pal, judge of the IMTFE, noted that the failure of the IMTFE to take into account both Western colonialism and the dropping of atomic bombs was little less than cynical neocolonialism (Schabas, 2013: 547; Brook, 2001: 694). Indeed, while the leaders of the States of the Axis Alliance were judged for their visions of racial supremacy, violence in the colonies of France and the United Kingdom and the subjugation of natives and African Americans in the United States (US/USA) were ignored, and even condoned (Reynolds & Xavier, 2016: 964).

Despite these concerns, the ICC Statute reached in just four years the sixty ratifications necessary for its entry into force (Schabas, 2013: 548). This was mainly due to the unexpectedly strong enthusiasm of many African[2] and Latin American States for the venture of creat-

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1 The term "Global South" refers to countries which were previously colonies and share similar socioeconomic problems. During the second half of the 20th century, they were known as the "Third World" (Sauvy, 1952; Sauvy, 1986; Pahuja, 2011).

2 Some examples are Sierra Leone, Burundi, the DRC, Uganda and Nigeria, being countries in which, at that time, there was an ongoing conflict or which had recently overcome a situation of conflict. (Schabas, 2013, p. 548).

ing a permanent international criminal tribunal. This attitude was due to the fact that, at that time, these States considered that the ICC could become an institution capable of making up for the lack of interest and effectiveness of other international institutions, such as the United Nations Security Council (UNSC), in responding to problems specific to their respective regions. Furthermore, the ICC Statute propounded an institution that would be guided by ideals of equality in its structure and of justice in its conception, and which did not obey the logics of "North-South", "rich-poor" or "First World-Third World" (Reynolds & Xavier, 2016: 964).

However, the enthusiasm of various States in the Global South for the role the ICC could play quickly turned to disillusionment and disinterest. Among the reasons for this change in perception towards the ICC has been the delay in the processes, the concentration of most of its investigations in countries of the Global South (especially in African States) and the role of the UNSC, which ended up taking more of a leading role than was initially expected (Schabas, 2013). However, the main reason for the negative perception towards the ICC has had to do with its selectivity in situations and cases, which has favored the political interests of certain States of the Global North, which has led some authors to affirm that the decision to investigate a particular situation, or to judge a certain person, is due to external political pressures, rather than to technical legal reasons (Kotecha, 2020).

The decision of the ICC Pre-Trial Chamber (PTC) II of April 12th, 2019, which rejected Prosecutor Bensouda's request to initiate an investigation regarding alleged international crimes committed during the armed conflict in Afghanistan, has contributed to strengthening the above-noted criticism. This is because this situation has affected the interests of a number of members of the North Atlantic Treaty Organization (NATO), especially the US. Although the decision was revoked on March 5, 2020 by the ICC Appeals Chamber (AC), which authorized the opening of the investigation, it is not clear to what extent this latest decision can contribute to diminishing the perception that the ICC is a neocolonial instrument, as this perception has been aggravated by the statement made on September 27th, 2021 by the then newly elected ICC Prosecutor, Karim Khan, in which he ex-

plained his intention to focus the ICC Office of the Prosecutor (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 Central Intelligence Agency (CIA)).

In light of the foregoing, the objective of this chapter is to analyze the role of the ICC from the perspective of postcolonialism and the Global South. To this end, it presents, first, its main postulates followed by questions related to the process of selection by the ICC of situations and cases. Next, we address the background, context and content of the ICC decisions of April 12, 2019 and March 5, 2020, and the statement of ICC Prosecutor of September 27, 2021. Finally, we conclude by analyzing the impact of these decisions upon the perception of the fulfillment of the ICC's role by the countries of the Global South.

2. UNDERSTANDING INTERNATIONAL CRIMINAL LAW FROM POSTCOLONIALISM AND THE GLOBAL SOUTH

The criticisms that international criminal tribunals have historically confronted, relating, among other things, to the lack of equity, the absence of legitimacy and the selectivity in their proceedings, seek to show the intimacy the project has with hegemonic power: its deep-rooted origin and its complicity with the structures of geopolitical domination (economic, cultural and gender-based) (Vasiliev, 2020: 627).

In contrast to conventional and liberal criticism, according to which the solutions to the problems of international criminal law (ICL) require more legal norms, stronger institutions, and a greater reach to the scope of its application, the approaches to ICL of the so-called "Third World", and the perspectives of postcolonialism and the Global South, question the foundations and ethic of this project.

These positions are part of a more generalized criticism of international law (IL) according to which colonialism, instead of being a marginal concern of the past that IL has helped to overcome, is in

fact central to its creation and development. In particular, the concept of sovereignty is seen as a doctrine that has been utilized, at first, to exclude the non-European world from the sovereign spheres of power, and, subsequently, to justify its entry into the field of IL through mechanisms of incorporation and transformation (Anghie, 2006).

Neocolonialism emerged as an idea to describe the stages following the decolonization and independence of the countries of Africa and Asia, following the struggles against European colonial rule. However, today it is used to analyze current phenomena from a transformative approach that can be defined in abstract terms and is not subject to a specific historical context (Schuerch, 2017: 39). This implies that it is wrong to interpret neocolonialism as an exclusively economic phenomenon, predicated only upon the relations between former colonial powers and former colonies, and which occurs only among States, since it can also be conceived of as being related to multinational companies and institutions and international organizations (IOs) (Schuerch, 2017).

Consequently, in Schuerch's words, neocolonialism describes an informal relationship between States of unequal power and capacity that has as its object the perpetuation of the influence of powerful States on subordinate countries (2017: 38). Neocolonialism manifests itself mainly in the non-consensual imposition of IL on subordinate States, and in its selective application in favor of the interests of neocolonial powers (Schuerch, 2017). This explains, to a large extent, the reasons why the ICC claim of universality and its selection of situations and cases (selectivity) are two of the aspects that are most criticized.

Accusations of neocolonialism have been central to the growing opposition to the ICC by States that were initially its supporters, or even its most prominent defenders, as is the case of South Africa (Lovat, 2020). In this sense, the former president of Gambia, Yahya Jammeh, prior to the completion of his mandate, went so far as to affirm that the ICC, despite being called the International Criminal Court, is in reality a Caucasian International Court for the persecution and humiliation of people of color, especially African (O'Grady, 2016). In this way, the bias against African States became one of the

main reasons behind the announcements by Burundi, Gambia, and South Africa of their intention to withdraw from the ICC in October 2016 (Cerda, 2017: 125)[3].

The fact that these criticisms are based upon parameters external to the law is one of the reasons for which they are generally dismissed by the legal community, since they see strategic or political interests behind them (Stahn, 2019). Nevertheless, responses limited to legal and institutional areas only serve to exacerbate these criticisms even further.

3. SELECTIVITY WITHIN THE INTERNATIONAL CRIMINAL COURT

Critics of the ICC have called it a neocolonial instrument due to its design and functioning. Regarding the design of its administrative structure, it has been highlighted that the largest financiers of the ICC are European countries and Japan[4], which has given them a considerable capacity to pull strings in every way possible (Khansa, n.d.).

Regarding the ICC's selectivity of situations and cases[5], it is important to highlight that, according to the principle of complementarity, the ICC can only open an investigation into a situation or initiate a case if: (a) the jurisdictional criteria established by the ICC Statute are met in relation to the relevant violence; and (b) the States with jurisdiction over it remain inactive or are unwilling or unable to proceed with their proceedings (arts. 1, 5, 12, 13 and 17 of the ICC Statute).

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3 Is important to remember that the decision of Gambia to withdraw from the ICC was revoked following the 2017 presidential election of Adama Barrow (Moore, 2017). Likewise, in South Africa, the Supreme Court declared that same year that withdrawal from the ICC was unconstitutional because it required parliamentary approval (Onishi, 2017). Consequently, only Burundi has ceased to be a State Party to the ICC Statute.

4 In 2018, Japan, Germany, France and the United Kingdom made the greatest contributions to the budget of the ICC (Felter, 2020).

5 The concept of judicial selectivity is understood as being a situation in which the judge has the discretional power to take no action in respect of a case despite his action being clearly justified (Davis, 1969, cited in Armenian, 2016).

These criteria have allowed the legal justification of the selectivity exercised by the ICC so as to assert its jurisdiction over: (a) certain situations and cases arising in particular States of the Global South[6]; and (b) certain leaders of these States allegedly involved in the commission of the crimes within the ICC jurisdiction. Likewise, these provisions have made it easier, in practice, for the ICC to accede to pressure from governments in the Global North at the times in which it is deciding upon the exercise of its jurisdiction (Kiyani, 2015-2016: 255; Kotecha, 2020: 108).

Behind the ICC's selectivity is hidden a characteristic of postcolonial IL, which invalidates the sovereignty of States considered weak while protecting that of the powerful (Kiyani, 2015-2016: 258). This is justified under the false premise that States of the Global South are considered to be an ungovernable place to which only a civilizing mission is capable of delivering the authority of law and justice. In this context, it has been suggested that the ICC has assumed the role of perpetuating global asymmetries of power and ancient patterns of subjection (Okafor & Ngwaba, 2015: 105).

This approach is part of the imperialist discourse that uses IL as a tool to impose "civilized" ideals about good governance and free trade (Reynolds & Xavier, 2016: 961). As a result, in addition to reducing the credibility of international criminal justice (ICJ), selectivity has the consequence of obscuring the magnitude of international crimes committed in places in the world in which international institutions, such as the ICC, have decided not to intervene (Okafor & Ngwaba, 2015: 101).

Similarly, for authors such as Kotecha (2020: 119), the procedure for the selection of situations and cases in the ICC does not comply with the necessary elements (consistent, impartial, and representative) to be considered "fair" in Rawlsian terms. A paradigmatic exam-

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6 While it should be noted that the ICC investigations have focused on Africa, leading to criticism of alleged bias, not all authors share these criticisms. In this sense, Campos and Lozano (2018: 16) sustain that African countries themselves have legitimized the intervention of the ICC in their countries, because they have activated the jurisdiction of the ICC. Furthermore, the self-victimization of some African leaders reveals a political use of the ICC

ple is the difference in the duration of the preliminary examination of the situation in Colombia, which took a total of 17 years (2004-2021), when compared with the period of just one week taken for the preliminary examination of the situation in Libya (Kotecha, 2020: 119).

Other criticisms relating to selectivity have focused on the actions of the ICC OTP, which, according to the ICC Statute, has the authority to launch investigations *motu proprio*. One of the greatest problems encountered by the ICC OTP in initiating investigations on its own initiative is due to the lack of certainty regarding the ICC goals, as well as the absence of a specific public to which it has to be accountable (Kotecha, 2020: 110).

Finally, the ICC also fails to promote the representation of victims and concerned communities, keeping in mind the absence of express rules allowing interaction between victims and the ICC OTP. In addition, when attempts are made aimed at representing them, only certain communities are given voice, excluding others, probably in order to allow for an agreement on a decision to be reached (Kotecha, 2020). This lack of interaction prevents the ICC from learning about the context of the crimes committed or about the perspectives and experiences of those affected.

4. THE ROLE OF THE UNITED NATIONS SECURITY COUNCIL IN REGARD TO THE INTERNATIONAL CRIMINAL COURT

In addition to the challenges in terms of selectivity, another challenge faced by the ICC is its relationship with the UNSC. The ICC Statute granted two powers to the UNSC in relation to the ICC. The first, enshrined in art. 13(b) of the ICC Statute, is to activate the ICC jurisdiction in accordance with Chapter VII of the UN Charter. This procedure consists of the ability of the UNSC to refer to the ICC OTP a situation in which one or more of the crimes provided for in the ICC Statute (genocide, crimes against humanity, war crimes and aggression) have been committed. In situations referred to the Court by the UNSC, the requirements established by art. 12 of the

ICC Statute, requiring that for the ICC to act it is necessary that either the State in whose territory the conduct took place, or the State of nationality of the alleged perpetrators, be part of the ICC Statute do not apply.

The second power, enshrined in art. 16 of the ICC Statute, is the UNSC power to request the ICC to not initiate, or to suspend for a renewable period of twelve months, the investigations, or prosecutions that it has initiated (UN, 1998). This power is perceived as an opportunity for the UNSC to politically interfere in the work of the ICC (Arbour, 2014).

Of the situations that are currently the subject of the ICC proceedings, two are by referral from the UNSC. The first is the situation in Darfur (Sudan), which was referred to in 2005, following the interest shown by the US government during the Bush administration. The referral ended in the issuance of an arrest warrant in respect of several defendants, including the then president of Sudan, Omar al-Bashir.

The situation in Libya was referred by the UNSC to the ICC OTP in late February 2011. It gave rise to the cases against Muammar Muhammad Abu Minyar al-Gaddafi (former Head of State of Libya), Saif al-Islam Gaddafi (former *de facto* prime minister) and Abdullah al-Senussi (former director of intelligence services) for alleged crimes against humanity committed through Libyan state institutions and forces in February 2011.

As a result of this, Al-Bashir described the ICC as a neocolonial instrument of the West for the repression of African freedom and sovereignty (Campos Orozco & Lozano Flores, 2018: 15). These statements were supported by Gaddafi, who subsequently dismissed the ICC intention to investigate him, making anti-imperialist and anti-colonialist discourses in his defense (Campos Orozco & Lozano Flores, 2018: 15). Finally, it should also be noted that Paul Kagame, current president of Rwanda, has also stated that the ICC is a slavery and colonialist (instrument) and, therefore, incompatible with the principle of self-determination of peoples (Campos Orozco & Lozano Flores, 2018: 15).

The above described circumstances have generated a lack of willingness on the part of African States to comply with their obligations to cooperate with the ICC. For example, Al-Bashir attended the Summit of the African Union (AU) in Johannesburg (South Africa) in 2015 and, although there were in force two arrest warrants for war crimes, crimes against humanity and genocide, he was not detained by South African authorities, due to Al-Bashir's alleged immunity and the possibility that South Africa would lose its role as a mediator in the African region (Campos Orozco & Lozano Flores, 2018: 15).

Likewise, it is conspicuous that in the referrals of the situations in Sudan and Libya, the UNSC has shown a diligence and efficiency that contrasts with its inaction regarding allegations of serious violations of International Human Rights Law (IHRL) and International Humanitarian Law (IHL) in other non-African States, such as Sri Lanka and Syria (Arbour, 2014: 199). For Schabas (2013: 547), this double standard is explained by the non-existence in these latter situations of strategic interests of one or more permanent members of the UNSC.

Finally, considering that three of the five permanent members of the UNSC (the US, Russia, and China) are not part of the ICC Statute, the practical effect of the powers attributed to the UNSC by the ICC Statute is that it prevents the ICC from investigating allegations of crimes committed by these States (Okafor & Ngwaba, 2015: 105). In this way, their ability to veto UNSC resolutions situates them above the universality and voluntary acceptance of the complementary jurisdiction of the ICC, which are central to the ICC legitimacy (Arbour, 2014).

5. THE RELATIONSHIP BETWEEN THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

Another important challenge that the ICC has faced since its establishment has been its relationship with the US. As stated in the introduction of the chapter, while the States of the Global South initially welcomed the project of creating a permanent international criminal tribunal enthusiastically, the US' position has always been highly critical. During the ICC Statute negotiations, some US allies

(such as France and Canada) expressed concern about the possibility that the ICC would judge actions of their nationals, especially those concerning the use of force. However, these concerns were diminished when it was agreed that the ICC's power to initiate any investigation should be subject to the principle of complementarity (Milton, 2009: 110-111).

Nevertheless, this did not convince US military leaders, who continued to express concern that countries that do not ratify the ICC treaty can consent to the ICC's jurisdiction over foreign peacekeeping troops for crimes committed on their territory, while refusing to allow the ICC to investigate and prosecute those responsible for the atrocities that brought the peacekeepers there. The concern about US citizens being tried by the ICC is due to the underlying fear that a politicized tribunal could be used by hostile States as a vehicle to challenge US foreign policy (Milton, 2009: 111).

As a result of the foregoing, the US has signed bilateral immunity agreements (BIA) with over one-hundred other States having as their purpose granting immunity to US troops in activities outside US soil and, thus, excluding its citizens and military personnel from the ICC jurisdiction (Echaide, 2014: 7). Likewise, the US Congress passed the American Service Members Protection Act in 2002, according to which: (a) US cooperation with the ICC is restricted; (b) permission to the US president for the use of armed forced to free US citizens and citizens of allied countries from the custody of the ICC is provided for; and (c) all US forces in service are allegedly exempted from the non-prescriptibility of their criminal responsibility and the universal jurisdiction established by the ICC Statute (Echaide, 2014: 8).

Furthermore, it should be noted that the US Congress approved the Nethercutt Amendment, by virtue of which, all economic aid to countries that have ratified the ICC treaty and that have not signed the BIA with the US was suspended (Echaide, 2014: 11).

Moreover, during the years 2002 and 2003, the UNSC adopted different resolutions (S/RES/1422 of 2002 & S/RES/1487 of 2003) to grant immunity to personnel of States not party to the ICC Statute who were involved in missions established or authorized by the UN (Echaide, 2014: 12).

All these developments, which have taken place following the negotiation of the ICC Statute, show that the US position *vis-à-vis* the ICC has always been directed at preventing by all possible means the ICC from investigating and prosecuting its nationals. This clearly explains the reaction of the Trump administration to the decision of Prosecutor Bensouda to request authorization to begin an investigation into the situation in Afghanistan and its subsequent authorization by the Appeals Chamber (AC).

6. THE SITUATION IN AFGHANISTAN[7]

In November 2017, after more than ten years of preliminary examination, the ICC OTP requested authorization from ICC Pre-Trial Chamber (PTC) II to begin the investigation of the situation in the Islamic Republic of Afghanistan (ICC, Afghanistan, 11/20/17). This was due to the fact that the ICC OTP had reasonable grounds to believe that war crimes and crimes against humanity had been committed within the context of the Afghan armed conflict after mid-2003[8] by the Taliban group, the Haqqani network and the Afghan National Forces, in particular, the National Directorate for Defense and the Afghan National Police.

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7 The authorization to initiate the investigation in Afghanistan does not represent the first time in which the ICC has affected the interests of States of the Global North and, specifically, of permanent members of the UNSC. On the one hand, Palestine's ratification of the ICC Statute and the decision of the ICC OTP to formally initiate the investigation into the alleged war crimes committed in Palestinian territory contradicted the interests of those States which do not recognize Palestine as a State (in particular, Israel and USA). On the other hand, the determination of the ICC OTP of the existence of reasonable grounds to believe that crimes foreseen in the ICC Statute were committed in the Republic of Georgia, and the subsequent authorization of ICC Pre-Trial Chamber I to initiate an investigation into the events that occurred in its territory between July and October of 2008 affected the interests of Russia, in light of the political context of the conflict in South Ossetia (ICC, n.d. (a)).

8 The ICC Statute entered into force in Afghanistan on May 1st, 2003.

Likewise, in its request, the ICC OTP stated that there were reasonable grounds to believe that, in the period between 2003 and 2004, the US Armed Forces and its intelligence agency (CIA) had participated in the commission of war crimes, specifically acts of torture, outrages against personal dignity and acts of sexual violence, both on Afghan territory and in clandestine detention centers in the territory of other ICC States Parties (ICC, Afghanistan, 11/20/17)[9].

As a result of this request, the US government decided to reaffirm its policy of hostility against the ICC (Evenson, 2018). Thus, in September 2018, US National Security Advisor, John Bolton, announced that the US government would refuse to cooperate with the ICC in the investigation process of alleged war crimes committed by its nationals within the framework of the Afghan conflict, since the decision of the ICC OTP to request the opening of an investigation into these events constituted a threat to American sovereignty, in addition to being contrary to the political interests of the country (Kahn, 2018).

Bolton also warned that the US government would proceed to implement a series of political and legal measures to prevent its nationals from being prosecuted by the ICC. Among these measures, Bolton declared that the US would proceed to: (a) negotiate agreements with allied States to avoid the surrender of US nationals to the ICC; (b) enact immigration restrictions and financial and economic sanctions on ICC personnel and any entity or State that assisted or cooperated in the investigation of US nationals; (c) implement coercive mechanisms to restrict the powers of the ICC; and (d) limit military, humanitarian and intelligence support to those countries that chose to cooperate with the ICC (Human Rights Watch, 2019a).

Despite the tense political environment generated by the antagonistic attitude of the US government, PTC II proceeded to analyze the ICC OTP request for authorization to open the investigation. As a result, on April 12, 2019, PTC II considered that the ICC OTP had managed to demonstrate the existence of reasonable grounds to be-

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9 In particular, Poland, Romania and Lithuania.

lieve that during the period under study crimes provided for in the ICC Statute had been committed in Afghan territory (both by Afghan groups and armed forces, as well as by US military forces and intelligence services), thus satisfying the requirements established in arts. 17 and 53 of the ICC Statute for the exercise by the ICC of its jurisdiction over the situation in Afghanistan (ICC, Afghanistan, 04/12/19: paras. 43-86).

Notwithstanding that, PTC II considered that the following factors would cause the investigation to be fruitless: (a) the long period extending between the commission of the crimes and the request to open the investigation; (b) the limited financial resources of the ICC; (c) the difficulties in obtaining effective cooperation from the Afghan government and other States and international actors, to be able to conduct the various investigative procedures efficiently and effectively; and (d) the low probability of accessing and having available the relevant evidence. Due to the foregoing, the PTC II denied the request submitted by the ICC OTP, since it considered that allowing the formal opening of the situation in Afghanistan would be contrary to the interests of justice, since it would neither give rise to an effective investigation, nor would it allow the prosecution of cases within a reasonable time period (ICC, Afghanistan, 04/12/19: para. 87-96).

This decision provoked strong criticism from civil society and among academia because it allowed the ICC's role to be seriously limited (and influenced) by international politics and the adoption of deterrence measures by antagonistic global powers as the US (Amnesty International, 2019; Human Rights Watch, 2019b; Kersten, 2019; Labuda, 2019).

As Anghie and Chimni (2003) have indicated, despite self-identifying as impartial and objective entities, international criminal tribunals, such as the ICC, are intensely political actors (Dancy & Montal, 2017). Therefore, on many occasions their interests and the goals of universal justice give way to the political power of global dynamics (Anghie & Chimni, 2003). In this way, both ICJ and the ICC have been aligned with the traditionally imperialist discourse and practices of IL, reproducing much of the colonial architecture implicitly incorporated by it (Reynolds & Xavier, 2016).

Similarly, Kiyani (2019) has pointed out that the decision of the PTC II to deny the opening of an investigation into the situation in Afghanistan reflects a clear structural defect of the ICC, which consists of its disproportionate dependence on state cooperation, especially from those States Parties which exert more influence over international society. Furthermore, States are aware that they can use this dependence to their advantage so as to manipulate prosecutions away from their own agents or towards their political opponents (Kiyani, 2019).

Accordingly, the decision of PTC II suggests the existence of a serious disparity between the ideals of justice of the ICC and the *realpolitik* that affects its functioning, which has provoked the reaffirmation of the accusations of bias and selectivity that had previously been leveled at the ICC (Labuda, 2019; Ezennia, 2016). A clear example of this is the willingness demonstrated by the ICC to prosecute, without any objection, nationals of States that do not form part of the ICC Statute, so long as said States are not part of the Global North, or are not powerful nations, as has happened within the framework of investigations into the situations in Darfur and Libya (Kiyani, 2019).

In addition, the decision of PTC II on the situation in Afghanistan has shown that the pressure exerted by the US government through its hostile policy of non-cooperation with the ICC has worked to influence and manipulate the actions of the ICC. It has managed to obtain decisions that favor US political interests. Likewise, through this decision, the PTC II has sought to restrict the actions of the ICC OTP on the basis of budgetary reasons. As Kiyani (2019) has pointed out in this regard, the limited support in terms of financial resources of the ICC States Parties (led by Western nations) has led to a justification of the limitation of the independence of the ICC OTP in fulfilling its role.

In spite of this controversial situation, in June 2019, the ICC OTP appealed the decision of PTC II, since it considered that it seriously affected the possibility of conducting a fair and expeditious investigation in the Afghan situation. Additionally, it had a serious impact with respect to the interpretation of the scope of its investigative powers *proprio motu*. Accordingly, the Prosecutor asked the SA to reconsider the possibility of granting the ICC OTP authorization to open an investigation into the situation in Afghanistan, since PTC II had not

only erred legally in the interpretation of the content of the interests of justice criterion but had also abused its powers by analyzing said criterion on its own initiative, and without the ICC OTP having requested it (ICC, Afghanistan, 06/17/19).

In March 2020, the AC decided unanimously to revoke the decision of the SCP II and proceeded to authorize the opening of an investigation into the situation in Afghanistan. The decision of the AC was based on its finding that PTC II had erred in its interpretation of the interests of justice criterion. For the AC, art. 15 of the ICC Statute establishes that, in the case of requests *proprio motu* from the ICC OTP, judicial control by the PTC over the existence of interests of justice that justify the non-opening of an investigation may only proceed when such is alleged by the ICC OTP so as to not open it (ICC, Afghanistan, 03/05/20: para. 23-46). Otherwise, as happened in relation to the situation in Afghanistan, the PTC cannot begin to analyze on its own initiative the question of the interests of justice.

As a consequence of this revocation, once the investigation into the situation in Afghanistan was authorized, the US government proceeded to make effective its political deterrence measures against the ICC. Thus, in June 2020, President Donald Trump issued an executive order, through which he suspended the possibility of ICC officials and agents, as well as members of their immediate families from entering into the US. Likewise, through said executive order, the US president imposed a series of economic restrictions on the ICC staff and on any individual or entity that cooperates, assists or sponsors the investigation of US nationals before the ICC (The White House, National Security & Defense, 2020).

In light of this situation, the then newly elected ICC Prosecutor, Karim Khan, made a statement on September 27, 2021 undertaking to focus the ICC OPT investigation in Afghanistan "on crimes allegedly committed by the Taliban and the Islamic State-Khorasan and to deprioritize other aspects of this investigation" (including the crimes alleged committed by the Afghan National Secu-

rity Forces, the US armed forces and the CIA)[10]. Khan took this decision even though this could put into question the ICC OTP's future legitimacy[11].

7. FINAL REFLECTIONS

The ICC has been described as a neocolonial instrument due, in large part, to the fact that its role has been limited to the investigation and prosecution of crimes committed in countries of the Global South. This phenomenon is a reaction to an institutional design that facilitates political pressures in the exercise of the ICC's jurisdiction. In particular, the preponderant role of the UNSC allows its permanent members to interfere politically. This is evident, for example, in the possibility of: (a) promoting or vetoing the referral of situations to the ICC OTP; and (b) fostering the approval of UNSC resolutions to suspend ICC investigations and prosecutions.

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10 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 authorization 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 deprioritize 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".

11 See: International Criminal Court: Office of Public Information. (n.d.(c)). *Situation in the Islamic Republic of Afghanistan.* https://www.icc-cpi.int/afghanistan.

In addition, the US, which has not ratified the ICC Statute, has been a particular protagonist in the imposition of economic restrictions on entities and individuals who cooperate with the ICC, and in promoting bilateral immunity agreements for the exclusion of its military personnel and citizens from the reach of the ICC.

It is within this context that the ICC OTP requests to authorize the opening of the investigation in Afghanistan must be analyzed. The decision of PTC II, which President Trump at the time called a victory for the rule of law (The Washington Post, 2019), confirmed concerns that there does not exist the political will and institutional capacity on the part of the ICC to investigate situations that could affect the interests of the countries of the Global North.

For that reason, the authorization by the AC to initiate the investigation, which revoked the decision of PTC II, is unprecedented in the history of the ICC. This is the first time in which US actors could see their international responsibility compromised by the commission of international crimes (Plachta, 2020) and has been described as the strongest step that the ICC could have taken to restore its fragile international credibility (Rondeaux, 2020).

Nevertheless, it is not yet sufficiently clear as to what extent such authorization can diminish the perception that the ICC is a neocolonial instrument. In particular, after the September 27, 2021 statement by the newly elected ICC Prosecutor to deprioritize the investigation of the crimes alleged committed by the Afghan National Security Forces, the US armed forces and the CIA.

Thus, notwithstanding the achievement of the authorization to open an investigation in the search for justice within the context of the Afghan conflict, geopolitical reality and power relations in the international community continue to be the main obstacles to the materialization of the goals of the ICC Statute and the proper fulfillment of the ICC's role.

Therefore, in practice, ICJ agenda continues to be shaped by what the dissenting opinion of Judge Radhabinod Pal (TMILO, 1948) in the Tokyo trial referred to as "the revenge and colonialism of the war victors".

In this way, ICJ ends up being enforced exclusively against communities that have traditionally been considered barbaric, violent and undeveloped, and which are subject to the criteria of justice of the civilizing States (Anghie & Chimni, 2003). Furthermore, in no case can the notion of universal justice focus on the activities of the civilizing States, since their acts of violence are legitimized in light of the values imposed by themselves and examining said acts would imply rejecting their sovereignty as States.

In light of the above, it can be stated that, to guarantee the right to justice of the victims of international crimes, it is essential that the ICC takes into account, to a greater extent, the realities and political and economic dynamics that exist between the Global North and South. For this reason, the ICC must implement a new institutional discourse and legal language that contributes to the decolonization of ICJ and its selectivity of situations and cases. Likewise, it is essential that the ICC approaches, and be truly committed to, the interests of those who have been historically oppressed, without acceding to the pressures of those having political, economic, and military power in international society. This, in general, also implies promoting cooperation between States and IOs, guaranteeing that there is more transparency in preliminary examinations and guaranteeing greater representation of victims.

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Chapter 10
The Perspective of Third World Theories[*]

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1. INTRODUCTION: GLOBALIZATION AND INTERNATIONAL LAW

Globalization has been a phenomenon that has transformed each and every aspect of society: from the way in which people relate to each other, to how States do the same. Thus, it has modified the functioning and understanding of what has been the fundamental paradigm of IL since the Peace of Westphalia: the sovereignty of the State (which supposes the equality between all States in IL and their control of everything that happens within the territory under their jurisdiction). This principle has increasingly been called into question in a world that is beginning to function globally, with all that this entails.

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

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According to Delbrück (2001:16), globalization can be understood as the process of denationalization/deterritorialization of groups of political, economic, and social transactions that involve national and international actors, as well as public and private ones, giving rise to a global interconnection of these actors.This paradigm, which has been promoted by the hegemonic States so as to relax national barriers and to favor international trade and investment and free competition, has not favored all members of international society equally. Furthermore, it has strengthened the North/South domination, which was already present since the time of colonization, taking advantage of the structures (and in particular the international organizations (IOs)) that globalization has promoted.

The so-called "Third World" approaches to international law (TWAIL) have questioned this supposed new paradigm of globalization, as they previously questioned the Westphalian model. As most States were not able to access sovereignty until decolonization occurred in the second half of the 20th century, this late arrival to sovereignty is the main cause of the inequalities that these States currently suffer under globalization. As Falk (2016: 1943) states, the decolonization process does not conclude with the simple gesture of raising a flag on a building of the new independent government, but rather requires a change in the mentality of the former colonizers and colonized.

However, the process of decolonization and access to sovereignty by Third World States has not transformed the systems of power. Thus, the IL, as the legal system of international society, has been incapable of promoting a homogeneous system of social welfare and has favored the maintenance in the Global South States of large pockets of poverty and great inequalities. Consequently, since the mechanisms of exclusion that deprive the non-European world of "Western" sovereignty persist despite the official end of the colonial period, it may be necessary to rethink narratives about colonialism and decolonization (Anghie, 2006: 741).

Because the almost perennial inequalities between Global North States and the Global South States have been interpreted as shortcomings in the very functioning of the sovereignty of States (deficiencies in democratic systems, humanitarian crises and generalization of

international crimes), the solutions offered by international society have focused on limiting State sovereignty (López Martín, 2009: 24). Although this trend continues, however, there are currently other mechanisms that are much more sinuous and masked than the old colonization systems. Among them, International Economic Law (IEL) and International Human Rights Law (IHRL) stand out.

With respect to the first, the conditions under which the globalization processes take place leave the States of the South at a great disadvantage since they have had to start playing under rules in the construction of which they did not participate. Likewise, as Toussaint has pointed out in his work entitled World Bank*, A Never-Ending Coup d'Etat* (2006: 4), the credits requested from this organization (whose presidents have always been nationals of the United States (US/USA) by the main metropolises made up a large part of the debt that were left to the new States that emerged following the decolonization process, which slowed down their development.

As regards IHRL, although it is true that the decolonization processes of the second half of the 20th century brought important advances in this field, the TWAIL continue to sustain that IHRL embodies an excessively Eurocentric vision in relation to the "universal" conception of human rights. Much of this criticism is directed at the 1948 Universal Declaration of Human Rights (UDHR), because, despite being the basis upon which the system of universal protection of human rights is built, only 58 States participated in its approval, without being among them most of the States that make up current international society (Villán, 2018: 114).

In the same sense, there have been numerous criticisms of hegemonic conceptions of the limited content of the principles of justice and freedom. In particular, only deliberately coercive acts are considered as interferences in the freedom of the individual. Thus, external interferences that prevent, for example, access to necessary goods for subsistence or to material conditions favorable to human development are ignored. This conception of freedom, understood as negative freedom, rejects what are considered attacks on freedom through the structural coercion applied by certain IOs towards those Third World States that have little power to position themselves against this interventionism (Chimni, 2017: 537).

In short, there is a universalization of the Western, so that Western uses and customs are seen and exported as the model to be followed. According to Hall & Hobson, the West has a "duty" to remake (or civilize) the uncivilized non-Western world for the betterment of "global humanity" (2010: 242). Along similar lines, Chimni (2012) asserts that at a time when Western dominance is being challenged by the rise of non-Western powers, the ideology of liberal paternalism represents an attempt to reaffirm that all that is good in human civilization is the contribution of the West, which is the guardian of all laudable human values. Thus, we are placed on a board governed by Western thought, which determines the models of power at the international level and the very functioning of IL.

Having analyzed the theoretical basis of this chapter, it is worth mentioning that it presents an analysis from the general to the particular. Starting from the general, the chapter shows how TWAIL has developed a comprehensive understanding of how the Western perspective in the formation and application of IL has prejudiced the interests of Third World States. An example of this will be analyzed in section 2, which is dedicated to two of the main practices that have diminished the sovereignty of the States of the Global South: legitimate defense and the responsibility to protect; their criticism by TWAIL shares much of the TWAIL view of the practice of the International Criminal Court (ICC).

Moving towards the particular, the chapter subsequently focuses on the role of international criminal justice (ICJ) and the question of whether one can understand it as justice having a truly global reach (section 3). Finally, based on the above, the ICC's role will be assessed from the perspective of TWAIL (section 4).

2. THEORIES OF THIRD WORLD STATES ON INTERNATIONAL LAW: AN ANALYSIS FOCUSED ON THE RESPONSIBILITY TO PROTECT AND SELF-DEFENSE

TWAIL considers that IL has been monopolized by the interests of Global North States, both in terms of its creation and application, and in the practice of certain IOs and international tribunals, such as

the ICC. Thus, for Anghie (2006: 740), IL consists of a series of doctrines and principles that emerged and developed according to European history and experience, and that over time spread to the rest of the world. This is a position that has also been maintained by other authors such as Verzijl (1968: 435-436). In this way, access to territorial sovereignty was conditioned upon compliance with certain cultural characteristics and social organization seen as essential from a European perspective. Thus, non-compliance prevented recognition as sovereign, thereby rendering the affected territory subject to dispossession and exploitation by foreign powers. In this way, IL has universalized one vision of the world, to the detriment of others, which have been (and are) simply ignored. This is reflected in the fact that, in the 19th century, States were classified as civilized, semi-civilized or barbarian, and only upon the first ones were conferred the "sacred mission" of civilization upon guidelines that only they were in a position to suggest (López Martín, 2009: 15).

A characteristic example of the foregoing is the principle of *terra nullius* or territory that belongs to no one. This term, coming out of papal bulls, refers to land inhabited by pagans, infidels, or unbaptized people, whom Christians treated, in a fundamental sense, as non-existent (UN, 2010: 35). For this reason, the Papacy authorized occupation of such territory by European Christian princes and kings (Stein, 2008: 35). Based upon this principle, the so-called "doctrine of discovery" was subsequently developed, the effects of which on indigenous peoples have been described as follows by the United Nations Permanent Forum on Indigenous Issues:

> The papal bull *Romanus pontifex,* issued in 1455, serves as a starting point to understand the Doctrine of Discovery, specifically, the historic efforts by Christian monarchies and states of Europe in the fifteenth and later centuries to assume and exert conquest rights and dominance over non-Christian indigenous peoples in order to take over and profit from their lands and territories. The overall purpose of these efforts was to accumulate wealth by engaging in unlimited resource extraction, particularly mining, within the traditional territories of indigenous nations and peoples (UN, 2010: 9).

Reminiscences of this principle can still be found in certain decisions of the International Court of Justice (ICtJ), such as the 1975 advisory opinion on Western Sahara, in which the ICtJ considered

that, according to state practice, a territory is not uninhabited (and, accordingly, would not fall into the category *terra nullius*), if the territory is inhabited by tribes or peoples having a social and political organization (ICtJ, 1975: 31). Nonetheless, it is the ICtJ understanding of what "social and political" organization requires that tips the balance towards Western positions: sufficient membership, obedience to a common superior and a certain degree of permanence in the territory (López Martín, 2005: 25). This interpretation leaves aside any alternative form of socio-political organization (including nomadic groups that may inhabit the land under occupation), thus denying them any right over said territory.

As can be noted, the European roots of IL have fostered the inclusion of the interests of the Global North States in international legal norms since the origin of IL. Thus, at the end of the 19th century, The Netherlands referred to IL (then called "the law of nations") as the law of Christendom; as little applicable to infidels as was the common law of the Greek cities to societies of barbarians (UN, 2010: 6).

The establishment of IOs, such as the ICC has, over the last one hundred fifty years, favored the continuation of this trend, which is currently reinforced by the interventionist behavior of the main powers of international society in Global South States. There are multiple arguments put forward to justify these practices against independent States, which has led Chimni (2012) to classify them as "liberal paternalism", which, beyond interventions for commercial and geostrategic reasons, is aimed at universalizing the model of Western liberal democracy at all costs.

Based on the foregoing, two of the main manifestations of current IL in which the circumstances of domination by the Global North States are manifested are analyzed herein: the birth of the principle of responsibility to protect (R2P) and the extension of the doctrine of legitimate self-defense.

The R2P principle emerged following the 2005 UN World Summit as a mechanism that looks for the establishment of a permanent obligation on States to protect their own population and prevent the commission of international crimes on their territory (Cunliffe, 2011: 56). Moreover, it provides that, in the event that States are un-

able to achieve these goals due to lack of will or capacity, it will be up to the international society as a whole (also referred to as "international community"), either through cooperation with the concerned States or by direct intervention, to ensure the effective protection of their population (UNGA, A/60/L.1, para. 138). This has opened the debate on whether the ICC can be defined as an R2P institution (UNGA, A/63/677; Olasolo, 2011; Stahn, 2015).

Global South States oppose the consolidation of R2P in IL for two main reasons. In the first place, they consider it inappropriate that, in accordance with this principle, Global North States would continue to be in charge of evaluating the lack of will or capacity of Global South States, which clearly reflects the position that each one occupies in the application of this principle (a criticism that is also made of the role of the ICC) (Stahn, 2014).

In the second place, they underline the danger entailed by the misuse of R2P, because it can be used by the permanent members of the UN Security Council (UNSC) to violate state sovereignty in order to satisfy their own interests in the name of an alleged defense of international peace and security. This opposition is the result of lack of trust of the Global South States in the UNSC as a guarantor of international peace and security, since for decades it has shown that it is not capable of assuming the responsibilities entrusted to it by the UN Charter in matters of collective security (Villán, 2018: 118). An example of this is the reaction of the UNSC to the occupation of Iraq in 2003 by the US and the United Kingdom after an act of aggression (UNSC, S/RES/1483, 2003), which has led López Martín (2009: 46) to qualify it as a body that makes otherwise illicit actions of its permanent members appear licit.

These arguments should not be understood as a defense of Western non-intervention in Global South States under any circumstances. On the contrary, the problem is found in all those situations in which, although intervention might have been justified, there was none. As Talleyrand points out, non-intervention is a diplomatic and enigmatic expression that means more or less the same as intervention (Ramón Chornet, 1995: 17). This reflects, ultimately, the arbitrariness of Global North States when it comes to intervening; it re-

veals an evident self-interested pattern, going beyond the arguments in favor of human rights and democracy.

As García Pérez (2006: 16) has pointed out, the causes of lack of action of Global North States are not complex: there is no intervention in those conflicts that do not threaten their direct national interests or do not pose a serious and immediate risk to international security. In general, there is also no significant pressure from public opinion and internal political forces to help populations living in remote places about whom everything is unknown. As a consequence, in all these cases, pragmatic decision-makers consider that the economic, military, and political costs of intervening to prevent genocide or widespread or systematic violence against civilian populations far exceed the cost of leaving things as they are. And to minimize the moral cost before informed public opinion, once the decision not to act is taken, the information about the events is manipulated, the ambiguity and contradictions of the available information are emphasized, ignorance of the facts is claimed and, if necessary, diplomatic mechanisms (such as solemn declarations, very complex negotiations or endless deliberations) are put in motion to offer the illusion that something is being done, without having to intervene.

The behavior of Global North States in the face of the genocide in Rwanda provides a paradigmatic example of this "interested interventionism". For the US, Rwanda was considered an area of low interest, which made it difficult to justify a military intervention in a country with which it did not have very close ties soon after the tragedy that the intervention in Somalia had entailed a few months before (Kuperman, 2001: 23). In turn, Belgium, France and The Netherlands limited themselves to saving their own nationals once violence spread throughout the country, before withdrawing totally from Rwanda (Grünfen & Huijboom, 2007: 259).

Grünfen and Huijboom emphasize that many States and IOs have apologized for the role they played in the face of the Rwandan genocide. Some have gone so far as to promote investigative commissions in order to reveal the truth of what happened, and the role played. The final reports of those established in Belgium, France, the African Union (AU) and the UN were very frank and critical regarding the

role that these countries and IOs performed. However, until today, no one has been held individually responsible; only the direct perpetrators have been condemned in local, national, and international instances, while those who made the decision not to intervene continue to be shielded (2007: 259).

Closely connected to the debate on R2P, over the past two decades there has arisen a certain interest on the part of Global North States[1] to justify their armed interventions in situations such as those of Afghanistan and Syria on a broad interpretation of the immanent right of States to self-defense. The goal has been to rely on this right against terrorist groups (non-state actors) which, for the most part, take their refuge in weak States of the Global South. This is why, little by little, the so-called unwilling or unable doctrine has been gaining weight. This doctrine admits the possibility of one State using force in the territory of another without its consent, due to their inability or lack of will to stop terrorist groups that attack others from there (Cervell Hortal, 2018: 77).

This deliberate expansion of the scope of the right to self-defense without any clear international legal basis offers one more justification/excuse for Global North States to carry out unilateral actions in retaliation for terrorist attacks committed inside their territory. As with R2P, it is Global North States (as victims of terrorist attacks) that evaluate the capacity and will of Global South States (where terrorist groups take refuge) to act effectively against them. However, as Ahmed (2013: 14) has pointed out, to allege that another State is unwilling, unable or ineffective can be a very subjective claim that is open to significant manipulation. This is because the efficacy of a State to deal with non-state actors cannot be easily assessed by a third party, which means that there is a very wide margin for contradictory and self-serving interpretations.

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1 See: Dawood Ahmed (2003), and, in particular, page 18 in which reference is made to the power rank of the most interventionist States and those which suffer their interventions.

3. INTERNATIONAL CRIMINAL JUSTICE: JUSTICE WITH GLOBAL REACH?

As the preamble of the ICC Statute recalls, during the 20th century "millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity". Nevertheless, not all of those responsible have been held accountable for the acts committed (Olasolo, 2017: 77-163). On the contrary, as Bassiouni (2013: 782) has pointed out, most situations have not received a response from the international community. For this reason, TWAIL considers that the evolution of ICJ has always been dependent on the will of the Global North States, which have a dominant position within the main IOs having a universal reach (Stahn, 2015: 55).

If one goes back, for example, to the International Military Tribunal (IMT) (Nuremberg Tribunal) after World War II, it is worth remembering that one of the most notable criticisms it received was the description of its actions as "victors' justice", because the prosecutions focused on those most responsible within the Nazi regime despite the fact that crimes were committed by all parties involved in World War II (Schabas, 2012: 2). In this sense, it is worth remembering that the dropping of the two atomic bombs on Hiroshima and Nagasaki took place during the same week as the signing of the London Agreement which established the IMT (Falk & Krieger, 2012: 125).

A very similar situation was experienced with the establishment of International Military Tribunal for the Far East (IMTFE) (Tokyo Tribunal), which was described by Indian judge Radhbinod Pal as an imperial project that reinforced inequality and domination by Western powers (Stahn, 2019: 168). Pal thereby denied the legitimacy of a tribunal that only focused on international crimes committed by the losing side, without taking into account those committed by those who won World War II.

Decades later, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone were carefully designed by the same States that established the IMT; the only difference being that in 1945 they were called "Great Powers", while now they are known as the "five permanent members" of the UNSC (Schabas, 2012: 4).

Although in the aforementioned situations international crimes had occurred which demanded the investigation, prosecution, and punishment of those most responsible, it is no less true that when they were established, complex calculations of political opportunity were undertaken. These types of considerations have also prevented the establishment of international criminal tribunals with respect to other situations in which international crimes have occurred repeatedly, such as in the conflict between Israel and Palestine (Schabas, 2012: 4-5). This lack of impartiality is due largely to the significant influence of the UNSC permanent members, which have vetoed any resolution that could affect their strategic interests (Schabas, 2014: 6). The problem, as Mamdani (2010: 62) has pointed out, is that when ICJ is enforced selectively, the result is its subordination to the dictates of power.

With the approval and entry into force of the ICC Statute, it was expected a reversal this situation of asymmetric application of ICJ, which led some authors from Global South States to sustain that: (a) the capacity of States to influence the activities of the ICC would be minor compared to what had occurred in the international criminal tribunals that preceded it (Bosco, 2014: 6); and (b) the ICC could limit the behavior of the most powerful States, given its jurisdiction to investigate and prosecute those most responsible (including state highest political and military authorities) (Bosco, 2014: 177). However, as seen in the next section, these expectations have not come to pass.

4. THE DISCRETION OF THE INTERNATIONAL CRIMINAL COURT IN THE FULFILLMENT OF ITS ROLE: PARTICULAR ATTENTION TO THE SELECTION OF SITUATIONS TO INVESTIGATE

Although the ICC's role is to investigate, prosecute and punish those most responsible for the international crimes provided for in the ICC Statute (genocide, crimes against humanity, war crimes and aggression), a number of States whose nationals are being investigated or prosecuted before the ICC have questioned its work as a

"Western" imposition[2]. Furthermore, on more than a few occasions it has been stated that the actions of the ICC are nothing more than interference by the main powers of current international society in the internal affairs of less favored states, even going so far as to equate the ICC with a mechanism of postcolonial domination[3].

In this way, some African States consider the ICC to be an instrument at the service of Western powers, which is why, TWAIL studies emphasize the continuity of postcolonial domination, the asymmetry in relations of power and the inequities created by ICJ in general, and the ICC in particular (Stahn, 2019: 168-171). Consequently, there are increasingly more voices demanding that each society dispense justice according to its own conceptions (An-Na'im, 2013: 199) and not through an imposed Western model (Nagy, 2013: 85).

This same criticism is also observed in the application of the admissibility criteria that guide the functioning of the ICC, because, as postcolonial visions maintain, the ICC portrays certain national legal systems as deficient (Stahn, 2019: 227). Although the ICC Statute contains certain mechanisms to prevent the ICC from being considered "superior" to other models of justice, it is no less true that this ideal is difficult to respect because the ICC conditions the response of national criminal jurisdictions through its choices, its policies, and its procedures (Stahn, 2015: 57).

Nevertheless, the content of the ICC Statute is closely tied to the conception held by those who had the greatest influence on its negotiation, and, during the negotiation process, those States that were not so "influential" in international society grouped together and managed to limit the privileges demanded by the most powerful States (Bosco, 2014: 7). In particular, it is necessary to highlight the prominent role that African States had in the outcome of the final text of the ICC Statute. This makes it difficult to consider the ICC as a Western (or anti-African) creation (unless said role is unknown) (Du Plessis, 2016: 25). For this reason, some authors have argued that the ICC is, to a large extent, the result of the success of small States in democratizing IR and IL (Stahn, 2019: 168-171).

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2 Vid. the criticisms expressed in this regard in Schuerch (2017).

3 Vid. the currents that defend this idea in Stahn (2015: 46-84).

Although the foregoing is undeniable (Jallow & Bensouda, 2008: 47), one wonders if those who initially supported the ICC continue to support it, considering that, to date, its actions have focused on States with little influence in international society (the large majority of them on the African continent); a decision with which the Global North States appear to feel comfortable (Schabas, 2012: 14).

In light of this situation, the position that the AU and a number of States in the region have held in recent years, urging the ICC to withdraw certain arrest warrants[4], withdrawing from the ICC Statute through its denunciation[5] and even promoting the establishment of a specialized section on international criminal law (ICL) at the African Court of Justice and Human Rights (Malabo Protocol, 2014)[6] is understandable. The creation of this section shows how African States have chosen to turn towards regionalism as a consequence of dissatisfaction with institutions such as the ICC or the UNSC and the dominance of Western States in the judicial field (Stahn, 2019: 211-213)[7].

On the other hand, it must be noted that the relationship of the UNSC with the ICC has been defined as one of the most complex po-

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4 While the most notable case was that of Al Bashir (in respect of whom the AU has repeatedly asked the UNSC to request the ICC to suspend proceedings under art. 16 of the ICC Statute), in cases arising from the Kenyan and Libyan situations similar requests have also been made.

5 On 27 October 2016 Burundi notified the UNSG of its decision to denounce ICC Statute and from 27 October 2017 Burundi ceased to be a party to the ICC Statute. As regards South Africa and Gambia, they also notified the UNSG of their decision to denounce the ICC Statute (October 19th and November 10th) but they did not move forward with their denunciation procedure.

6 Vid. Werle & Vormbaum (2017). As to the incompatibility that certain provisions of the Malabo Protocol may generate with the ICC Statute. Vid. Stahn (2019: 211-213).

7 Even though the leaders of the AU and several African States have criticized the actions of the ICC, the same has not happened with the African victims who have sought in the ICC the justice that has been denied to them at the national level. Thus, despite the signing and entry into force of the ICC Statute, impunity continues to be the general rule, and not the exception, for the commission of the crimes provided for in the ICC Statute.

litical issues under the ICC Statute (Schabas, 2010: 433). In accordance with arts. 13(b) and 16 of the ICC Statute, the UNSC has the power to refer situations to the ICC (as can States Parties as well) and request it not to initiate, or to suspend for one year, investigations and prosecutions already begun. There is no doubt that the five permanent members of the UNSC (and, in particular, China, the US and Russia, which are not States Parties) are the principal beneficiaries of the broad powers granted to the UNSC by the ICC Statute, in that: (a) they are decisive in deciding on the ICC actions in relation to non-party States, and can therefore delay or prioritize the intervention of the ICC according to their interests (this is one of the reasons given by India for not being part of the ICC Statute; Mandani, 2010: 64); and (b) in the event that their nationals (or nationals of their allied States) are involved in the commission of international crimes, it will be very difficult for them to end up being prosecuted by the ICC (although the ongoing investigations in Palestine and Ukraine, and to a lesser extent in Afghanistan, show that this is not completely impossible).

Although the fact that the ICC Statute contemplates the initiation of *ex officio* investigations by the ICC Office of the Prosecutor (ICC OTP) may lead us to think that all nationals of the States Parties are on equal terms before ICJ, practice lends confirmation that this has not been the case, and that, on occasions, a more lenient position has been shown in relation to the situations that affected the Global North States. For this reason, numerous voices state that the ICC has used its discretion (which reflects the inherent political dimension of the ICC) (Schabas, 2012: 17-18)[8] to avoid conflicts with the main powers of international society, as reflected particularly in the case of Iraq (Bosco, 2014: 185-186).

If we consider that the way in which the ICC selects the situations and cases in which it intervenes can have a notable effect on its own legitimacy (De Guzman, 2018: 74), and that the power to initiate *ex officio* investigations is a tool that differentiates the ICC from the international criminal tribunals that preceded it (Schabas, 2012: 11-

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[8] Regarding the exercise of discretion by the Prosecutor, vid. Brubacher (2004: 71-95).

12), it is noteworthy that the ICC OTP did not exercise this power until the end of 2009 (that is, more than six years after the entry into force of the ICC Statute) (Schabas, 2012: 11-12). Likewise, the ICC OTP initial reluctance to begin investigations in cases where nationals of the Global North States could be involved has not gone unnoticed, such as, for example, the crimes that occurred in Iraq or Afghanistan which, as is known, can affect, among others, nationals of the US and of the United Kingdom.

Indeed, it is surprising the speed with which the ICC OTP closed the preliminary examination in Iraq in 2006 (without prejudice to the subsequent reopening) through a controversial interpretation of the notion of gravity (ICC OTP, 2006; 2014). It was, without doubt, a hasty action that led to the suspicion that the first ICC Prosecutor, Luis Moreno Ocampo, was avoiding creating a direct confrontation with the United Kingdom (Schabas, 2012: 11).

This was a situation that, years later, could have been well repeated in Afghanistan, when ICC Pre-Trial Chamber II (PTC II) denied authorization to initiate an investigation because, in its view, it would not be in the interest of justice (ICC, Afghanistan, 04/14/2019: 33).

It is true that ICC Appeals Chamber (ICC AC) revoked this decision and authorized the initiation of the investigation (ICC, Afghanistan, 03/05/2020: 138), but this does not mean that the controversial decision of PTC II should go unnoticed, since, apparently, it could have aimed at preventing the situation from being investigated because it affected US nationals.

Furthermore, it should not be forgotten that the US had adopted sanctions at that time against the then ICC Prosecutor, Fatou Bensouda, and some senior officials of the ICC OTP, urging them not to proceed with this investigation. This behavior is reminiscent of the position held years before by the US and reflects the pressure that the latter can exert on the fulfillment of the ICC's role (Gamarra, 2005: 155)[9].

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[9] In regard to the relationship that the US has maintained with the ICC, see. Kielsgard (2010). In this regard, recall, for example, the policy of signing bilateral agreements with third States, both party and non-party to the ICC

Further confirmation of this can be found in the statement made on September 27, 2021 by the then newly elected ICC Prosecutor, Karim Khan. In his statement, Khan explained his intention to focus the ICC OTP investigation on 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, the US armed forces and the CIA)[10].

5. CONCLUSIONS

The European roots of IL have conditioned its effectiveness and purpose since its inception. This is something surprising if one considers that the goal of IL is to set legal norms that regulate international society as a whole and not just one of its hemispheres. This is noticeable through the existing inequalities in each of the legal regimes from which current IL is nourished: from ICL and IHRL to economic IL and the regulation of the use of force. In effect, in each of these legal regimes, the positions of Global North States have taken precedence over those of Global South States. This is something that has had as an unavoidable consequence the slow path towards development of Global South States, which has also been punctuated

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Statute, in order to prevent the extradition to The Hague of American citizens, in a malicious use of art. 98 (2) of the ICC Statute (Gamarra, 2005: 155). Likewise, and with regard to the sanctions imposed on the ICC Prosecutor and officials of the Office of the Prosecutor after the SA ruling authorizing the beginning of the investigation in Afghanistan, see. CNN (03/15/2019). What's more, the North American Secretary of State, Mike Pompeo, was quick to describe this decision as a *"truly breathtaking action by an unaccountable political institution masquerading as a legal body."* (The Guardian, 5/03/2020).

10 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 authorization 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.

by alleged humanitarian interventions, direct attacks on their sovereignty and a continuous plundering of their natural resources.

It is true that, given the frequency with which international crimes are committed, ICJ and the ICC will always have a limited scope (Schabas, 2017: 84). However, the policy followed to date by international criminal tribunals has chosen to focus their attention on crimes that affect those States that do not have much influence in international society. This selectivity, which has been rightly criticized by TWAIL, seems to be replicated by the ICC (Stahn, 2015: 55).

For this reason, one can only share the reflections of Bosco (2014: 187), when he emphasizes that, even if at the beginning some diplomats and many activists conceived of the ICC as an instrument that could significantly alter international politics, a decade later there exists little evidence that this has occurred. This is because the ICC seems to have become more of an instrument in the hands of the most influential States in international society for responding to the challenges presented by situations of instability and violence in fragile states (Bosco, 2014: 187).

In this sense, it is worth recalling that, for a decade and a half, the ICC tried to select those situations that have the approval of the most influential States in the international community, and on whose cooperation the ICC depends, to a large extent, in order to fulfill its role. And what is more, it is still notable that, to date, no top State representative has been convicted.

Nevertheless, despite the foregoing, the multiple atrocities that continue to be committed around the planet demonstrate that an institution such as the ICC, having a mandate to criminally prosecute those most responsible, continues to be a necessary and essential institution. Consequently, one can only agree with Bassiouni and Hansen (2016: 324) when they affirm that the time has come for the ICC to investigate, prosecute, and punish international crimes committed beyond African territory.

In this regard, although no trial has been yet initiated against non-African leaders, investigations into the situations in Afghanistan, Bangladesh/Myanmar, Georgia, Palestine, the Philippines, Ukraine and Venezuela I show a certain change in policy that one hopes will

be consolidated in the future, as there is ample evidence that points to the participation of nationals of powerful Global North States in the commission of crimes within the jurisdiction of the ICC. Ultimately, only time will tell whether the ICC has the capacity and independence necessary to guarantee that ICJ can be enforced with a global scope, and not only according to the interests of the most powerful States in international society.

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Chapter 11
The Perspective Of African States[*]

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[*] For the institutional ascription of this chapter, see the initial Note of the book. This chapter is a revised, further elaborated and updated version of the article published in Spanish in the journal *Estudios de Asia y Africa* of the Autonomous National University of Mexico (UNAM) under the title "Las tensiones subyacentes al proceso de creación de la Sección Especializada en Derecho Internacional Penal de la Corte Africana de Justicia y Derechos Humanos". Vid. https://www.scielo.org.mx/scielo.php?script=sci_serial&pid=2448-654X. Therefore, the Spanish version of this chapter was not included in Volume of the Ibero-American Perspectives on Justice Book Collection. As a result, the chapter has been updated up to the end of 2024.

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1. INTRODUCTION

The perspective on the role of the International Criminal Court (ICC) by African States is especially relevant, given that all investigations and prosecutions undertaken by the ICC from 2002 to 2016 were focused on international crimes allegedly committed in Africa by African state and non-state leaders.

Unlike the approach of postcolonialism and Global South and the perspective of the so-called "Third World" approaches to international law (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.

Thus, for most African countries, the ICC represented a promise of greater equality in the international order, as African States had had to exist within a bipolar system of shared hegemony between the United States and the Soviet Union during the Cold War, and since the early 1990s they have had to adapt to the monopoly of international power by the US. The establishment of the ICC was therefore seen as a welcome change that would reduce the disparity between the Global North and the Global South and promote an end to the impunity of neocolonial States (Schabas, 2013: 548).

As the legal adviser of the then Organization for the African Union (OAU)[1], Tiya Maluwa, stressed during the negotiation process of

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[1] The African Union (AU) is the result of several previous attempts to politically unite the continent, such as the Union of African States created by the Pan-Africanist and father of the independence of Ghana (formerly the Gold Coast), Kwame Nkrumah in 1958, the Organization of African Unity (OAU) in 1963, or the African Economic Community. The Proposal to create the AU was relaunched by some Heads of State and government in the Sirte Declaration (Libya) issued on September 9th, 1999. This declaration was followed by a series of summits in: (a) Lomé (Togo) (2000), where the AU constitutive act was drafted (the act called on the African diaspora to become actively involved in the development of the AU); and (b) Lusaka (Zambia) (2001), where the plan for the establishment of the AU was approved. Nigeria deposited its instrument of ratification of the Constitutive Act of the African Union with the OAU Secretariat-General on

the ICC Statute during the second half of the 1990s, international criminal justice (ICJ) is of particular importance to the African continent, as it had suffered especially from slavery, colonial wars and other acts of violence (Jalloh, 2012: 205).

Moreover, the creation of the ICC was perceived by most African States as a positive development because it also represented the establishment of a permanent international criminal jurisdiction, instead of the temporary mechanisms established until then for Rwanda (the International Criminal Tribunal for Rwanda (ICTR) and Sierra Leone (the Special Court for Sierra Leone (SCSL)) (Washburn, 1999: 365).

A paradigmatic example of this perception is the proposal put forward by the Southern African Development Community (SADC) during the negotiations of the ICC Statute for the ICC to have a strong Office of the Prosecutor (ICC OTP), independent of the United Nations Security Council (UNSC), and with material jurisdiction over the four core international crimes (aggression, genocide, crimes against humanity and war crimes); a model almost identical to that eventually adopted in the ICC Statute (Reinold, 2012: 1088).

The perception of the ICC transformative potential led to declaration of Banjul (Gambia) issued by the African Commission on Human and Peoples' Rights (ACHPR) on October 31st, 1998, inviting African States to ratify the ICC Statute and to harmonize national law with it (ACHPR, 1998).

This call was reaffirmed in 2000 by the Solemn Declaration of the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), issued by the Heads of State and Government of the States Parties to the OAU, which sought the ratification of the ICC Statute (OUA, CSSDCA Solemn Declaration 2000).

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26 April 2000, becoming the thirty-sixth Member State to do so. The two-thirds requirement was thus met, and the Act entered into force on May 26th, 2001. The AU was formally inaugurated in Durban (South Africa) on July 9, 2002 by its first President, South African Thabo Mbeki. See: African Union (n.d.).

As a consequence, 34 African States became parties to the ICC Statute, representing more than a quarter of all ICC States Parties[2], and Africa soon became the region with the largest number of States Parties (Du Plessis, Maluwa & O'Riley, 2013: 3; Mmasenono-Monageng, 2014: 15)[3].

Nevertheless, despite the key role played by Africa in the emergence of the ICC (Schabas, 203: 248; Du Plessis, 2010: 6), the positive perception of the ICC by most African States would not last long, as will be seen throughout this chapter.

2. THE PROPOSAL FOR AN AFRICAN REGIONAL CRIMINAL COURT AGAINST APARTHEID IN THE 1970S

Following the International Military Tribunal (IMT-Nuremberg Tribunal) (1945-1946) and International Military Tribunal for the Far East (IMTFE-Tokyo Tribunal) (1946-1948), and in light of the impunity that characterized the Cold War, Africa was one of the first regions to debate the idea of a regional criminal tribunal to judge the most serious international crimes. Thus, in the 1970s, a OAU Committee of Experts suggested the establishment of an African criminal tribunal with a view to prosecuting those responsible for the apartheid regime in South Africa (Abass, 2017: 15–16). This was in line with the 1961 "Lagos Law", which highlighted the importance of a

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2 Libya, Mauritania, Ethiopia, Somalia, Togo, Rwanda, Equatorial Guinea and Swaziland did not sign the ICC Statute (Sudan signed it, but subsequently withdrew its signature in August 2008). Moreover, Egypt, Algeria, Morocco, Cameroon, Mozambique, Zimbabwe and Eritrea signed the ICC Statute, but did not ratify it. Furthermore, Burundi withdrew from the ICC Statute in 2017.

3 It is worth remembering that of the 125 States Parties to the ICC Statute as of January 1st, 2025, 33 are from the African region, 28 from Latin America and the Caribbean, 25 from Western Europe and other States, 20 from Asia and the Pacific, and 19 from Eastern Europe. Furthermore, two States have withdrawn from the ICC: Burundi and the Philippines. See: ICC, Assembly of States Parties (n.d.). https://asp.icc-cpi.int/states-parties.

pan-African judicial body, as a precedent to the current African Court of Justice and Human Rights (ACJHR) (Cartes Rodríguez, 2025).

This proposal sparked some interest, even at a global level in the UN (Derby & Bassiouni, 1981; Weissbrodt & Mahoney, 1986), but was ultimately rejected by the OUA drafting team, headed by Keba M'Baye, on logistical grounds, as the OAU did not appear to have the capacity to maintain such a tribunal (Viljoen, 2004: 4).

Furthermore, as the UN was also considering at that time the proposal to create an international criminal court to try apartheid and other crimes against humanity, the idea of establishing a regional tribunal for Africa with the same material jurisdiction was considered redundant. Ironically, at that time, the UN and OAU helped to "kill" the idea of a permanent international or regional criminal court through a conflict over which organization should establish it (Abass, 2017: 16).

There were also other reasons why numerous African countries rejected this proposal. On the one hand, there was reluctance to create additional limits on their sovereignty, considering that most African States had only recently achieved independence and attached great importance to it. Thus, in events such as Idi Amin's *coup d'état* in Uganda (1971) or the brief independence of the Republic of Biafra and its conflict with Nigeria (1969-1973), sovereignty was considered by African States the fundamental element of the international order, whose value was even superior to international peace and security and human rights (Amate, 1987).

On the other hand, regional tribunals were seen as an externally imposed idea that did not respond to the needs of African States (Lyons, 2006; Bekker, 2007: 151). Thus, following the rejection of the proposal by the OAU Committee of Experts, there were no further attempts to establish an African regional tribunal until the adoption of the Protocol to the African Charter establishing the ACJHR (1998) (Bekker, 2007). However, by then, the process of establishing the ICC was already well underway, and the latter was viewed with optimism by most African countries. For this reason, the OAU preferred to support the adoption of the ICC and limited the jurisdiction of the ACJHR to disputes over state responsibility, as the European and the Inter-American systems for the protection of human rights had done (Abraham, 2015: 7-10).

3. THE PROBLEM OF A BROAD CONCEPTION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION

The newly created AU started the 21st century having abandoned the idea of establishing a regional system of ICJ and having decided to rely on the international system. However, misgivings soon arose about its application in relation to international crimes committed in Africa. The first tensions date back to 2000, following the continuous use by Belgian judges of the principle of universal jurisdiction to prosecute those responsible for these crimes in the territory of their former African colonies. The tension reached such a point that in the same year the Democratic Republic of the Congo (DRC) appealed to the International Court of Justice (ICtJ) to allege that Belgium had abused the principle of universal jurisdiction. However, the ICtJ (2002) refused to address this issue in its judgment on the merits.

Annoyed at the ICtJ process and its outcome, the AU established the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States (CUPUJ) (AU, Executive Council, 2008). The CUPUJ criticized the use of this principle in relation to both the so-called ICL core crimes and other international crimes such as slave trade, torture or terrorism. According to the report of CUPUJ (2008: 8), there was no evidence of established state practice in IL on the application of said principle to international crimes. Consequently, using universal jurisdiction outside the assumptions expressly provided for in international treaties threatened to breach due process, deny individual rights and affect international relations (ibid., 17). Furthermore, the CUPUJ stressed that its use should always be accompanied by the recognition of the immunities provided for in IL for the highest state representatives, which was not being complied with in judicial proceedings undertaken in Belgium and Spain (ibid., 13-16).

The CUPUJ did not, however, recommend the total abandonment of international institutions, but on the contrary continued to regard international courts (particularly, the ICtJ and the ICC) as a valuable tool. Indeed, one of the recommendations made to the AU Executive Council was to request the intervention of the ICtJ (ibid,

18). As a result, the AU Assembly of States Parties (AUASP) issued decision 199 (2008), declaring that the abuse of the principle of universal jurisdiction was a threat to the international order, making it necessary to regulate its use (AUASP, 2008b).

This approach was in line with the new proposal that had emerged in 2007 for the establishment of an African criminal tribunal. As it was not the result of a conflict with the ICC, the proposed material jurisdiction for the tribunal was limited to the new crime of "unconstitutional change of government" provided for in the 2007 African Charter on Democracy, Elections and Governance —the Charter had created an obligation for the AU to investigate and prosecute those responsible for unconstitutional changes of government (*coups d'état*) through its own judicial institutions, but they were never established, partly due to an absence of political will to create a regional criminal tribunal complementary to the ICC (Abass, 2017).

Consequently, for the AU, the principle of universal jurisdiction had to be regulated to prevent its use from giving rise to abuses that could harm the development of ICJ (Garrod, 2012: 825; O'Keefe, 2019: 26). Although in 2008 the AU still had an overall positive view of the ICC, it was already foreseeable that relations between the AU and the ICC could deteriorate due to: (a) the reluctance of African countries to allow third-party intervention to enforce ICJ; and (b) their view of investigations and prosecutions of political leaders as an abuse of ICJ (Dube, 2015).

4. THE BEGINNING OF TENSIONS WITH THE INTERNATIONAL CRIMINAL COURT: THE INVESTIGATION OF THE SITUATION IN DARFUR AND THE ARREST WARRANTS AGAINST THE HEAD OF STATE OF SUDAN IN 2009 AND 2010

Once Belgium came under pressure from the US in 2003 to change its law on the principle of universal jurisdiction (Baker, 2009), it seemed that the conflict with African countries would be resolved, and they would again enthusiastically support ICJ. However, the con-

flict intensified again following the arrest warrants issued by the ICC in 2009 and 2010 against the then President of Sudan (a non-party State), Omar Al-Bashir.

Unlike other previous ICC investigations into situations in Africa (especially, those concerning the DRC and Uganda), in which the ICC had cooperated with African governments (which, although it had "taken the edge off", had brought the benefit of securing state cooperation), the investigation into the situation in Darfur (Sudan) was directly driven by the UNSC, and was carried out under pressure from the governments of the United States and the United Kingdom (Stompor, 2006). Thus, although Sudan was not a party to the ICC Statute, the UNSC referral under art. 13(b) of the ICC Statute allowed the ICC to assume jurisdiction over the situation.

In this context, the Sudanese government and the AU appeared to accept the initial ICC investigation in Darfur, on the understanding that only middle-ranking officers would be investigated. Hence, the surprise and disappointment were significant when, in 2007, charges were brought against Ahmad Harun, deputy interior minister of Sudan, and Ali Kushayb, leader of the Janjaweed militia (traditional ally of the Sudanese government in the region). As a result, Sudan immediately cut off all cooperation with the ICC (2012).

The unrest increased exponentially when in March 2009, Pre-Trial Chamber (PTC) I, at the request of the ICC OTP, issued the first arrest warrant for crimes against humanity and war crimes against Al-Bashir (ICC, Al Bashir, 2009), which would be accompanied the following year by a second arrest warrant for genocide (ICC, Al Bashir, 2010; Bower, 2019). The fact that the arrest warrants were issued against an acting Head of a non-party State generated, despite the provisions of art. 28 of the ICC Statute, outrage and reopened the controversy over: (a) the scope of the immunities of the highest state representatives (in this case, before an international criminal tribunal such as the ICC); and (b) the alleged need for consent of the sovereign State not to apply them, especially when, as in this case, Sudan was not even a party to the ICC Statute (Olasolo, Martínez Vargas & Rodríguez Polanía, 2016).

Faced with this situation, the AUASP reacted firmly, stressing in its decision 245 (XIII) that the arrest warrant against Al-Bashir constitut-

ed a new abusive application of the principle of universal jurisdiction (AUASP, 2009). Furthermore, after having repeatedly pointed out the risks of abuse of this principle and having lost its patience with the ICC, it formally recommended that the ACJHR be given criminal jurisdiction over international crimes committed in the territory of African countries, or by their nationals. In addition, it promoted the active participation of its members in the Review Conference of the ICC Statute that took place in Kampala (Uganda) in 2010 to show their rejection of the Al-Bashir case (Bower, 2019). Finally, by decision 296 (UAASP, 2010), it asked the UNSC to make a deferral request, under art. 16 of the ICC Statute, in relation to the ICC prosecution of Al-Bashir[4].

In this context, the following year saw the first threat by an African State (Senegal) to withdraw from the ICC Statute in the wake of the Al-Bashir case. However, the threat by a single state was not really taken seriously by the ICC (Von Borzyskowski & Vabulas, 2023).

All of this resulted in those African States Parties having close relations with Sudan allowing Al-Bashir to attend diplomatic meetings and events on their territories without arresting him, despite their international obligations. This led to the ICC issuing decisions on non-compliance by Chad (ICC, 2013), Djibouti (ICC, 2016a), Uganda (ICC, 2016b), South Africa (ICC, 2017a) and Jordan (ICC, 2017b) with their obligations to cooperate with the ICC. In addition, a sixth decision was issued against Sudan (ICC, 2014).

The situation in South Africa in 2015, when Al-Bashir visited an AU summit without being arrested by South African authorities, was considered the zenith of the crisis. In light of this, the ICC did not even refer the breach to the UNSC, officially because there was no need as the South African judiciary had declared the inaction of the Government unconstitutional, but, in reality, because they considered the referral useless since previous referrals had not had the expected results (ICC, 2017c).

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4 According to art. 16 of the ICC Statute: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions".

5. THE CONFRONTATION BETWEEN THE AFRICAN UNION AND THE INTERNATIONAL CRIMINAL COURT: THE ARREST WARRANT AGAINST THE HEAD OF STATE OF LIBYA AND THE CONFIRMATION OF CHARGES AGAINST THE HEAD OF STATE OF KENYA

In March 2011, the ICC OTP opened its investigation into the situation of Libya (another non-party State), as requested by UNSC in Resolution 1970/2011 (the investigation was especially fostered by the European permanent members of the UNSC) (Ocampo, 2022).

Three months later, the ICC PTC I issued an arrest warrant against the then Head of State of Libya, Muammar Gaddafi, for war crimes against humanity, which further contributed to the serious deterioration of the relationship between the AU and the ICC.

The AUASP reacted through its decision 366 (2011) in which it again recommended attributing criminal jurisdiction to the ACJHR over international crimes committed in its Member States or by their nationals. The following year, the AU Executive Council officially underlined in its report 710 (XX) (2012) that it was evident that the ICC had "double standards".

As if that were not enough, that same year, the ICC decided to confirm the charges against Uhuru Kenyatta, William Ruto and Joshua Sang for crimes against humanity allegedly committed during the post-election violence that occurred in Kenya at the end of 2008. The situation became untenable when, in March 2013, Kenyatta and Ruto were elected President and Vice President of the country, respectively. As a result, as soon as the new Kenyan government assumed office, it began to claim that ICC proceedings were contrary to the popular will of the Kenyan people, who had democratically elected those being prosecuted as their top leaders.

In particular, the new government made it clear that Kenya remained committed to strengthening an effective and impartial ICC seeking to achieve the goals set out in the ICC Statute. However, at the same time, it highlighted that the benefits of fostering democracy and reconciliation in Kenya could be derailed by an ICC OTP that pursued an agenda contrary to the sovereign will of the Kenyan

people, as freely and democratically expressed in the 2013 elections (Republic of Kenya, 2013).

The AUASP, which had already rejected the Al-Bashir and Gaddafi cases, also rejected in the strongest terms the Kenyatta case (AUASP, 2013) and reiterated its opposition to investigations on the African continent against national political leaders, especially when they held the highest representation of their respective States (ibid.). It also recommended that African leaders fostered the conclusion of non-extradition agreements among African States (AUASP, Decision 397, 2012); a recommendation that was widely followed by its members and led the governments of Chad, Djibouti, Kenya, Malawi and South Africa to refuse to cooperate with the ICC in arresting Al-Bashir while he was on in official visits to their respective countries (Tladi, 2013).

6. THE MAIN ISSUES AT STAKE IN THE CONFRONTATION BETWEEN THE AFRICAN UNION AND THE INTERNATIONAL CRIMINAL COURT

The increasing tensions between the AU and the ICC in the period 2009-2012 showed how the issue of the immunities of the highest state representatives was a central element in their confrontation (Tladi, 2017), especially when, as in the cases of Al-Bashir and Gaddafi, the concerned States were not even parties to the ICC Statute (Olasolo, Martínez Vargas & Rodríguez Polanía 2016).

However, this had not been, by any means, the only cause of tensions. In fact, at least three other issues could be identified that had also contributed significantly to them. Firstly, the perception among African countries that the UNSC referrals to the ICC OTP had had a neocolonial nature. Secondly, the alleged lack of transparency and discriminatory attitude of the ICC OTP in the application of the criteria provided for in the ICC Statute in the selection of situations for investigation. Finally, there was the view of ICC OTP investigations as presenting obstacles to peace-building processes (Brett & Engbo Gissel, 2020).

Regarding the first issue, the AU had repeatedly expressed its concern about the UNSC power to refer situations to the ICC, which, in

the opinion of AU, had been instrumentalized by some of its permanent members in relation to the situations of Darfur (Sudan) and Libya, with a view to putting political pressure on African countries (AUASP, 2012). This ultimately turned out to be the main political argument put forward by the AU to ask the UNSC to request the ICC, pursuant to art. 16 of the ICC Statute, for a deferral of the prosecution of the aforementioned cases (Akande, 2010; Dicker & Gagnon, 2008).

Secondly, the fact that all situations investigated by the ICC OTP until then had taken place in Africa, and that all arrest warrants and summons to appear had been issued against African state and non-state leaders, revealed, in the view of the AU, a double standard that placed African States in a position of "systematic disadvantage" when dealing with the ICC (AUASP, 2017). According to the AU, this had two main causes. On the one hand, there was the lack of transparency of the ICC OTP in applying the criteria for the selection of situations for investigation (AU Executive Council, 2012). On the other hand, there was the openly discriminatory way in which these criteria had been applied against African countries (ibid).

Finally, the limitations imposed on amnesty and pardon processes by the ICC interpretation of the ICC Statute, made it difficult to reach peace agreements in internal armed conflicts. For the AU, an example of this situation was the "regrettable" impact that the ICC proceedings in the Al-Bashir case had had on the peace negotiations in Darfur (AUASP, 2009). Another example was what had happened in the Gaddafi case, which had led the AU to claim that the ICC intervention necessarily provoked tensions between justice and peace (Shilaho, 2018). For the AU, this was contrary to the purposes of the ICC Statute, since it sacrificed peace for a certain ideal of justice (AUASP, 2008a; Mystris, 2019; Shilaho, 2018).

7. THE ESTABLISHMENT OF AN ALTERNATIVE TO THE INTERNATIONAL CRIMINAL COURT THROUGH THE MALABO PROTOCOL IN A CONTEXT OF CREATION OF NEW REGIONAL COURTS IN AFRICA

Since the AU considered it unlikely that the UNSC would agree to request the ICC for the deferral of prosecutions arising from situ-

ations the UNSC itself had referred to the ICC, it decided to propose to the UN General Assembly (UNGA) that, in the face of the UNSC inaction on this matter, the UNGA make such a deferral request to the ICC (Akande, 2010).

After the failure of this last proposal, African States finally decided to adopt on June 27, 2014, within the framework of the Twenty-Third Ordinary Session of the AUASP (Decision 529 (XXIII)), the Malabo Protocol, whose Preamble expressly reiterated Decision 213 of AUASP (2008) on the abuses of the principle of universal jurisdiction by countries of the Global North.

The Protocol established an alternative to the ICC by extending the jurisdiction of the ACJHR, which previously dealt with disputes between African States and acted as the principal entity of the African System of Human Rights. For this purpose, the Malabo Protocol created the Specialized Section on ICL of the ACJHR[5], to which it attributed jurisdiction to investigate, prosecute and punish the international crimes provided for in the ICC Statute, when they are committed in the territory or by nationals of the African States that ratify the Protocol.

Consequently, unlike the Extraordinary African Chambers (EAC), that were established in 2012 in the Senegalese courts as a result of an agreement between the AU and Senegal to try international crimes committed in Chad from June 7, 1982 to December 1, 1990 (the period in which the regime of former Chadian President Hissène Habré was in place)[6], the aim of the Protocol is not to prosecute a specific case. On the contrary, the Protocol aims at limiting,

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5 Similar sections had already been created in some African national jurisdictions, notably in the Supreme Courts of Uganda and Kenya (Barigayomwe & Prevost, 2022).

6 The EACs were created in Senegal specifically to try former dictator of the Republic of Chad, Hissène Habré, who ruled between 1982 and 1990. Although the EACs are important in the history of ICJ, as they allowed for the first trial and conviction of a Head of State on the basis of the "Pinochet Principle" (Høgestøl, 2016), their scope is much more limited than that of the Malabo Protocol. However, being the only precedent of an African criminal court without influence from the UN System (Cimiotta 2015), the EAC have undoubtedly been a source of inspiration for the Protocol.

to the greatest extent possible, ICC proceedings concerning African situations (Nimigan, 2019)[7], by extending the jurisdiction of ACJHR based on territoriality (art. 46E bis (2)(a) of the Protocol), active nationality (art. 46E bis (2)(b)) and passive nationality (art. 46E bis (2)(c)) criteria.

It is important to highlight that the decision to establish the ICL Specialized Section of the ACJHR was taken in a context of promotion of several regional and subregional tribunals on the African continent (Alter, 2013), as shown by the creation of the East African Court of Justice (EACJ), the Court of Justice of the Economic Community of West African States (ECOWAS), the Southern African Development Community Administrative Tribunal (SADCAT) and the ACJHR.

Likewise, in the field of ICJ, the experiences in Rwanda (ICTR) and Sierra Leone (SCSL) were followed by the establishment of the EAC (2013) to try Hissène Habré for war crimes committed during the armed conflict between Chad and Libya in the 1980s and for crimes against humanity perpetrated against several ethnic groups during his dictatorship (1982-1990) (Brody, 2015). This was a development that was seen as a "victory" for international justice (Høgestøl, 2016) and as an African solution to an African problem (Uwazuruike, 2021).

The establishment of the EAC by the Senegalese government also constituted a political victory in relation to both the principle of universal jurisdiction (Belgium had requested the extradition of Habré in accordance with this principle) and international criminal tribunals (the EAC were ultimately created by a decision of ECOWAS) (Brody, 2015). This reinforced the idea that the problems of Africa affecting international peace and security could be resolved at a regional level and without the intervention of international organizations (IOs) of global reach (Garrido, 2020).

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7 Since the ICC has a complementary nature, the ICC only acts when the other jurisdictions that are competent over the international crimes in question do not act or are not willing or able to do so (Lungu, 2022; Nimigan, 2019).

Some authors (Sirleaf, 2017) have seen in this phenomenon a manifestation of the "cascade of justice" notion (Sikkink, 2011), according to which the internationalization of institutions for the investigation and prosecution of public servants reduces impunity. Consequently, the expansion of international criminal tribunals (whether universal, regional, or subregional) is understood as a true "cascade" against impunity. The fact that several regional and subregional tribunals established in Africa have grown stronger over the years, even going so far as to act in direct opposition to some African States (Gathii, 2020), seems to provide some support to this view (Cartes Rodríguez, 2025).

All in all, what is important is to underline that, even at the time of greatest tension between the AU and the ICC, African countries never considered the return to jurisdictional nationalism and the abandonment of IJ, ICJ and international cooperation as a real option, as has occurred with some countries of the Global North. This is particularly so especially as African citizens and leaders of AU Member States saw in their development ample guarantees and opportunities (Gathii, 2020).

8. THE SITUATION AFTER THE ADOPTION OF THE MALABO PROTOCOL

Following the adoption of the Malabo Protocol, tensions between the ICC and the African States continued to escalate, leading to the first formal notices of withdrawal from the ICC Statute being filed by Burundi, Gambia and South Africa in October 2016. The case of Burundi is the most relevant one as it was the only one which was finally effective. The notice of withdrawal was filed six months after the ICC OTP decided, on its own initiative, to request judicial authorization to begin an investigation into crimes against humanity allegedly committed by state agents and members of the youth wing (Imbonerakure) of the ruling party (Forces for the Defence of Democracy) against members of the political opposition (violence took place after the announcement in April 2015 that the then President of Burundi, Pierre Nkurunziza, would run for a third term) (Ventura, 2015; Tladi, 2015; Dyani-Mhango, 2017).

These notices of withdrawal were accompanied in the following months by an intense debate within the AU (AUASP, 2017) on the possibility of launching a collective exit strategy from the ICC Statute[8], which would undoubtedly have seriously affected the ICC because more than a quarter of the States Parties are AU members. This raised the confrontation between the AU and the ICC to its highest level ever (Ssenyonjo, 2018).

After months of negotiation with the ICC, and after the South African High Court declared that the decision of the government to withdraw from the ICC Statute was unconstitutional, South Africa chose not to continue with the withdrawal process (BBC News, 2017; Woolaver, 2017). The same position had already been taken by the new government of Gambia[9].

Likewise, the AU decided not to implement its collective withdrawal strategy (Procopio, 2017; Mahdi, 2018), so that only Burundi ended up formally withdrawing from the ICC Statute in October 2017 (ICC, n.d.). Furthermore, after a decade since its adoption, only one State, Angola, has ratified the Malabo Protocol[10], which for some authors such as Clarke (2022) reflect its "performative" nature, in that rather than seeking a real alternative to the ICC, African countries tried to draw attention to their position and put pressure on the ICC and the States that most strongly support it, in order that their interests would finally be taken into consideration.

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8 Even before its publication, the exit strategy of the AU was already controversial. Senegal, Côte d'Ivoire, Cape Verde and Nigeria announced their opposition to the withdrawal of the other African States from the ICC Statute (Ngari 2017; Louw-Vaudran & Bedzigui 2017; Bachmann, Dominik & Nwibo 2017). Perhaps this influenced the final outcome; out of 34 African States Parties, only 1 (Burundi) ended up withdrawing.

9 As the ICC Office of Public Information (2017a) explained: "On 10 November 2016 the Islamic Republic of the Gambia notified its decision to withdraw from the Rome Statute of the International Criminal Court to the Secretary-General of the United Nations, as depositary of the Treaty. Following the election of a new President, on 10 February 2017, the Permanent Mission of the Islamic Republic of the Gambia to the United Nations notified the annulment of its former decision with immediate effect".

10 According to Article 11 of the Malabo Protocol, 15 ratifications are required for it to enter into force.

Be that as it may, the fact is that since mid-2017 the level of confrontation between the AU and the ICC has decreased significantly, which does not mean that the reasons underlying such confrontation have, by any means, disappeared (Okeke, 2022). Indeed, some authors, such as García Iommi (2023), suggest that the AU acceptance of the ICC is more related to identity-based and geopolitical issues, than to issues associated with the specific situation that caused the conflict between the AU and the ICC[11].

9. OBSERVATIONS FROM A LAW AND POLITICAL ECONOMIC PERSPECTIVE THAT CAN BE EXTRACTED FROM EXAMINING AFRICAN INTERACTIONS WITH THE ICC

The African experience in interacting with the ICC reveals an interesting development from acknowledging the potential of this international institution to confronting unfulfilled expectations resulting from its functioning. This has led to a shift in the perspectives of African States regarding the ICC, which have evolved from initial inducement and enthusiasm to subsequent criticism (Reynolds & Xavier, 2016).

As a result, a series of observations from a law and political economic perspective can be extracted from examining African interactions with the ICC[12]. They show the relative autonomy (Moyn, 2024) of ICL as the realm in which such interactions occur.

ICL is undoubtedly a subfield of international law that, when examined through the lens of regime theory (see generally Young, 2012), constitutes a framework of rules, institutional arrangements, and shared imaginaries within which actors interact with each other. Simply put, it constitutes a distinct domain with a well-defined structure from which specific dynamics emerge.

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11 This approach is especially pessimistic for the Malabo Protocol, whose ratification depends on the view of African States (Nel & Sibiya, 2017).

12 On Law and Political Economy, see e.g. (Harris & Varellas, 2020; The IGLP Law and Global Production Working Group, 2016).

Therefore, ICL possesses a degree of autonomy that entices passing judgments about its architecture and functioning from a predominantly internal vantage point. This means that debates about, for example, the functioning of the ICC are framed as assessments of how its framework rules have been applied and whether this meets the normative expectations held by affected subjects. This paves the way for articulating (and dispatching) critiques such as the selective operativity by the ICC as normative dysfunctions.

However, this standpoint leads to the paradox of understanding instances of possible internal malfunctioning in institutions such as the ICC as expressions of neocolonialism or racism while at the same time expecting to redress them from within the institution's structural setting.

In other words, it creates conditions for a constant oscillation between hope and despair while obscuring the role of external factors such as the international economic order as possible root causes of legal issues.

In this context, the assessment of African experiences with the ICC assists in revealing that, while ICL has some degree of autonomy, such autonomy is still relative. Specifically, it reminds us not to lose sight of the fact that ICL is not apolitical.

Conversely, core institutions such as the ICC operate within a context of relative autonomy in the sense that, while they are constitutive of an international legal regime operating under its own set of rules and logic, such an operation is ultimately determined by underlying power relations influencing the exercise of decision-making authority.

In this regard, ICL is not just some pre-existent realm that informs normative prescriptions about global justice. It is, at the same time, constituted by social, economic, and political processes.

This perspective prevents us from separating law and politics, allowing for a comprehensive, interdisciplinary account of key debates surrounding the ICC, such as its preference for a punitive form of justice based on individualized responsibility (Schwöbel-Patel, 2021), or its failure to address injustices associated with what is commonly referred to as corporate violence or the forms of organized violence

inherent to specific business activities under capitalist social relations (Klein, 2014).

Indeed, although these and similar attributes of the ICC result from choices made by subjects within its legal structure or institutional setting, more fundamentally, they are determined by broader social, political, and economic formations.

This is why decisions to refer situations to the ICC are certainly influenced by patterns of neo-imperialist discourses and practices of permanent members of the Security Council, which instrumentalize their referral power to advance material interests, profit seeking by its local corporations, and economic expansion.

In this regard, the ICC has, critically, played a function of "encasing" the market through decisions that contribute to its stabilization by: (a) isolating it from political interference (Schwöbel-Patel, 2021); (b) promoting local institutional arrangements that reproduce an understanding of good governance underpinned by market values (Schwöbel, 2014); (c) or closing off the conditions of possibility for alternative visions of social and economic justice premised on by closing off the conditions of possibility for alternative visions of social and economic justice premised on redistribution policies and greater materialization of economic, social, and environmental rights (Schmid, 2015).

In sum, the African experience with the ICC and the way critical voices such as TWAIL scholars have tried to make sense of it denote new iterations of argumentative patterns that reveal the interconnectedness between, for example, capitalism and racialization (Savvias, 2023), and how this connectedness plays out in the way the ICC operates against a background of power relationships and unfair economic structures.

10. CONCLUSIONS

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 consequence, more than a quarter of all ICC States Parties are African countries, which has made Africa the region with the largest number of States Parties.

Nevertheless, and despite the key role that African countries have played in the establishment of the ICC (Schabas, 2013), the ICC has since lost popularity and acceptance among them, while being subjected to strong criticism due to a perceived neocolonial bias that led it to investigate only situations and cases from the African continent until 2016. Thus, from the perspective of most African States: (a) the ICC seems to have turned its back on them; and (b) their attempt to turn the ICC into an anticolonial tool, which could serve as a protection against the excesses of the most powerful States, appear to have been unsuccessful.

This disappointment with the ICC has been reflected in the confrontation between the African Union (AU) and the ICC which ran 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.

All of 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 (the ICL Specialized Section of the ACJHR), which was formally established in 2014 through the adoption of the Malabo Protocol to the Charter of the ACJHR. This was accompanied by the notice of withdrawal from the ICC Statute filed by Burundi, Gambia and South Africa with the UN Secretary General in October 2016.

For the time being, the AU "withdrawal strategy" has only had a minor impact on the ICC due the following circumstances:

1. At the last minute, the intensity of the tensions between the AU and the ICC began to decrease. This happened, in particular, after the charges against Kenyatta and Ruto were respectively dropped in 2015

and 2016. As a result, the AU shelved its discussions on a collective withdrawal from the ICC Statute by African States (Ssenyojo, 2018: 63).

2. The new Gambian government annulled in February 2017 the decision of the former government to withdraw from the ICC Statute, and South Africa followed suit the following month after the South African High Court declared that the decision of the government to withdraw from the ICC Statute was unconstitutional. Therefore, only Burundi ceased being a State Party to the ICC Statute in October 2017 (ICC, Office of Public Information, 2017a; 2017b; n.d.).

3. The Malabo Protocol had not been ratified by any AU member for a decade until Angola recently ratified it in mid-2024 (Sadat, 2023; Human Rights Watch, 2024). As a result, as Clarke (2022) has stated, the Malabo Protocol may been in the end a "performative" strategy by the AU: rather than actually seeking to establish a real alternative to the ICC by creating more effective regional tools in the fight against impunity for State and non-state leaders who commit the most serious international crimes. The Protocol appears to have been a last-ditch attempt by the AU to pressure the ICC, and especially the ICC OTP, to abandon their perceived neocolonial attitudes and agree to be more receptive to the demands of African States. Several aspects of the Malabo Protocol show that is very unlikely that a Specialized Section of the ACJHR would be a more effective tool than the ICC to fight against the impunity of said leaders. Despite having multiple sections with jurisdiction over issues as complex as dispute settlement between States, protection of human rights and investigation and prosecution of international and transnational crimes, it includes an exceptionally broad immunity clause and will be part of a regional court with limited budgetary availability (Nmehielle, 2019).

Nevertheless, several of the underlying causes of tension between the AU and the ICC remain, and a new confrontation could emerge at any time in the coming years that could prove decisive. This is something that that the perspectives of postcolonialism and Global South and TWAIL have long since predicted. Moreover, the increasing institutional mistrust towards ICJ and the ICC in international society, which goes far beyond the perception of African States, brings this possibility even closer, despite the steps taken by the ICC to try to avoid it.

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PART IV
CONCLUSIONS

Chapter 12
Conclusions

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1. INTRODUCTION

As indicated in chapter 1, this is the last of the two volumes of the trilogy that address the ICC's role from analytical non-positivist perspectives that renounce modernity and its subjectivities. It focuses on the analysis of the role of the ICC from philosophical and theological perspectives on the one hand, and from international law (IL) and international relations (IR) analytical approaches on the other, based on two interdisciplinary axes of analysis: (a) critical studies (Part II: chapters 2-6); and (b) subaltern historical-contextual approaches (Part III: chapters 7-11).

As in Volumes I and II of the trilogy, 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 ICC's role is usually understood.

2. FIRST INTERDISCIPLINARY AXIS OF ANALYSIS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT FROM A CRITICAL PERSPECTIVE

The first interdisciplinary axis from which the role of the ICC has been analyzed is that of critical studies, which aims at promoting the analysis of new currents of thought and to expand the horizon of knowledge through the exploration of new paradigms. The inseparable relationship between law and politics and the prevalence of human beings over the abstract entity of the State as units of analysis facilitate the understanding of the purposes of international criminal justice (ICJ) and international criminal law (ICL), as well as the role of the ICC, beyond the matrices of thought that have dominated legal theory and practice to date. The perspectives of the utopian horizon (chapter 2), the mercy-liberation principle (chapter 3), Marxism (chapter 4), the Helsinki School (chapter 5) and social idealism (chapter 6) are good examples of this phenomenon.

In Chapter 2, Olasolo, Ana and Baquero examine the role of the ICC from a philosophical-utopian perspective, according to which the long and tortuous path that has led to the development of ICJ and ICL and to the establishment of the ICC is considered as a process driven by that militant optimism that pushes committed actions of the hopeful individual towards a social transformation that reaffirms and promotes the realization of human dignity. Consequently, since the aims of ICL in general, and the role of the ICC in particular, are closely related to the social utopia of the path towards liberation and reaffirmation of human dignity, it is possible to understand the ICC's role as a social password, thereby overcoming the reductionism characteristic of those who try to find its content in the ICC Statute and its complementary instruments.

For this reason, the authors affirm that the ICC outstrips its own spatial and historical structure and positions itself as an institution that, from an independent ICJ enforcement, must ensure the protection of humanity through the absolute affirmation and promotion of the dignity of each of the human beings who make up international society, so as to favor its transformation towards the better world of which it dreams. On this basis and given the ICC's ineffectiveness in fulfilling core aspects of its role that are instrumental to the liberation and reaffirmation of human dignity (which has led to the gradual decline of its political support in international society), there is a principle of hope. This principle of hope reminds us that, despite everything, and without prejudice to all the difficulties experienced, it cannot be ignored that today the actions of the ICC include several preliminary examinations in progress; there are almost twenty situations under investigation, and around thirty cases against relevant members of state and non-state actors involved in the situations under investigation.

Furthermore, despite the "disheartening" reality currently experienced by the ICC and the other ICJ enforcement mechanisms, Olasolo, Ana and Baquero emphasize that the utopian horizon: (a) shows the potential of the ICC as a "project" coherent between its origins and its purposes; and (b) marks the path that the present must take. As a result, hope becomes conscious and is recognized as an action for the fulfillment of that projected utopianism that is found in the

deepest roots of ICJ and the ICC. In this way, despite the ineffectiveness shown by the ICC to date and the loss of much of the political capital it had two decades ago, it maintains a reason for being that must drive it to fulfill its role with militant optimism based upon its guiding principles of justice.

In Chapter 3, López Saavedra and Pinto address the role of the ICC from the theological perspective of the Mercy-Liberation principle, which promotes overcoming a notion of the divine that contrasts the private God of a few who have everything and the God of many who have nothing. It embraces the experience of the universal God, who in no case legitimizes the violence of one society over another or of rulers over the people but suffers with those who suffer and rejoices with those who leave behind undignified conditions, while encouraging sharing with others. Consequently, as the authors point out, Christianity is not an invitation to live unconcerned about the situation of others in the world, but to "have eyes for" them and thus be challenged by their pain and suffering. It maintains its focus on poverty in order to transform it because things should not be like this; they have to change. God is, therefore, the utopian engine of that which is desired for the world, and for that reason one must act from now on to make it real in the events of history.

From this perspective, according to the authors, understanding justice requires a structural reading of history and society because this is the only way to broaden the horizon of critical analysis towards the conditions of violence and marginalization that sustain unjust orders. Based on this type of structural analysis, the existence of a close connection is affirmed between the responsibility of: (a) States and organizations in their double capacity as promoters of the structures that carry out crimes against humanity and as guarantors of their reparation; and (b) human beings, in their dual capacity as victims and perpetrators, as the case may be. Consequently, it is the State, or the organization in question, that promotes the violence committed by the individual perpetrator. This therefore makes possible the conditions of systematicity necessary for the configuration of this type of crime. Likewise, human beings become victims due to their condition as members of a certain group.

For López Saavedra and Pinto, the notion of the ICC as an actor that symbolizes the new worlds that can be built out of the wounds of history has multiple consequences. Firstly, it recognizes the potential of the ICC as a valid interlocutor with States, in order to challenge them not to engage in, or to put an end to, actions that threaten humanity. Secondly, it is a reminder to States of their obligations to their nationals and to international society, in order to rebuild their social fabric and provide reparation to the victims. Thirdly, it promotes the ICC's role in ending the anonymity of state and non-state structures. This in turn allows attention to be focused on promoting justice and peace, as it is necessary to overcome the false dilemma between justice and peace. This is because the former is a *conditio sine qua non* for the latter since justice should be understood beyond criminal punishment as a human dimension. Moreover, this also offers the possibility of dismantling the structures that favor the systematicity of crimes while providing procedural guarantees for the parties, comprehensive reparation to victims and guarantees of non-repetition. Fourthly, it allows us to move past the understanding of the ICC as a simple enforcement mechanism of the ICC Statute, thus avoiding the following risks inherent in this last idea: (a) the consideration of the ICC as a new element of hegemonic oppression, due to the creation of new colonialisms that would cause the States Parties to denounce the ICC Statute because they consider the action of the ICC to be too invasive; and (b) the limitation of ICC actions to becoming a set of discretionary recommendations but lacking the binding force necessary to generate the indispensable transformations.

In chapter 4, Back and Osório study the ICC's role from a Marxist analytical perspective emphasizing that the critical view offered by historical materialism allows us to understand the ICC's role with greater clarity, thus avoiding the risk of "imprisoning" its analysis in the steel cage of legal technicality. In this way, by including elements of politics and economics in the study of law, the veil of purity is lifted, thereby revealing a horizon eclipsed by a dominant positivist legal tradition.

For the authors, the ICC is one of the many examples that can be observed in a positivist IL approach, that is characterized by the ignorance of the social, political, and economic consequences of the

application of its norms. Therefore, in order to understand the true role of the ICC and stop feeding irrational views and false expectations, it is necessary to analyze its normative system in connection with reality, because only the understanding of reality will allow its transformation.

Based on the foregoing, Back and Osório affirm that, although the entry into force of the ICC Statute has created a legal basis to advocate for the punishment of the most serious crimes of international concern (genocide, crimes against humanity and war and aggression), its practice seems to repeat the standards of "victors' justice" of the international criminal tribunals that preceded the ICC. This is shown by the selectivity criteria of the ICC Office of the Prosecutor (ICC OTP) and the difficulty of access to the ICC for Global South States and their nationals. As a result, only leaders of peripherical States are investigated and prosecuted by the ICC, while the highest officials of central countries are protected from their individual international responsibility. In addition, the ICC Statute limits itself to analyzing criminal responsibility without at any time entering into a discussion of the political, social and economic causes of widespread and/or systematic violence, the elimination of which is the only way to generate structural changes in the international system.

To conclude Part II of the book, Urueña-Sánchez, Dermer-Wodnicky and Hernández-Cortés address in chapter 5 and 6 the ICC's role from the perspectives of the Helsinki School and social idealism. While the former understands that the ICC is shaped by both the ideas and the practices of the lawyers who apply the ICC Statute and its complementary norms, social idealism has a preference for ideas and how they can build social relations. This means, according to the authors, that although both perspectives underline the importance of the relationship between law and politics, the way in which they approach this relationship varies considerably. Thus, while the Helsinki School adopts an anthropological pessimism that subjects the legal sphere to pre-existing relations of political power ("the law of empire" instead of the "rule of law"), social idealism advocates a "path to redemption" that requires de-emphasizing the economic and restoring politics to its fundamental function of producing values, ideas and practices for international society.

According to Urueña-Sánchez, Dermer-Wodnicky and Hernández-Cortés, both the Helsinki School and social idealism have questioned the ICC as an actor in international society. Thus, while the Helsinki School is categorical in presenting the ICC as an instrument of the hegemony of powerful States and of the individuals who represent them (thus converting itself into a valuable tool for positioning its values), social idealism manages to glimpse a ray of hope towards a good social order through the ideas that the ICC represents (the ICC has thus the potential to become an alternative to "unsociety", characterized by the greed, selfishness and evil of the elites who instrumentalize the State). As a result, the Helsinki School considers that only the projects, interests and ambitions of the jurists who create and apply IL, ICL and the ICC Statute can bring about change in the IJ and ICJ institutions such as the ICC. In contrast, social idealism trusts that the conscience of society ("revolution of the mind"), embodied in the actions of the ICC, can shape the surrounding reality as a way of achieving "good governance" in spite of the interests of the elites.

However, despite these discrepancies, Urueña-Sánchez, Dermer-Wodnicky and Hernández-Cortés emphasize that both perspectives agree that the authentic unit of analysis is not the States, but certain particular individuals (internationalist lawyers for the Helsinki School and elites for social idealism), which allows for a debate that extends beyond the international responsibility of the State and its agents and focuses on the notion of international criminal responsibility of individuals. On this basis, the prevalence of ideas and their creative capacity over the instrumentalizing power of the elites (social idealism), and the combination of these with the practices of lawyers who try to enforce the agenda of the States they represent (Helsinki School), offer a wide range of analytical possibilities to those interested in understanding the dynamics of ICJ and ICL and the role of the ICC.

The five chapters that make up the first interdisciplinary axis of analysis (critical studies) show a shared approach to the outside world in general, and to the place occupied by the ICC in particular. They openly break with the positivist and empiricist traditions to: (a) make room for interpretivist approaches to reality; and (b) conceive facts

and values as inseparable elements when approaching the object of study (ontology and epistemology thus become two sides of the same coin). In this way, critical studies offer us a wide variety of analytical perspectives that have in common their rejection of the neutrality and apparent naturalism of positivism and empiricism so as to make a commitment to social transformation.

In this context, the philosophical-utopian horizon, the Mercy-Liberation principle and social idealism underline that the ICC could play an active role in this transformation by: (a) expressing social aspirations; (b) searching for justice; and (c) putting the well-being of human communities before the interests of States and their elites. In contrast, for Marxism and the Helsinki School, the ICC is not in a position to play this role because it is an actor that has been created to legitimize the hegemonic status quo and the will of the central States to subjugate peripheral countries. Therefore, according to these last two analytical perspectives, the ICC's role is: (a) to neutralize the claims of the subordinated actors in international society by "guaranteeing" justice for the most abominable crimes, as long as they are committed by warlords and leaders of the periphery; and (b) not to interfere with the agenda of the powerful Western States, whose leaders do not have to fear eventually having to answer to the ICC.

In any case, whether with the ICC as an ally or as an obstacle, the different analytical approaches of critical studies never lose sight of the possibility of social change, whether from a teleology of history (even utopian), or from human *praxis* and the aspirational value of law. In this way, even if the debate between them allows us to contemplate the richness, complexity and diversity that comprise the approaches to ICJ purposes and to the role of the ICC (providing a very suggestive reading of this role in the contemporary international system), their assessment of the ICC is, at the end of the day, very different. Therefore, their main challenge lies precisely in the ontological balance between materialism and ideationalism in order to avoid ending up making an apology for the established order (and its institutions) as a result of discourses that obscure criticism of its more than questionable practices.

3. SECOND INTERDISCIPLINARY AXIS OF ANALYSIS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT FROM SUBALTERN HISTORICAL-CONTEXTUAL APPROACHES

The second interdisciplinary axis of analysis is made up of subaltern historical-contextual approaches, which include the perspectives of: (a) biblical historical-contextual hermeneutics (chapter 7); (b) emancipatory legal pluralism (chapter 8); (c) postcolonialism and the Global South (chapter 9); (d) Third World theories (chapter 10); and (e) African States (chapter 11). All of these are characterized by emphasizing the importance of analyzing the reality of each society from its historical, economic, political and social particularities. They are also characterized by rejecting the artificial division promoted by classical IL and IR studies between: (a) the civilized, stable, and morally, politically, economically, and socially superior societies of the "developed" countries of the First World or Global North; and (b) the uncivilized, unstable, underdeveloped, and inferior societies of the "developing" countries of the Third World or Global South.

In Chapter 7, Santamaría-Rodríguez and Botero address the ICC's role from a biblical historical-contextual hermeneutical perspective, which has as its epicenter the meaning of the notion of justice contained in the biblical texts of the Old and New Testaments, which is based upon the experience of the relationship of the People of Israel and the rural society of Galilee with their God. This allows for a better understanding of the criteria used by the Judeo-Christian tradition to qualify a certain action as just.

The authors highlight the dialectic between the historical-contextual approach to justice based on the Judeo-Christian biblical tradition and the justice that is provided for at the ICC. The former presents, as a core element, the action of God in history in favour of his people, and the demand for conversion in the face of the structure of sin and oppression that has taken hold of them (the action of the prophets and its definitive manifestation in the person of Jesus reflect this notion of justice in their preaching, their denunciations and their announcements of liberation-salvation). In contrast, ICJ and its enforcement by the ICC place special emphasis on a justice

centered on the application of penalties to those most responsible for the crimes provided for in the ICC Statute, and on the development of a strategy to promote a universal rejection of their commission.

As a result of this dialectical relationship, the authors stress that, according to a biblical historical-contextual analysis, ICJ must: (a) assume that, by themselves, norms are insufficient for the application of justice because they have to: (i) be imbued with a criterion of humanity that responds to the contexts and situations that they claim to protect; and (ii) be operational in the face of realities that affect human dignity and life; and (b) adopt a prophetic and historical character by: (i) paying special attention to the vulnerability and victimization of the "other"; and (ii) acting from a perspective of love-charity for one's neighbor under the principle of compassion and mercy reflected in God's action in favor of Israel.

For Santamaria-Rodríguez and Botero, two aspects of ICJ and its enforcement by the ICC are particularly problematic: (a) the excessive focus on punishment and the perpetrators to the detriment of the reality of the victims (which frequently leads to their re-victimization); and (b) the various ideological, political, and diplomatic tensions that limit the independence of the ICC in the effective fulfillment of its role. Therefore, it is necessary to: (a) guarantee the independence and autonomy of the ICC in the investigation and prosecution of the crimes provided for in the ICC Statute; and (b) rebalance the excessive attention given to the perpetrators to the detriment of the victims, so that the ICC can promote structural processes of a restorative nature for the latter.

In Chapter 8, Back, Resende and Villarraga study the ICC's role from the perspective of emancipatory legal pluralism. This, like the other manifestations of legal pluralism, rejects the idea that States become the unitary center of political power and the source from which all legal production arises. Thus, it accepts the coexistence in the same socio-political space of multiple normative manifestations and mechanisms for the creation of rights and conflict resolution, which may or may not be recognized by state and interstate norms. Based on the above, the characteristic of emancipatory legal pluralism is the express acceptance that normativity can also arise from: (a) the democratization of the mechanisms for the creation and applica-

tion of law; (b) interculturality; and (c) the plurality of institutions and social actors. This implies recognizing social movements and their practices as guarantors of the legitimacy of the new nonstate normative forms, which have been developed to satisfy their fundamental demands and basic needs.

As the authors point out, both globalization and localization are causing a strong crisis in national States and in their role as promoters of the well-being of society. Consequently, a global restructuring around communities represents a favorable terrain for the development of emancipatory legal pluralism because it forces us to rethink the role, scope and limits of state structures. In this context, the struggles and mobilizations of human rights victims and their families have found a response in international tribunals of social mobilization, which, in addition to breaking with state and interstate positivism, constitute a good example of how punitive responses are sometimes not the best when it comes to massive violations of human rights. These tribunals, the authors claim, do not seek to maintain the established order, but rather the emancipation of those who are subjected to repressive regulations. They also aim at redefining the process of constructing legal discourse. Their existence is, therefore, a clear reflection that the application of justice is not limited to jurisdictional bodies and state or interstate entities but extends to the collective action of human beings.

Regarding the ICC specifically, Back, Resende and Villarraga point out that the practices of community justice, understood as an expression of emancipatory legal pluralism, have a broad scope in the area of civil liability and reparation for victims. The ICC itself has stressed in the Katanga case that, to the extent possible, reparations should reflect local practices and customs, specific to the culture of the affected population, with the exception of those that may be discriminatory, exclusionary or detrimental to the rights of victims. This means that the ICC, and especially its Trust Fund for Victims (TFV), can participate in the implementation of reparation models based on community justice practices.

For the authors, this is the consequence of understanding that community justice models developed in States such as Rwanda (Gacaca courts, whose relevance for the reconstruction of the social fab-

ric has been widely recognized by victims) and Uganda (the Acholi culture has a traditional process called *Mato Oput*, where the victim and the perpetrator meet to develop a reconciliation ceremony in which the perpetrator not only admits the commission of the crimes, but also compensates victims through traditional methods, such as the delivery of animals), focus on reparation to victims, the reconstruction of the events, reconciliation and the reintegration of the perpetrators in their communities, despite not being governed by predetermined legal norms.

However, Back, Resende and Villarraga emphasize that concerning criminal liability, the regulation and interpretation of the principle of complementarity by the ICC does not yet accept that community justice practices could be sufficient to: (a) negate the initiation of ICC proceedings, or to halt them; or (b) to guarantee the rights of the victims. As a result, the ICC OTP has repeatedly stated that, in application of the principle of complementarity, community justice processes are not sufficient to defer criminal proceedings to national or community-based bodies. Consequently, emancipatory legal pluralism has no real scope for action. The issuance of a declaration of inadmissibility of a situation or a case if national jurisdictions, or their respective legal alternatives, do not carry out criminal prosecutions is very unlikely. Therefore, for the authors, the challenge remains in this area regarding the legal recognition and respect of practices that do not exactly respond to the characteristics of the Western state-centrist criminal legal model.

In Chapter 9, Cárdenas, Pontón Serra, Prieto-Ríos and Suárez Vargas analyze the role of the ICC from the perspective of postcolonialism and the Global South. According to this perspective, they claim that the artificial dichotomy promoted by classical IL and IR studies between a developed Global North and an underdeveloped (or developing) Global South reflects how States, societies and leaders belonging to the former have taken it upon themselves to privilege their interests (those of the Western World) and dominate what they have considered to be less developed (the territories and societies that were once their colonies). These dynamics, which date back to centuries of domination, prevent the existence of true equality in international society and in contemporary human societies.

As the authors point out, in this context, the victorious Allies of World War II established the IMT (Nuremberg) and the IMTFE (Tokyo) in order to make their narrative the dominant "official history" of the war in the consciousness of victors and vanquished alike. Thus, while the impact of the racial supremacist ideology of the leaders of the Axis States was judged, neither the extreme violence of European colonialism (particularly in the colonies of France and the United Kingdom) nor the systematic subjugation of Native Americans and African Americans in the US were addressed. The same was true of the devastating effects of the atomic bombs dropped on Hiroshima and Nagasaki. It is therefore not surprising that these tribunals have not been well received by the Global South States.

Despite this situation, the authors observe how numerous African, Latin American and Caribbean States showed their support for the ICC in the 1990s because the ICC Statute: (a) includes principles of equality and justice that depart from the "North-South" logic; and (b) offers to more effectively address the problems specific to these regions, at a time when the lines of subordination inherent to this logic were beginning to blur and to be confronted with some effectiveness.

However, the authors themselves note that these expectations have been short-lived and have transformed over the last decade into disillusionment and disinterest, if not to opposition. This has been due to, among other reasons: (a) the delay in ICC proceedings; (b) the lack of transparency and legitimacy in the criteria used by the ICC OTP to select situations and cases (which seems to have favoured the interests of some States, generating the perception that decisions to investigate and prosecute, or not to do so, with respect to certain situations and leaders involved in them, are due mainly to external political pressures); (c) the concentration of most ICC investigations in countries of the Global South (in particular, in African States); and (d) a greater than expected involvement of the UN Security Council (UNSC) in ICC proceedings (in particular, in relation to the situations in Darfur (Sudan) and Libya). The decision issued on April 12, 2019 by Pre-Trial Chamber (PTC) II, rejecting the request of ICC OTP to initiate an investigation in Afghanistan, has deepened

these criticisms, as it appears to respond to the interests of the US and other NATO members involved in this situation.

In light of the foregoing, Cárdenas, Pontón-Serra, Prieto-Ríos and Suárez-Vargas consider that the revocation of this last decision by the ICC Appeals Chamber (AC) on March 5, 2020, while constituting an important step in the search for justice in the situation in Afghanistan, does not seem to have the capacity to reverse the perception of the ICC by the Global South States as a neocolonial instrument. According to this perception, ICJ is enforced through institutions as the ICC that only apply the criteria of justice of the "Global North" to the leaders of the "Global South" (especially when the latter´s actions do not conform to interests of the former). The September 27, 2021 statement by the then newly elected ICC Prosecutor, Karim Khan, de-prioritizing the investigation of the crimes committed in Afghanistan by inter alia the US Military and the US Central Intelligence Agency (CIA), has reinforced this perception.

Consequently, according to the authors, for the ICC to be successful in reversing this perception, it must: (a) adopt a new institutional discourse and a new legal language that contribute to the decolonization of ICJ and ICL, particularly with regard to the selection of situations and cases; (b) assume a greater commitment to the interests of those who have been historically oppressed, without giving in to pressure from those who hold political, economic and military power in international society; (c) promote cooperation between States and international organizations (IOs); (d) ensure greater transparency in determining and applying the criteria for opening investigations and cases; and (e) promote greater representation of victims.

In Chapter 10, Rodríguez and Loyo analyze the ICC's role from the perspective of Third World approaches to IL (TWAIL), which consider that late access to sovereignty by three-quarters of the States in today's international society is the main cause of the inequalities they currently suffer under globalization, as the process of decolonization and access to sovereignty during the second half of the twentieth century did not significantly alter the previously existing power systems.

For the authors, this situation is particularly serious in the economic sphere, because it was the main metropolises that generated a

large part of the debt that they left to the newly independent States (thus slowing down their economic development). This is also evident in the legal field because the conditions in which the globalization processes took place left these States at a disadvantage, having to operate in accordance with international legal norms in whose construction they had not participated (a good example of this situation is the notion of freedom adopted by IL, which protects the structural coercion that some IOs exercise over Third Word States, which do not have sufficient power to oppose this interventionism). As a result, international society continues being governed by Western thought, which determines: (a) the models of power and the systems of distribution of resources within international society; and (b) the content and application of IL.

In this context, Rodríguez and Loyo consider that the European roots of IL have conditioned its effectiveness, proving it incapable of preserving a homogeneous system of social welfare, fostering large pockets of poverty and great inequalities between Global North States and Global South States. All of this has been accompanied by alleged humanitarian interventions, direct attacks on the latter`s sovereignty (dressed up as a false defence of the interests of international society) and a continuous plundering of their natural resources, promoted and protected by the main economic organizations at the international level.

Consonant with the foregoing, the authors consider that the justice offered by ICJ through institutions such as the ICC does not have a global scope. Thus, while it is true that its scope will always be limited (it is impossible to investigate and prosecute all those potentially responsible for the international crimes provided for in the ICC Statute), it is no less true that the ICC has, to a great extent, selected so far situations and cases committed in States that do not have great international influence. Moreover, as the ICC depends largely on the cooperation of the most influential States in international society, the initiation of ICC proceedings has normally the approval of the most influential States (the investigations into the situations in Afghanistan, Palestine and Ukraine, which have not resulted so far in any prosecution, can be considered the main exceptions). Further-

more, it is noteworthy that, to date, no senior state leader has been convicted.

It is for all these reasons that Rodríguez and Loyo affirm that there are well-founded reasons that support the criticisms of the TWAIL regarding the role that the ICC has been playing. To overcome this, an essential first step is to investigate, prosecute and punish those most responsible for the crimes foreseen in the ICC Statute committed outside the African continent (abundant evidence showing the alleged criminal liability of leaders of Great Powers undoubtedly demand more attention by the ICC). In addition, although the investigations into the situations in Afghanistan, Palestine and Ukraine show a first step in the right direction, it is not clear to what extent the ICC will have the necessary capacity and independence to guarantee an ICJ with global reach, or whether it will continue to be at the service of the hegemonic Powers.

Part III of the book concludes with the work by Olasolo, Freydell and Tamayo on the perspective on the ICC's role of African States. As all ICC proceedings from 2002 to 2016 were focused on international crimes committed in African countries by African state and non-state leaders, this perspective is especially relevant. As the authors underscore, the initial perception of the ICC's role by most African countries was very different from the views of postcolonialism and TWAIL. They had an initial positive view of the role that the ICC could play in both reducing disparities between the Global North and the Global South and ending the impunity of neocolonial States. As a consequence, 34 out of 54 African States become parties to the ICC Statute, representing more than a quarter of all ICC States Parties.

Nevertheless, as foreseen by postcolonial and TWAIL scholars, many African countries soon left behind this perception, as shown by the intense 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 against African countries by the ICC OTP when applying the criteria for se-

lecting situations for investigation; and (d) the obstacles created by ICC proceedings to peace processes in Africa.

This confrontation led to two AU proposals: (a) the collective withdrawal of its members from the ICC Statute; and (b) the establishment of an alternative ICJ enforcement mechanism: the ICL Specialized Chamber of the African Court of Justice and Human Rights (ACJHR).

In 2014, the AU Member States embraced the second proposal by adopting the Malabo Protocol, which provided for the creation of the ICL Specialized Chamber. Two years later, in October 2016, Burundi, Gambia and South Africa began to unilaterally implement the first AU proposal by filing with the UN Secretary General their notices of withdrawal from the ICC Statute.

Nevertheless, the level of confrontation between the AU and the ICC appears to have been progressively reduced since the end of the Kenyatta case in 2015. As a result, Gambia and South Africa halted their withdrawal process in early 2017 (only Burundi left the ICC system in October 2017), and no collective withdrawal of African States from the ICC Statute took finally place. Furthermore, after more than a decade, the Malabo Protocol has only been ratified by one state: Angola in mid-2024.

However, as the Olasolo, Freydell and Tamayo point out, several of the underlying causes of last decade's strong tensions between the AU and the ICC have not disappeared, and a new confrontation could emerge at any time in the coming years.

All in all, the five chapters that make up the second interdisciplinary axis of analysis of this volume share the following critique of modernity (especially modernization) and of the national and social subjectivities that it has left in its wake: the production of binary identities by certain communities that arrogate to themselves a discourse of superiority (developed, civilized and cultured) and a position of economic, political, military and cultural dominance, compared to other communities with which they have established asymmetrical relations and which they pejoratively describe as undeveloped, uncivilized and uncultured (this is also applicable to the emancipatory

legal pluralism that contrasts state legal and political elites with social movements).

According to the different approaches, the prolongation of this discourse over time and its projection into practices of domination have contributed to the establishment of an inequitable, unjust and anti-democratic international system. For this reason, they adopt an epistemological construction "from below" with which they seek to denounce these asymmetrical relations from their historical processes and contexts. In doing so, they reveal hegemonic and neocolonial practices that have been naturalized by the promoters of the dominant discourses and their collaborators. It is a comprehensive denunciation that includes the ancient people of Israel more than two thousand years ago, the societies currently established in most of Africa, Latin America and Asia, and numerous communities with participatory practices that give rise to nonstate normative bodies in all continents.

As for their differences, the contrast between the emphasis on the persecution of peoples for their religious beliefs and their cosmogonies, as shown by the perspective of biblical historical-contextual hermeneutics, versus the emphasis on the contempt derived from occupying a relegated position, whether at the state level (emancipatory legal pluralism) or at the international level (postcolonialism and Global South, TWAIL and African States perspectives), is striking. However, despite these differences, it is particularly relevant that all these analytical approaches make the element of subordination a practice of resistance. They all invite a challenge to a status quo determined by a certain understanding of historical processes, contexts and dominant ideas and practices, which can be deconstructed to give rise to other more equitable and democratic results.

Finally, as regards the role of the ICC, legal pluralism emphasizes that the ICC accepts non-discriminatory community justice practices in the area of reparation for victims but rejects them when applying the complementarity principle to criminal proceedings. In contrast, the other four analytical perspectives share the view of the ICC as an institution that, although theoretically including in the ICC Statute principles of equality and transformative justice that deviate from the logics of domination mentioned above, in practice does not have suf-

ficient independence to: (a) apply these principles; (b) pay greater attention to the restoration of victims (thus limiting the centrality of punishment and the role of the perpetrators); and (c) avoid contributing to the maintenance of an inequitable, unjust and undemocratic international system.

Nevertheless, it is possible to also observe a marked contrast amongst the last four analytical perspectives in what concerns their perception of the capacity of the ICC to adopt the necessary measures to correct this situation. Thus, the biblical historical-contextual hermeneutical approach offers a more positive tone regarding the ICC capacity to reduce the excessive attention given to perpetrators and promote structural processes of a restorative nature in favor of the victims. In contrast, the perspectives of postcolonialism and the Global South, of TWAIL and of African States are completely skeptical regarding the ICC's capacity to cease being a neocolonial instrument that applies the criteria of justice of the Global North or First World to the leaders of the Global South or Third World, particularly when the actions of the latter do not conform to the interests of the former.

4. CONTINUITIES AND DISCONTINUITIES ON THE ROLE OF THE INTERNATIONAL CRIMINAL COURT BETWEEN APPROACHES FROM THE TWO INTERDISCIPLINARY AXES OF ANALYSIS

Complementing the two previous volumes, this third volume of the trilogy, moving past the disciplinary perspectives of modernist nature (volume 1) or those that renounce modernity and its subjectivities (volume 2), has focused on offering critical and subaltern interdisciplinary readings of the ICC and the place it occupies in the current international legal system (a system produced by the project of enlightened modernity and the subjectivities it created).

As with the two previous volumes, this third volume is far from being a homogeneous text in terms of the considerations collected in its chapters. As a result, five main types of continuities and two of discontinuities can be observed. The former focus on: (a) the asymme-

try of power amongst the States that make up international society; (b) the relationship between States and civil society; (c) the need to analyse ICJ and the ICC in light of the concrete circumstances (political, economic and social) in international society that allowed their birth and which mark their current application; (d) the double enforcement standard of ICJ and the ICC; and (e) the characterization of the ICC as an unfinished project. As for the discontinuities, these refer to the tensions observed between: (a) teleology and praxis; and (b) materialism and ideationalism.

These continuities and discontinuities are, to a large extent, also common to the disciplinary analytical perspectives collected in volume 2, in that, similar to those addressed in the two axes of analysis in volume 3, they renounce modernity and its subjectivities.

4.1. Continuities

The first continuity that can be observed between the two interdisciplinary axes of analysis in this volume is the importance that both accord to the different weight that each State has when interacting with other States in the configuration of the international system in general and the ICC in particular. Far from viewing these actors with the homogeneity with which the hegemonic discourse of international law does (as shown in most of the chapters in the first volume of the trilogy), the analytical perspectives addressed in both axes of analysis emphasize the asymmetry of power whose correlation leads to a subtle or coercive imposition of the agendas of powerful States in the face of the passivity, impotence or complicity of their weaker counterparts. This is a circumstance that is of little relevance to most of the analyses contained in volume I.

Several authors agree that, despite the ideals that led to the creation of the ICC, the Court has lent itself to serving as a kind of channel for new forms of colonialism. The supranational powers of the ICC have become a double-edged sword which infringes upon the sovereignty of States and the self-determination of peoples in the name of ICJ. This is a strategy different from that of other times when the powerful used the threat of force to impose themselves upon others, but which today relies more on discursive strategies to impel

the elites of the peripheries to join their cause. The confrontation between African States and the ICC is very significant in this regard because it raises questions about the way in which the States of the Global North instrumentalize international institutions that they themselves have largely created to discipline the political leaders of the Global South, so that the latter adjust their actions to what these Global North States consider desirable.

Descending to the domestic level, a second noticeable continuity between the two interdisciplinary axes of analysis is the relationship between the State and civil society. The problem of the State being the filter *par excellence* of IL and IR (a situation that has not been satisfactorily overcome with the entry into force of the ICC Statute) means that the search for effective justice for the victims of the most serious crimes of international concern must be carried out on the basis of adequate collaboration of those who manage the state apparatus. As most of the authors point out, this situation constitutes a significant obstacle to achieving effective justice, which creates tension with the understanding of these leaders as collaborators of justice by those theories that adopt modernity and its subjectivities.

Thus, although it would be desirable for state authorities to cooperate with the ICC to account for situations that they were unable to resolve due to action or omission, the truth is that, for the authors of this volume, this does not happen as a general rule. This situation is aggravated to the extent that these state authorities generate actions of re-victimization, affecting the social contract on which the *status quo* is based in the domestic sphere. For the average national elite of one or another type of State, there is no such thing as a dilemma between class privilege and the precept of justice. The evident inclination towards the former, guided by greed in the accumulation of capital, selfishness and the consciousness of an exploitative class, make material and ideological oppression the recurring resource in shaping the discourse of justice towards their private interests. In this context, the ICC struggles between the enormous difficulties to achieve its most laudable and democratic objectives and its selective instrumentalization in the service of an exclusive and predatory human group.

The third continuity between the two interdisciplinary axes of analysis is the relevance of analyzing the idea of justice embodied in the ICC Statute in light of the circumstances (political, economic, and social) which existed in international society at the time of its approval by comparison with the current situation in which it must be applied. The establishment of the ICC presupposes the demand for universal justice for those most responsible for those crimes that offend humanity as a whole. These are injustices produced by an "unsociety" whose structural violence is not only due to local actors and their strategies of oppression.

However, as can be seen in volume I, the approaches adopted by modernity and its subjectivities (whether positivist or not) do not present a fundamental intention to take these circumstances into account. Hence, if only these analytical perspectives are considered, the content of this volume III (and largely also of volume II) would give the impression of progressing towards a reinterpretation of what the ICC means in the international order. This would imply, in turn, a reaction against the structural marginalization to which the most powerful states have subjected the most vulnerable.

Thus, the contemporary liberal international order, on which the ICC has been built, and which is constantly claimed in volume 1, has naturalized the present and has represented it as "necessary." This means that all political, economic, legal, social and ideological structures have converged towards the current times and that no other type of present could have really been possible. Furthermore, without another possible present, it is not possible to envision an alternative future, not even an emancipatory one for peripheral States or the billions of human beings subjected to exploitation.

As a result of this discourse, the ICC has avoided questioning the social and international relations of material and ideological production and reproduction that have created the conditions (and correlations of force) for the proliferation of conflicts and repressive authoritarianisms both inside and outside the state apparatus. Without studying these aspects in depth, most of the authors of volumes II and III warn us that the ICC will end up repeating the same errors and injustices that have been evident in international organizations of the liberal order.

This lack of self-reflection by the legal operators of the ICC leads to the establishment of a double standard (more or less consciously) when administering justice. Hence, there is a fourth continuity between the two interdisciplinary axes of analysis: the denunciation of the impossibility of those who manage the destiny of the ICC to give a similar treatment to the political and military leaders who are responsible for the commission of international crimes. Thus, the specific weight of each State in the international system is undoubtedly a criterion for inhibiting or facilitating the administration of justice by the ICC. The analysis of this double standard is almost absent in the reflections collected in the first volume.

The more than two decades that have passed since the establishment of the ICC show how the situations investigated and the cases opened have followed different paths. For the leaders and warlords of peripheral countries (so far almost exclusively African), the ICC has tried (albeit with very little success in the case of state leaders) to identify those most responsible for the crimes included in the ICC Statute and bring them to The Hague (Netherlands) to be tried and punished for the atrocities for which they are responsible.

In the opposite sense, situations such as that of Afghanistan among others, demonstrate that when there is a risk that responsibility may fall on the leaders of the great powers, a kind of selectivity takes over the process and hinders its progress. This is one more reason that the vast majority of authors in volumes 2 and 3 claim to affirm that ICJ and ICL, as well as the ICC, constitute a hegemonic practice by which the agenda of the powerful takes precedence over that of the weak and protects the representatives of the former while only showing results for the latter. We will see if the arrest warrants issued in the last two years against the presidents and certain ministers of the governments of Russia and Israel prove the contrary, although at the time of finalizing these conclusions at the end of 2024, it does not seem that Vladimir Putin or Benjamin Netanyahu will be tried by the ICC. Only the militant optimism of Bloch's utopian principle, the social idealism of Philip Allot or the reading of the biblical historical-contextual hermeneutics in light of the Mercy-Liberation principle allow some to continue to harbor hope that perhaps the outcome could be different.

Finally, the fifth and final element of continuity between the two interdisciplinary axes of analysis of this collective work is the characterization of the ICC as an unfinished project. This is a view that, despite the differences among the analytical perspectives addressed, is common to the vast majority of the chapters in all three volumes of the trilogy.

As regards the present volume, the power relations that structurally determine the actions of the ICC do not completely close off the possibility (although it seems very unlikely at present) that the ICC can advance in the construction of the project it embodies and can in the end become a vehicle for the transformation of international society. This would be a transformation that must extend beyond the commitment of the ICC legal operators and must count on the participation of subaltern civil societies who, through their activism, push this movement from below to materialize the hope of a democratic and plural international justice.

The growing skepticism, if not to say pessimism, regarding the inability of the ICC to fulfill its role has the potential to serve as a mirror of the promises of ICJ and ICL, and from there invite self-reflection on what has been achieved so far, with a view to reorganizing this project according to its purposes. This would allow us to transcend towards ways of thinking and relating between human beings where each person is an end in itself, and not an object of instrumentalization.

4.2. Discontinuities

Despite the similarities between the approaches to the role of the ICC presented in this work, it is also worth highlighting two important elements of discontinuity. The first concerns the teleology of ICJ and the ICC (and of IJ in a broader sense) and with them the world to come. Some visions are optimistic about the future of humanity as a whole, as a consequence of resuming the ideals of natural law and the philosophy of the Enlightenment. Both intellectual projects have a metaphysical root (in particular, the latter due to their Kantian orientation) which affirms that human emancipation constitutes an inevitable step of civilization.

By way of contrast, the other international legal and political visions condition the emancipation of the oppressed, and the action of the ICC in favor of the collective interest, on what the transforming actors may do with the ICC. In this way, the option of reversing the international order and putting its organizations and courts at the service of the billions of excluded human beings ultimately depends on whether the praxis of possible transformative subjectivities can create the conditions for carrying out emancipatory projects (whether it is organic intellectuals such as international lawyers or IL educators, social classes such as the international proletariat, the subaltern or the excluded in general, or peoples and communities inspired by the actions of God).

The second discontinuity lies in the disjunction between materialism and ideationalism as an ontological choice of the different analytical perspectives. Modernity and the subjectivities created by it begin by giving primacy to the weighting of materiality as a characteristic of the capitalist mode of production. The conception of the individual as homo economicus cuts across other disciplinary perspectives, including IL, to put at the centre of the discussion the logic of private property and accumulation as driving forces of ICJ and the ICC. Hence, most of the chapters in volumes 2 and 3 have opted to shift towards viewing IL and ICL as a discursive practice, an argumentative act or a common ideal project.

However, not all renunciation of modernity and its subjectivities entails a renunciation of materialism. The great example of this argument is found in Marxist perspectives. Marx himself, as a critical reference for capitalist modernity, highlighted a materialist (dialectical) proposal to understand the relations of class domination and the projection of this domination to the international level. Furthermore, from another school of thought (Helsinki), an intermediate path is chosen by trying to combine the (ideational) discourse of IL and its (material) practice. Hence, the opportunities to redirect the role of the ICC towards the satisfaction of its original purposes could take place in more ways than one.

5. FINAL REMARKS

Having reached this point, we hope that the reader has found in the trilogy on the role of the ICC that concludes with these final remarks a true "perspective of perspectives" regarding one of the most innovative international organizations of the 21st century. To this end, a long journey has been offered through four disciplines that are as different as they are relevant to understanding the role of the ICC: philosophy, theology, IL and IR.

Furthermore, as part of this journey, an attempt has been made to approach the object of study from the most varied orientations (in favor of modernity and its subjectivities and contrary to them), and a genuine interdisciplinary analysis has been carried out in this third and final volume based on the axes of analysis offered by critical studies and subaltern historical-contextual approaches.

Each one of the perspectives from which the ICC's role has been approached in the trilogy 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 role of the ICC in its triple condition of IO, the first and only permanent international tribunal that applies ICL, and the central institution of the current ICJ system. Given this situation, an effort has been made to facilitate the comparison between the different understandings of the ICC's role in order to determine the common elements and the differences between them.

Assuming an authentic commitment to dialogue among the multiple and heterogeneous ways of understanding the ICC's role, the aim has been to provide the reader with the opportunity to compare alternative interpretations of the content and elements of the ICC's role and its fulfillment (or lack of it) in the situations and cases processed to date, thereby offering a broad analytical perspective for those interested in its comprehensive study.

As a lengthy exercise, that we hope that has offered the reader a holistic view of what the ICC represents, not only for itself, but for the context from which it comes and its purpose, complemented by an entire series of suggestive dialogues resulting from comparing the

conclusions reached about the ICC's role by the twenty-five analytical perspectives that have been addressed.

This reflects the determined vocation of the authors that have carried out the research presented in this work over several years 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. The development of this vocation has undoubtedly been favored by the support provided by the Ibero-American Institute of The Hague for Peace, Human Rights and International justice (IIH) and, in particular, by its Research Network on Ibero-American Perspectives on Justice.

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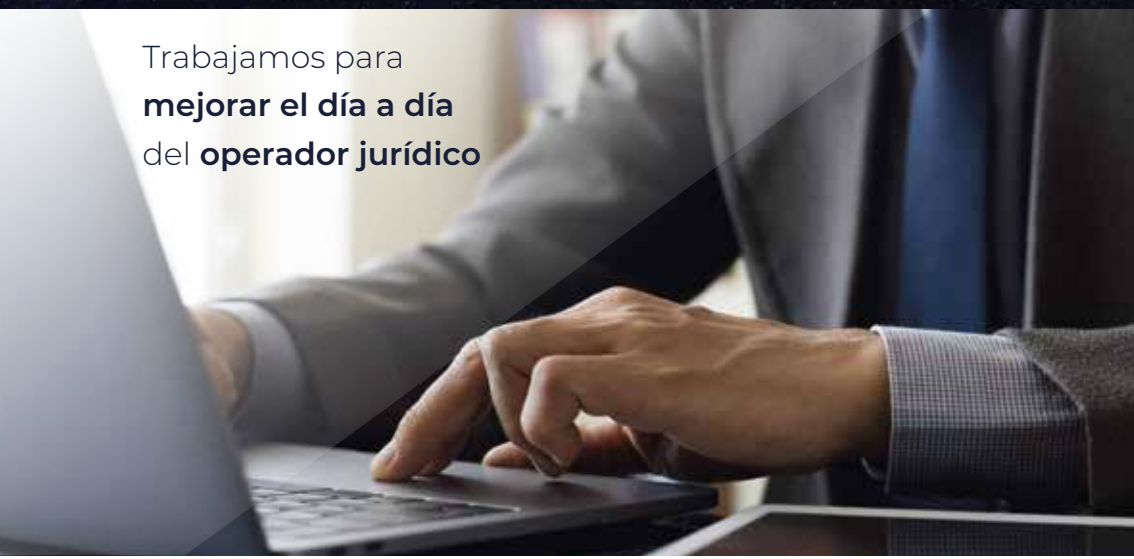

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