Universiteit Leiden

Grotius Centre for International Legal Studies

KGF

KALSHOVEN-GIESKES FORUM
ON INTERNATIONAL HUMANITARIAN LAW

Amicus Curiae Brief
for the
Jurisdicción Especial Para La Paz
Bogotá, Colombia

by

Dr. Robert Heinsch, LL.M.

Associate Professor in Public International Law
Director Kalshoven-Gieskes Forum and Leiden IHL Clinic,
Leiden University

&

Mr. Andrés Felipe Morales Arias
Ms. Fernanda García Pinto
Ms. Lígia Lazzarini Monaco

Advanced LL.M. Students in Public International Law, Leiden University

[This page is intentionally left blank]

Table of Contents

Question 1:

1. Breaches of international humanitarian law are usually incorporated to domestic legislation as war crimes. To solve the cases pending judgment it is important to know the practice and conceptualization on the subject in other countries' laws. Therefore, the following questions are proposed:

1.1 Several sub-questions:

1.1.1 What is the stance of international law regarding the meaning and scope of the concept of war crimes?

1.1.1.1 General Concept and evolution of war crimes

War crimes have been defined in a diverse array of international instruments, all of which share the same two-component definition: (i) a serious violation of a rule of International Humanitarian Law (IHL) found in customary or treaty law that (b) entails criminal responsibility.[1] As a starting point, both International Military Tribunals for Nuremberg (IMT) and for the Far East (IMTFE), and the Nuremberg Principles defined war crimes as "violations of the laws and customs of war".[2]

The Statute of the Nuremberg tribunal followed that definition with a non-exhaustive list of crimes including "murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity". Additionally, the Nuremberg Tribunal went as far as to rule that violations of the Hague Regulations of 1907 and the Geneva Conventions of 1929 "were

[1] *Tadić*, ICTY AC, 2 October 1995 at § 94.

[2] Charter of the International Military Tribunal of Nuremberg, Article 6(b); Charter of the International Military Tribunal for the Far East, Article 5(b); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle VI(b), 1950.

already recognized as war crimes under international law"[3] but failed to provide further arguments to support such a claim.

It was not until 1949 when the Geneva Conventions were drafted, that clear provisions regarding individual criminal responsibility for war crimes came to be codified under the "grave breaches" regime. These contained the essence of those offences prosecuted by the IMTs like wilful killing, torture, inhumane treatment, among others.[4] This regime implies the obligation to adopt legislative measures to establish penal sanctions and that such breaches shall be subject to universal jurisdiction.[5]

The term "grave breaches" was chosen for political reasons during the drafting of the Geneva Conventions, and it took the Members States until 1977 when they decided to recognize them as war crimes in Article 85 (5) of Additional Protocol I (API) to the Geneva Conventions. This provision clarifies that "without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes".[6]

By adopting this change States intended "to confirm that there is only one concept of war crimes, whether the specific crimes are defined under the law of Geneva or The Hague and Nuremberg law".[7] Moreover, the Protocol went on to add a series of other grave breaches such as making the civilian population or individual civilians the object of

[3] Nuremberg Judgment, p. 25

[4] Grave breaches specified in the four 1949 Geneva Conventions (Art 50, 51, 130,147 respectively): willful killing, torture or inhuman treatment; biological experiments; willfully causing great suffering; causing serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (this provision is not included in Art. 130 third Geneva Convention).

Grave breaches specified in the third and fourth 1949 Geneva Conventions (Art 130 and 147 respectively): compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile Power; willfully depriving a prisoner of war or a protected person of the rights or fair and regular trial prescribed in the Conventions. Grave breaches specified in the fourth 1949 Geneva Convention (Art 147): unlawful deportation or transfer; unlawful confinement of a protected person; taking of hostages.

[5] ICRC, Commentary to Additional Protocol I (1987) § 3403.

[6] Art. 85.5

[7] ICRC, Commentary to Additional Protocol I (1987) § 3522.

attack, launching an indiscriminate attack affecting the civilian population or civilian objects, among others.[8]

The "grave breaches" regime, however, did not foresee its application in the context of a non-international armed conflict (NIAC) as neither Common Article 3, nor Additional Protocol II made a reference to this type of violations. This state of affairs led to the assumption that there could not be war crimes in a NIAC.[9]

This view was altered years after by the International Criminal Tribunal for the Former Yugoslavia (ICTY).[10] Given the non-exhaustive list of crimes under its jurisdiction,[11] there was discussion on whether the ICTY had jurisdiction over violations of the laws

[8] See, *inter alia*, seriously endangering, by any wilful and unjustified act or omission, physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of an armed conflict, in particular physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation which is not indicated by the state of health of the person concerned or not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and in no way deprived of liberty; When committed wilfully and if they cause death or serious injury to body and health: making the civilian population or individual civilians the object of attack; launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage civilian objects; making non-defended localities and demilitarized zones the object of attack; making a person the object of an attack in the knowledge that he is hors de combat, the perfidious use of the distinctive emblem of the red cross and red crescent or other protective signs; When committed wilfully and in violation of the Conventions and the Protocol: the transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; unjustifiable delay in the repatriation of prisoners of war or civilians; practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination; attacking clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given, causing as a result extensive destruction thereof when such objects are not located in the immediate proximity of military objectives or used by the adverse party in support of its military effort; depriving a person protected by the Conventions or by Protocol l of the rights of fair and regular trial.

[9] See: Denise Plattner, The penal repression of violations of international humanitarian law applicable in non-international armed conflicts, 278 IRRC 409 (1990).

[10] Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 1.

[11] Article 3 Violations of the laws or customs of war: The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

and customs of war committed in the context of a NIAC.[12] The issue was greatly elucidated in the famous *Tadić* Decision on Jurisdiction of 1995, where the Appeals Chamber did an extensive interpretation of the Statute and the development of the law of war on this regard.[13]

Firstly, the Appeals Chamber provided that Article 2 of the ICTY Statute only applied to offences committed within the context of an international armed conflict.[14] Secondly, its findings on Article 3 ICTY Statute cleared out that:

> "(i) it refers to a broad category of offences, namely all 'violations of the laws or customs of war'; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive […] it covers all violations of International Humanitarian Law other than the 'grave breaches' of the four Geneva Conventions" [15], hence covering "(i) violations of the Hague Law on international conflicts; (ii) infringements of provisions of the Geneva Conventions, (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law".[16]

Thirdly, the Chamber proceeded to develop the notion of "serious violations of international humanitarian law". It provided the following conditions:

> "(i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;

[12] In the context of the *Tadić* decision, the defence argued that the tribunal only had jurisdiction over violations of the laws and customs of war committed during an IAC. Both the prosecutor and the US (through the submission of an amicus curiae) alleged that said violations encompassed also those occurred in a NIAC. Yudan Tan, "The Rome Statute as Evidence of Customary International Law" (2019).

[13] *Tadić*, ICTY AC, 2 October 1995.

[14] Ibid at § 84.

[15] Ibid at §87.

[16] Ibid at § 89.

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [...];
(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.
It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met."[17]

By adopting these criteria, the ICTY accepted the possibility of war crimes in the context of a NIAC and provided for the basis of these crimes. In spite of finding certain opposition[18], this view was confirmed by states only three years later in the Rome Statute. Indeed, the constitutive instrument of the International Criminal Court (ICC) provides for war crimes in both IACs and NIACs under Article 8. This explicit recognition of individual criminal responsibility for war crimes in NIACs was replicated in other IHL instruments such as the Amended Protocol II to the Convention on Certain Conventional Weapons (article 14) and the Second Protocol to the Hague Convention for the Protection of Cultural Property (articles 15 and 22), in addition to ICL ones such as Regulation No. 2000/15 establishing the Special Panels for Serious Crimes in East Timor, Statute of the Special Court of Sierra Leone and the Law on Specialist Chambers and Specialist Prosecutor's Office and it is today reflective of customary international law as noted by Rule 156 of the Customary International Humanitarian Law Study of the International Committee of the Red Cross (ICRC).

With that being said, it is worth noting that the obligation to prosecute or extradite as part of the grave breaches' regime of the Geneva Conventions was not extended to war crimes committed in NIACs. Formulated differently, it is important to note that there are no 'grave breaches' in non-international armed conflicts. This is without prejudice to the trend to harmonize war crimes in both sorts of armed conflicts.

[17] Ibid at § 94.

[18] Geoffrey Watson, The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic, 26 Virginia Journal of International Law 708 (1996).

1.1.1.2 Components of war crimes

After this general explanation of the concept of war crimes and its evolution, this section will address its particular components. These are (1) a serious violation of IHL that (2) entails criminal responsibility.

1.1.1.2.1 Seriousness of the violation

From the outset, it must be said that because only serious violations of IHL rules constitute war crimes, these are but a fraction of the vast body of law that forms IHL. Some serious violations are enshrined in IHL treaty law. The Geneva Conventions and Additional Protocol I expressly include as serious violations those that entail criminal responsibility upon its breach (so-called "grave breaches").[19] Other treaty provisions have been found to constitute serious violations of IHL and therefore constitute war crimes. These encompass violations of Common Article 3.

Besides grave breaches and serious violations to Common Article 3, there are "other" serious violations which are identified by using the test established in the above-mentioned *Tadić* decision.[20] Since the criteria used in the decision lacked precision, the Customary Law Study of the ICRC establishes that "violations are in practice treated as serious, and therefore as war crimes, if they endanger protected persons or objects or if they breach important values".[21]

Accordingly, most war crimes involve death, injury, destruction or unlawful taking of property; yet, not all of them have to result in actual damage to persons or objects. For instance, it may be enough to launch an attack on civilians or civilian objects, even if unexpected circumstances prevent the attack from causing death or serious injury.[22]

On the other hand, the concept of "important values" is not that developed, however the ICRC offered a series of examples, such as "abusing dead bodies; subjecting persons to

[19] See: Article 50 of the First Geneva Convention; Article 51 of the Second Geneva Convention; Article 130 of the Third Geneva Convention, Article 147 of the Fourth Geneva Conventions.

[20] *Tadić*, ICTY AC, 2 October 1995 at § 94.

[21] ICRC, Study on Customary International Humanitarian Law, Rule 156. (CIHL)

[22] *Ibidem.*

humiliating treatment; making persons undertake work that directly helps the military operations of the enemy; violation of the right to fair trial; and recruiting children under 15 years of age into the armed forces."[23]

This exercise of finding "important values" whose violations lead to the characterisation as "other serious violations" of international humanitarian law, and therefore individual criminal responsibility has become, however, less important after the codification of the most important war crimes in Article 8 of the Rome Statute. In many ways, Article 8 of the Rome Statute has to be seen as the attempt of the drafters to set up a codification of the existing war crimes at the time of its drafting in 1998.

1.1.1.2.2 Individual Criminal Responsibility

The principle of individual criminal responsibility for war crimes can be traced back to the Lieber Code and is a long-standing rule of customary international law. This implies that in parallel to State responsibility for international law violations, individuals may be held criminally responsible for international crimes. In IHL, each member of the armed forces is directly responsible for grave breaches or other serious violations of the law of war he or she commits and can be held individually responsible before a criminal court for them.[24]

On this note, the *Tadić* judgment recalled that "(t)he Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals."[25]

---

[23] *Ibidem*.

[24] ICRC, Individual criminal responsibility, in: How does law protect in war? available at https://casebook.icrc.org/glossary/individual-criminal-responsibility

[25] *Tadić*, ICTY AC, 2 October 1995 at § 128.

In order to assess the individual responsibility, the Appeals Chamber greatly relied on national codification of offences as war crimes. Criteria confirmed in several cases such as *Blaškić* and *Kordić*, among others.[26]

Hence, the notion of individual criminal responsibility may encompass the idea that individuals can be held directly responsible for international crimes, and second that this should only occur when there is a degree of personal culpability.[27]

1.1.1.3 Conclusion

Ultimately, the concept of war crimes under international law can be defined as serious violations of IHL which entail individual criminal responsibility. These can be grave breaches of the Geneva Conventions and Additional Protocol I, violations to Common Article 3 and certain provision of Additional Protocol II of the Geneva Conventions as well as all other serious violations of IHL found in treaty or custom. It is difficult to find an exhaustive list of war crimes. However, two sources of war crimes are arguably the most complete today: i) Article 8 of the Rome Statute and ii) the list in the aforementioned ICRC Customary International Humanitarian Law study, customary rule 156. Annex 1 consists of a table comparing these war crimes and those contained in the Colombian criminal code.

1.1.2 How are war crimes regulated at the domestic level?

Much like with other international crimes, war crimes are primarily envisaged to be prosecuted at the domestic level. This transpires from the treaty obligations to criminalize certain conducts domestically. The Geneva Conventions and Additional Protocol I impose on the State parties the obligation "to enact any legislation necessary to provide effective penal sanction for persons committing, or ordering to be committed, any of the

[26] See: ICTY, *Blaškić* case, Judgment (ibid., § 112), *Kordić* and *Čerkez* case, Judgment (ibid., § 120), *Furundžija* case, Judgment (ibid., § 110), *Delalić* case, Judgment (ibid., § 109), Kunarac case, Judgment (ibid., § 113), *Kvočka* case, Judgment (ibid., § 114), *Krnojelac* case, Judgment (ibid., § 115), *Vasiljevic* case, Judgment (ibid., § 116), *Naletilić* case, Judgment (ibid., § 117), *Stakić* case, Judgment (ibid., § 118), *Galić* case, Judgment (ibid., § 119); ICTR, *Akayesu* case, Judgment (ibid., § 103), *Musema* case, Judgment (ibid., § 105) and *Rutaganda* case, Judgment (ibid., § 104).

[27] Andreas Gordon, Individual Criminal Responsibility, MPEPIL (2009).

grave breaches".[28] So do other international treaties such as the Hague Convention on the Protection of Cultural Property[29] and its Second Protocol[30], the Chemical Weapons Convention[31], the Amended Protocol II to the Convention on Certain Conventional Weapons[32], the Ottawa Convention on Anti-Personnel Mines[33] and the Optional Protocol on the Involvement of Children in Armed Conflict[34]. These treaty obligations may lead States parties to either enact domestic criminal legislation or apply the treaty provision directly into their legal system.[35]

This obligation to enact legislation does not encompass all of the existing war crimes, however. Those war crimes that are based on customary international law alone are not always incorporated into national legislation. This usually depends on the legal tradition

---

[28] Article 50 of the Third Geneva Convention; Article 51 of the Second Geneva Convention; Article 130 of the Third Geneva Convention, Article 147 of the Fourth Geneva Conventions.

[29] Article 28. The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

[30] Article 15 Serious violations of this Protocol
1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts: (...)
2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

[31] Article VII. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:
(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;
(...)
(c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

[32] Article 14 Compliance.
1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control.
2. The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice.

[33] Article 9 National implementation measures. Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

[34] Article 4.2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

[35] Ward Ferdinandusse, *Direct Application of International Criminal Law in National Courts*. The Hague (2006).

of the State in question and its understanding of the principle of legality. For example, in Germany, a civil law country with a strict interpretation of the principle of legality, non-codified criminal law is not accepted.[36] In contrast, in the United Kingdom, a common law country, customary crimes are acceptable insofar as they do not constitute creation of new offences.[37]

One additional caveat is worth noting with respect to the domestic regulation of war crimes. While it remains a prerogative of the States to enact legislation that reflects not only those treaty-based war crimes but also those custom-based ones (in light of their legal tradition and understanding of the principle of legality), a factor that may weigh in favour of codifying all of the war crimes is the State's adherence to the Rome Statute. In general, the Rome Statute does not include an obligation for its Member States to enact legislation that matches the provision of Article 8 of the Statute.[38] However, it may be in the interest of States to prosecute the same crimes as the ICC in order to meet the *complementarity test*.[39]

In taking all of these factors into account, States may regulate war crimes into their domestic criminal system in three ways. First, they may mirror the provisions of the Rome Statute in a national law including treaty-based and custom-based war crimes; this approach has been followed by Argentina, Australia, Canada, New Zealand, South Africa and the United Kingdom.[40] Second, States may transform provisions of the Rome Statute into the legal terminology used in that State; this is the case of Germany.[41] Finally, States

[36] Basic Law for the Federal Republic of Germany, Article 103.

[37] See e.g. R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3) (2000) 1 AC 147; and Nulyarimma v. Thompson (1999) FCA 1192.

[38] Robert Cryer, et al. "An introduction to International Criminal Law and Procedure", Chapter 4. page 81 (2019): "Neither the 'complementarity test' nor the related *ne bis in idem* provisions [...] require that the State mirror the ICC's legal characterization of the underlying conduct".

[39] Ibid.: "States are free to choose solutions other than those provided for by the ICC, but again the choice may affect the capacity to meet the complementarity test and any other international obligations".

[40] David Turns, A*spects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States* in McGoldrick et al., The Permanent ICC, at page 81.

[41] Helmut Satzger, *German Criminal Law and the Rome Statute, A Critical Analysis of the German Code of Crimes Against International Law* ICLR (2002).

may ensure that the crimes already part of their domestic criminal system cover those crimes described in the Rome Statute, including those that are custom-based.[42]

1.1.3 Is every breach of international humanitarian law a war crime, both in international and non-international armed conflicts?

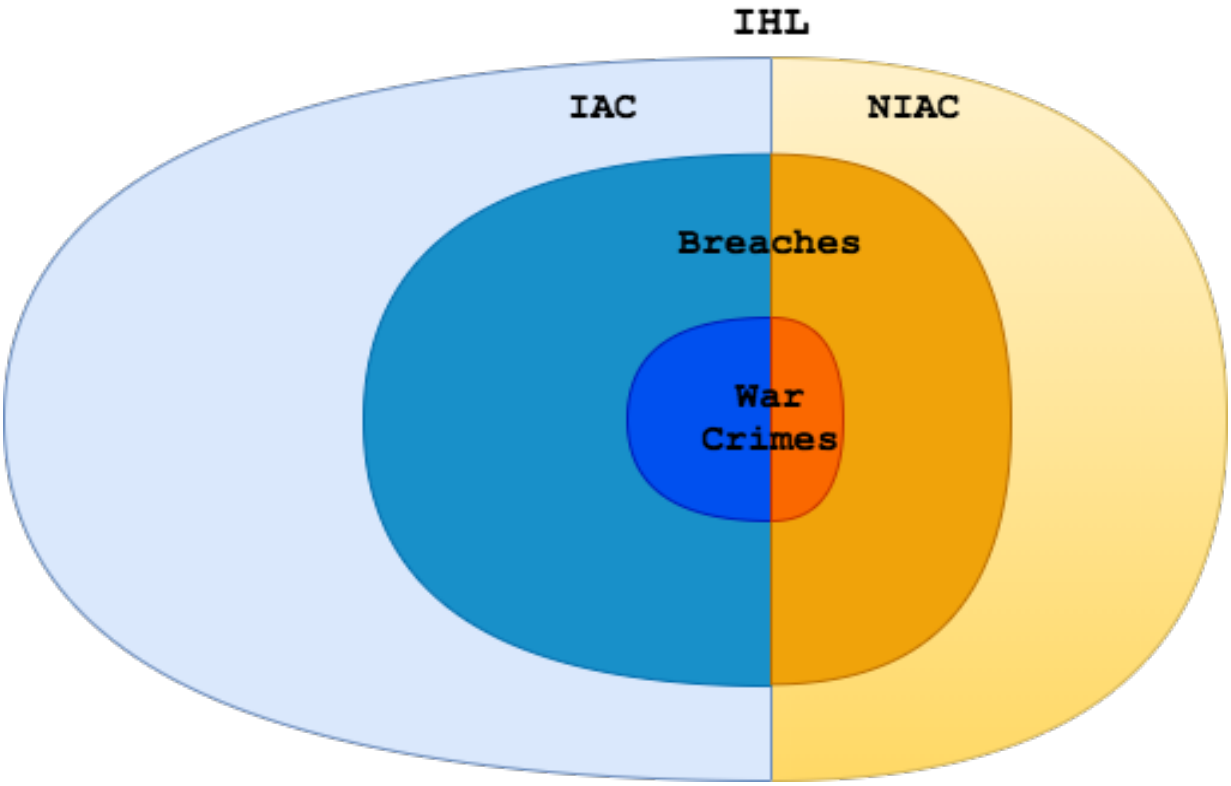
This question is directly related to question 1.1.1. that addressed the definition of war crime under international law as being only *serious* violations of IHL. Drawing on the answer provided above, it can be said that not all breaches of IHL constitute a war crime, these are only those with the element of seriousness described in the *Tadić* decision on jurisdiction of 1995.

The second part of the question was also touched upon in question 1.1.1. From that response, it is safe to say that all serious violations of IHL are war crimes, but the list of applicable war crimes may vary from IAC to NIAC. From the outset, it becomes clear that IHL treaty law is more robust for the former that it is for the latter; with these being limited to Common Article 3 of the Geneva Conventions and Additional Protocol II. This has to do with the traditionally state-centred approach to international law at the time in which the Conventions and Protocols came to be.

This gap between IAC and NIAC was narrowed with the already mentioned *Tadić* decision of 1995 according to which there is no complete transposition of the norms that govern IACs into NIACs, "but only a number of rules and principles […] have gradually extended to apply to internal conflicts".[43] The convergence between IAC and NIAC is a continuum that keeps expanding today as it is reflected in the ICRC Customary Humanitarian Law study. A snapshot of that continuum as it stands today in international law is represented in the diagram below.

[42] Robert Cryer, et al. "An introduction to International Criminal Law and Procedure", Chapter 4, page 81 (2019).

[43] *Tadić*, ICTY AC, 2 October 1995 at § 126.



1.2 In Colombia, since 2000, the Criminal Code has a section on "crimes against persons and property protected by international humanitarian law". Can domestic criminal legislation be used as a parameter for the classification of a conduct as a war crime?

As it was explored in question 1.1.2., domestic criminal legislation may or may not be required as a means of complying with treaty obligations under international law; that depends on the approach to international law that a given State has taken. In the case of Colombia, the approach to international law is dualist.[44] This means that in Colombia there is a dichotomy between the national and international legal orders and for an

[44] Constitución Política de Colombia, Article 9.

international instrument to be applicable in Colombia, it must be domesticated through national legislation.[45]

With regard to Colombia's obligations under IHL, a look at the explanatory statements of Law 599 of 2000[46] suggests that the section "crimes against persons and property protected by international humanitarian law" of the criminal code was included in compliance with the country's international obligation of criminalizing grave breaches of the Geneva Conventions. With this, much like the German model of application of international law, international treaty dispositions are adapted to the country's own legal terminology.[47]

The above suggests that domestic legislation can be used as a parameter for the classification of a conduct as a war crime.[48] In the case of Colombia, this domestic legislation – in particular law 599 – has been used for the classification of war crimes, even if the terminology does not mirror that of the Geneva Conventions.

Apart from Articles 135 to 164 of Law 599 of 2000, and while acknowledging the compilation of various war crimes other than grave breaches, no other national legislation has been enacted to implement the remaining war crimes under treaty and customary international law. Constitutional Amendment 02 of 2001 and Law 742 of 2002 simply recognize the jurisdiction of the ICC over Colombia and implement the Rome Statute in Colombian Law without amending the criminal code to cover the war crimes absent in the Colombian legal system; crimes such as attack against civilian population remain absent.

It is arguably due to the incomplete catalogue of war crimes in the domestic criminal system that Article 5 of Constitutional Amendment 01 of 2017 and Article 23 of Law 1957 of 2018 envisaged a drastic change in Colombia's approach to international law, shifting

[45] Constitución Política de Colombia, Article 150(16).

[46] Fiscalía General de la Nación. Exposición de motivos Proyecto de Ley por la cual se expide el Código Penal, Imprenta Nacional, agosto de 1998, p. 9.

[47] V.gr. Article 136 of Law 599 of 2000 criminalizes as "personal injury to protected persons" the crime of violence to life and person provided for under article 8(2)(c)(i) of the Rome Statute.

[48] To this effect, Rule 156 of the ICRC Customary International Humanitarian Law Study relies on national legislation and military manuals as evidence of customary international war crimes.

apparently from a dualist approach into a monist one and allowing the Special Jurisdiction for Peace (JEP) to directly apply international criminal law when legally qualifying conducts under their subject-matter jurisdiction.[49] This drastic change in the application of international law is an exclusive prerogative of the JEP and strict adherence to the *nullum crimen sine lege scripta* principle is expected from the rest of the Colombian judiciary.

To conclude, war crimes are envisaged to be prosecuted primarily at the domestic level, which is also mirrored in the principle of complementarity as reflected in the Preamble, Article 1 and Article 17 of the Rome Statute. This is why in Colombia Articles 135 to 164 of Law 599 of 2000 can be used as a parameter for the classification of conducts as war crimes. Additionally, given that this piece of legislation falls short from including all of war crimes in treaty and customary law provided for in the Rome Statute or the ICRC Customary Law study, JEP judges are encouraged to use the powers invested in Article 5 of Constitutional Amendment 01 of 2017 and Article 23 of Law 1957 of 2018 and directly apply treaty and customary international law as a way of filing the existing lacunae.

[49] Constitutional Amendment 1 of 2017, Article 5 and Law 1957, Article 23: "JEP, when issuing its resolutions and judgements will legally qualify conducts under its jurisdiction based on the Colombian Criminal Code, Human Rights norms, International Humanitarian Law or International Criminal Law".

Question 2:

2. What is the stance of international law regarding the possibility of granting amnesty for breaches and/or serious breaches of international humanitarian law? Specifications about the difference between the two types of infractions and the way in which international tribunals have addressed them are welcome.

In order to assess where international law stands on the possibility of granting amnesty for IHL breaches it is necessary to firstly understand what the term "breaches" means.

According to the ICRC commentary to Article 89 of API, the terms "violation" and "breach" may be considered to be synonymous, and both cover any conduct – acts and omissions – contrary to the [Geneva] Conventions or the [Additional] Protocol".[50] The first part of the question thus refers to the stance of international law regarding the possibility of granting amnesty for breaches or violations of IHL, both terms equally correct.

As to the second part of the question, the words "serious breaches" are used. Nevertheless, instruments of IHL framework do not use this term. They either mention "serious violations" or "grave breaches" and in this case, they are not synonymous.[51] The ICRC, in its commentary to Article 89 of API, explains that the term "serious violations" refers to conduct contrary to the Geneva Conventions and the Protocol, which is of a serious nature, but which is not included as such in the list of "grave breaches".[52]

In general, one can state that grave breaches refer to "Geneva Law", as it is a term envisaged by the Geneva Conventions and their Additional Protocol I[53] T is the area of law which deals with the protection of specifically protected persons, like civilians, prisoners of war, or wounded soldiers. On the other hand, according to *Tadić*, "other

[50] ICRC, Commentary to Additional Protocol I (1987) § 3590.

[51] *Ibid*. at § 3591.

[52] *Ibidem*.

[53] Article 50 of the First Geneva Convention; Article 51 of the Second Geneva Convention; Article 130 of the Third Geneva Convention, Article 147 of the Fourth Geneva Conventions and Article 85 of API.

serious violations" refer to all other international humanitarian law violations not contemplated in the grave breaches regime, including especially the means and methods of warfare.[54]

Consequently, this question will be interpreted as enquiring for the position of international law with respect to the possibility of granting amnesty for serious violations of IHL including grave breaches of the Geneva Conventions and Additional Protocols. Furthermore, bearing in mind that amnesties consist of barring criminal prosecution, violations of IHL not criminalized under international law, that are "simple" violations of IHL will not be considered for the purpose of this study.[55]

In light of these preliminary observations, this study will turn to the following questions: i.) why may amnesties be considered inconsistent with international law in general terms; and, ii) why they would not be applicable for alleged perpetrators of international crimes, including war crimes.

2.1 General Context of Amnesties in International Law

Amnesties may be conflicting with international law because of the State's obligation to extradite or prosecute international crimes (*aut dedere aut judicare).*[56] This obligation may become unattainable in case amnesties are implemented as a mechanism to avoid prosecution for such conducts. Before referring to its violation, however, it is appropriate to give an overview of the sources of this obligation in (1) treaty law; including (2) human

[54] *Tadić*, ICTY AC, 2 October 1995 at § 87.

[55] 'There is also a practice which does not contain the adjective "serious" with respect to violations and which defines war crimes as any violation of the laws or customs of war. The military manuals and legislation of a number of States similarly do not require violations of international humanitarian law to be serious in order to amount to war crimes. However, most of this practice illustrates such violations in the form of lists of war crimes, typically referring to acts such as theft, wanton destruction, murder and ill-treatment, which indicates that these States in fact limit war crimes to the more serious violations of international humanitarian law' – ICRC, Study on Customary International Humanitarian Law, Rule 156, page 569, (CIHL).

[56] Carsten Stahn, "A Critical Introduction To International Criminal Law", Chapter 3, page 259 (2019). See also: A. O'Shea, "Amnesty for Crime in International Law and Practice" (2002); R. Cryer, et al. "An introduction to International Criminal Law and Procedure", Chapter 22, page 535 (2019).

rights law; and (3) customary international law[57], and how it impacts the assessment of the compatibility of amnesties with international law.

2.1.1 Treaty obligation

The obligation to extradite or prosecute persons alleged to have committed international crimes in the context of an international armed conflict or a non-international armed conflict is found in various treaties among which the most important are the Hague Convention for the Protection of Cultural Property (Article 28); the Chemical Weapons Convention (Article VII(1)); the Amended Protocol II to the Convention on Certain Conventional Weapons (Article 14) and the Second Protocol to the Hague Convention for the Protection of Cultural Property (Articles 15–17).[58]

From an IHL perspective, it is clear that under the treaty regime, the Geneva Conventions only oblige States to prosecute or extradite alleged perpetrators of grave breaches. They require High Contracting Parties to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" identified in the treaty. Besides, each High Contracting Party is

> "under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."[59]

[57] Although it is not yet settled if this obligation has reached the status of customary international law. See: International Law Commission (ILC), The obligation to extradite or prosecute *(aut dedere aut judicare)*, Final Report of the International Law Commission, pages 16-19, (2014).

[58] CIHL, Rule 158, page 608.

[59] First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146.

Moreover, Article 85 of Additional Protocol I makes the 1949 Geneva Conventions grave breaches provisions applicable in the context of the Protocol[60] and introduces several additional acts as grave breaches.[61]

The Extraordinary Chambers in the Courts of Cambodia (ECCC), confirmed the nature of this obligation in its *Decision on Ieng Sary's Rule 89 Preliminary Objections*. It ruled that, "as Cambodia is under an absolute obligation to ensure the prosecution or punishment of perpetrators of grave breaches of the 1949 Geneva Conventions, genocide and torture,

[60] Article 85 (2) of Additional Protocol I provides that: Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

[61] Article 85 (3) and (4), of Additional Protocol I states that:
3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
(a) making the civilian population or individual civilians the object of attack;
(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii) ;
(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
(d) making non-defended localities and demilitarized zones the object of attack;
(e) making a person the object of attack in the knowledge that he is ' hors de combat ';
(f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.
4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:
(a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
(b) unjustifiable delay in the repatriation of prisoners of war or civilians;
(c) practices of ' apartheid ' and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b) , and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

the 1996 Royal Decree cannot relieve it of the duty to prosecute these crimes or constitute an obstacle thereto".[62]

This was confirmed in the same sense by the ruling of the Special Court of Sierra Leone (SCSL) in *Prosecutor v. Morris Kallo* and *Brima Bazzy Kamara*, in which the Court stated that "given the existence of a treaty obligation to prosecute or extradite an offender, the grant of amnesty in respect of such crimes as are specified in Articles 2 to 4 of the Statute of the Court is not only incompatible with, but is in breach of an obligation of a State towards the international community as a whole.[63]

2.1.2 Human Rights Law

In general, human rights treaties entail a duty "to respect and to ensure" the rights there foreseen. Hence, one can argue that this implies an obligation to investigate and prosecute certain serious violations of human rights that underlie international crimes, including international crimes if at the same time they constitute a violation of certain human rights. This might be the case especially with regard to Crimes Against Humanity. For instance, this position was ruled by the ECCC in the *Prosecutor v. Ieng Sary's* concerning crimes against humanity.

> "Cambodia, which has ratified the ICCPR, also had and continues to have an obligation to ensure that victims of crimes against humanity which, by definition, cause serious violations of human rights, were and are afforded an effective remedy. This obligation would generally require the State to prosecute and punish the authors of violations. The grant of an amnesty, which implies abolition and forgetfulness of the offence for crimes against humanity, would not have conformed with Cambodia's obligation under the ICCPR to prosecute

[62] ECCC, *Prosecutor v. Ieng Sary*, Decision on Ieng Sary's Rule 89 Preliminary Objections (Ne Bis In Idem and Amnesty and Pardon), Trial Chamber, 3 November 2011, at § 39 and 53.

[63] SCSL, *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Decision on challenge to jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004, at § 73 and 82.

and punish authors of serious violations of human rights or otherwise provide an effective remedy to the victims".[64]

Human rights courts and quasi-judicial bodies that monitor compliance with human rights treaties have interpreted the duty to prosecute into the specific obligation of States to provide access to justice and remedy for human rights violations.[65] Additionally, they have demonstrated a stricter position about the commission of gross human rights violations and the grant of amnesties. Some examples will be highlighted in the following.

In the UN system, the Human Rights Committee has affirmed in its General Comment 31 the possibility of breaching the International Covenant on Civil and Political Rights (ICCPR) in case of failure to investigate and bring to justice perpetrators who violate human rights laid down in that treaty:

> "A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy […] where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant".[66]

In the case of *Bautista de Arellana v. Colombia*, the Committee also stated that a State party to the ICCPR is under the obligation to pursue an investigation and prosecution of violations of rights provided in this instrument.

> "[T]he Covenant does not provide a right for individuals to require that the State criminally prosecute another person [...]. The Committee nevertheless

[64] ECCC, *Prosecutor v. Ieng Sary*, Decision on Ieng Sary's Appeal against the Closing Order, Pre-Trial Chamber, 11 April 2011, at § 201 (footnotes excluded).

[65] Antonio Cassese, et.al "Cassese's International Criminal Law", Chapter 17, page 310, (2013).

[66] UN Human Rights Committee General Comment No. 31 (80) (The nature of the legal obligation imposed on States parties), UN Doc. CCPR/C/21/Rev.l/Add.13, 26 May 2004 ("General Comment No. 31"), § 15 and § 18.

> considers that the State party is under a duty to investigate thoroughly alleged violations of human rights [...] and to prosecute criminally, try and punish those held responsible for such violations".[67]

Furthermore, the Inter-American system has always been considered as a reference on ruling on the incompatibility of amnesties with human rights law on the grounds that they preclude an investigation and punishment of perpetrators of serious human rights violations, which, even in cases of armed conflict, are still non-derogable rights (such as prohibition of torture). Moreover, the absence of investigation and prosecution violates the rights of victims to access to justice, the truth and reparations. In the case *Barrios Altos v. Peru*, the Court decided in this sense:

> "This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law. […] Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation".[68]

In a similar judgement, the Inter-American Court concluded that:

> "[T]he manner in which the Amnesty Law has been interpreted and applied by Brazil has affected the international obligation of the State in regard to the investigation and punishment of serious human rights violations because it

[67] *Bautista de Arellana v. Colombia*, Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993, Human Rights Committee, 27 October 1995, § 8.6.

[68] IACtHR, *Barrios Altos v. Peru,* Merits, 14 March 2001, at § 41 and 43.

> prevented the next of kin in the present case from being heard before a judge, pursuant to that indicated in Article 8(1) of the American Convention and violated the right to judicial protection enshrined in Article 25 of the Convention given the failure to investigate, persecute, capture, prosecute, and punish those responsible for the facts, failing to comply with Article 1(1) of the Convention".[69]

Similar to this is the position of the Inter-American Commission on Human Rights in the Third Report on the Human Rights Situation in Colombia:

> "[A]mnesty laws and comparative legal measures that preclude or terminate the investigation and prosecution of State agents who may be responsible for serious violations of the American Convention or Declaration violate multiple provisions of these instruments […] where violations of international humanitarian law coincide with human rights violations, universal criminal jurisdiction exists in relation to those violations even where they do not rise to the level of crimes against humanity. Whatever their label, all of these violations are international crimes and every State has a duty to repress them and a right to prosecute or else extradite the offender(s)".[70]

An interesting decision of the Inter-American Commission is the one dealing with the Amnesty Law promulgated in El Salvador. In this decision the Commission recognized that the amnesty granted to individuals who committed violations of common Article 3 and of Protocol II may not be compatible with human rights law in the moment when many of these violations, such as extra-judicial executions and torture, can be put on a

[69] IACtHR, *Gomes Lund et. al ("Guerrilha do Araguaia") v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, 24 November 2010, § 172.

[70] Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter IV, § 345 and § 347**.** See also: *Report 28/92, Argentina, Annual Report of the IACHR 1992-1993*, § 41; *Report 29/92, Uruguay, Anuual Report of the IACHR 1992-1993*, § 51; *Reports 34/96 and 36/96, Chile, Annual Report of the IACHR 1996*, § 76 and § 78 respectively; *Report 25/98, Chile, Annual Report 1997*, § 71; *Report 1/99, El Salvador, Annual Report of the IACHR 1998*, § 106.

par with human rights violations, which are not subject to suspension according to the American Convention on Human Rights.[71]

In the European system, the decision of the European Court of Human Rights in the case of *Marguš v. Croatia* also reflects this position. This ruling discussed, *inter alia,* that granting amnesty to a situation where acts amount to war crimes was contrary to Croatia's international obligation.

> "A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances".[72]

Finally, in the African system, the African Commission on Human and Peoples' Rights considered that amnesty laws cannot protect the State from complying with their international obligations,[73] and noted, in addition, that in prohibiting the prosecution of perpetrators of serious human rights violations via the granting of amnesty, the States not only promote impunity, but also close off the possibility that said abuses be investigated and that the victims of said crimes have an effective remedy in order to obtain reparation.[74]

---

[71] Inter-American Commission on Human Rights, Case 10.480 (El Salvador), Report No. 1/99, 27 January 1999, § 115.

[72] ECHR, *Marguš v. Croatia,* Judgement, 13 November 2012, § 139.

[73] ACHPR, *Malawi African Association and Others v. Mauritania*, Communication. Nos. 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, Decision of 11 May 2000, § 83.

[74] ACHPR, *Case of Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/2002, Decision of 21 May 2006, § 211 and § 215.

2.1.3 Customary Law

At this point, it was demonstrated that the duty of *aut dedere aut judicare* may be found in treaties including those which are part of human rights law. There is no doubt concerning the obligation to prosecute or extradite related to the regime of "grave breaches" of the Geneva Conventions. Yet, it is not clear where this obligation comes from in relation to "other serious violations of IHL".

Under this general obligation, several national trials for international crimes have taken place, such as *Eichmann, Habré, Barbie, Demjanjuk,* and *Finta*. However, these cases remain rare. Nevertheless, it could be argued that, despite the lack of state practice, it is a norm of customary international law that States have to prosecute or extradite for all international crimes.[75] If this is the case, it entails that States are bound regardless if they are parties to relevant treaties.

Under article 38 (1)(b) of the Statute of the International Court of Justice (ICJ), customary international law is one of the main sources of international law. This source is constituted by "evidence of general practice accepted as law." In other words, customary international law consists in a practice generally applied by the majority of States due to the fact of the recognition that they are legally obligated to do so (*opinio juris*).[76]

In its Customary International Law Study, the ICRC stated that the available State practice shows States' duty to exercise their criminal jurisdiction prosecuting the suspects of committing war crimes in an international armed conflict and a non-international armed conflict has reached the *status* of customary international law:

> "Rule 158. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute

[75] Robert Cryer, et al. "An introduction to International Criminal Law and Procedure", Chapter 4, page 77 (2019). See also: Mark Freeman and Max Pensky, "The Amnesty Controversy In International Law", Amnesty in the Age of Human Rights Accountability: Comparative and International Perspective, Chapter 2, page 56.

[76] Mark Freeman and Max Pensky, "The Amnesty Controversy In International Law", Amnesty in the Age of Human Rights Accountability: Comparative and International Perspective, Chapter 2, §52, (2012). See generally: Antonio Cassese, "International Law", Chapter 8, pages 156-166. (2005).

the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects".[77]

The number of examples of national amnesties granted in the context of non-international armed conflict suggests that State practice speaks against the existing duty of states to prosecute or extradite for the commission of war crimes in this type of armed conflict.[78] The ICRC objects this argument stating that there is sufficient practice, such as that these amnesties often have been found to be unlawful by national courts or by regional courts and were criticized by the international community.[79]

More recently, the SCSL faced this argument and decided on the matter. It sustained the existence of an obligation under international law to prosecute perpetrators of international crimes that have reached the status of *jus cogens:*[80]

> "Under international law, states are under a duty to prosecute crimes whose prohibition has the status of jus cogens. It is for this reason that the Special Representative of the United Nations Secretary-General asserted the UN's understanding of Article IX of the Lomé Agreement as excluding the international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law".[81]

2.2 Applicability of amnesties for alleged perpetrators of international crimes

Under international law, it is not yet established if the prohibition of granting amnesty to persons who committed international crimes (including war crimes) already reached the

---

[77] CIHL Rule 158, at page 607.

[78] For instance, Argentina, Chile, Peru, El Salvador, Brazil, Sierra Leone and Uganda adopted an amnesty law as a transitional mechanism after the end of a non-international armed conflict.

[79] CIHL, Rule 158 at page 609.

[80] The status of *jus cogens* reflects a set of norms universally binding on states without exception or derogation. International crimes that have reached this status entail a universal or peremptory obligation on the part of states to prevent, investigate, prosecute, and punish such crimes. Adopting an amnesty law interferes directly on this duty (Mark Freeman and Max Pensky, "The Amnesty Controversy In International Law", Amnesty in the Age of Human Rights Accountability: Comparative and International Perspective, Chapter 2, page 56).

[81] SCSL, *Prosecutor v. Augustine Gbao*, Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Appeals Chamber, 25 May 2004, at § 10.

status of customary international law.[82] Namely, it is still not agreed if an amnesty is going to be entirely incompatible with international law when it comes to a situation involving the perpetration of international crimes. Therefore, an assessment of this discussion will be provided to clarify its current stage and how international tribunals have decided upon this issue.

According to Guideline 6(b) of the Belfast Guidelines on Amnesty and Accountability, no international treaty explicitly prohibits amnesties.[83] It is even argued that Article 6 (5) of Additional Protocol II (which concerns the protection of victims of non-international armed conflicts) encourages this practice in order to end hostilities.[84]

On a different note, the ICRC's Study on Customary International Humanitarian Law interprets the aforementioned article as a provision excluding persons suspected of, accused of or sentenced for war crimes from benefiting from amnesties, concluding that State practice established this as a norm of customary international law.[85]

The Belfast Guidelines, a more recent study on this subject, disagree with the interpretation given by the ICRC. It argues that state practice does not demonstrate in a concrete way that the prohibition of granting amnesty to persons who committed war crimes has reached the status of customary international law.[86] It claims:

> "Crimes against humanity and war crimes committed in NIACs have been defined [in Articles 7 and 8] of the Rome Statute of the International Criminal Court (ICC). Where it has jurisdiction, the ICC can prosecute these crimes. These developments, together with the case-law of international courts and the opinions of authoritative bodies have provided greater clarity on the nature of

[82] For example, SCSL, *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Decision on challenge to jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004, at §82.

[83] The Belfast Guidelines on Amnesty and Accountability, Guideline 6, pages 10-12 (2013).

[84] Article 6(5), Additional Protocol II reads "At the end of hostilities, the authorities in power shall endeauvor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

[85] CIHL Rule 159, at page 612-614 .

[86] It even highlights that 'that even if this duty [to prosecute] is found to exist, it does not necessarily mean that the duty is absolute and that it precludes the use of amnesties in all instances.'- The Belfast Guidelines on Amnesty and Accountability, page 38.

> these offenses and contributed to a body of opinion to support the existence of a customary prohibition on amnesties for international crimes. However, other sources of *opinio juris* from domestic and hybrid courts, together with state practice on amnesties does not reflect an established, explicit and categorical customary prohibition of amnesties for international crimes."[87]

In addition to that, the ICRC study explains that through an assessment of different sources of state practice and *opinio juris* such as statutes and case-law of international and hybrid tribunals, "soft" law instruments, the Amnesty Law Database, as well as statements of States before the UN General Assembly and the UN Security Council, it is possible to suggest that States remain willing to enact amnesty laws and endorse amnesties in other states, even for the most serious crimes.[88]

The International Law Commission also brought this discussion into the context of the Draft Convention on Crimes Against Humanity, where it was agreed, among other things, that since the status of such prohibition is not settled, a provision tackling this issue should not be included in the future convention.[89]

The SCSL addressed this matter in the case of the *Prosecutor v. Augustine Gbao*, ruling that the law is still crystallising:

> "In Prosecutor v. *Furundzija*, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia was of the opinion that the proscription of torture had reached the status of *jus cogens*, that is to say a mandatory norm of general international law from which there can be no derogation in the absence of another rule of similar status to the contrary. Earlier, the International Court of Justice in the Barcelona Traction case, without expressly using the notion of *jus cogens*, implied its existence when it referred to obligations *erga omnes* in its judgment of 5 February 1970. The Court was of the opinion that the 'obligations

[87] The Belfast Guidelines on Amnesty and Accountability, Guideline 6(d), page 12.

[88] For understanding the assessment, see the Belfast Guidelines on Amnesty and Accountability, Belfast Guidelines, pages 38-43.

[89] ILC, Report on the work of the sixty-ninth session, UN Doc. A/72/10, Chapter IV, (2017). See also: S. Murphy, Third Report on Crimes Against Humanity, UN Doc.A/CN.4/704, at 13 (2017).

> of a state towards the international community as a whole' were 'the concern of all states' and for whose protection all states could be held to have 'legal interest.' According to Hermann Mosler and as he stresses with justification, there is a close connection between *jus cogens* and the recognition of a 'public order of the international community.' *There is, therefore, support for the statement that there is a crystallised international norm to the effect that a government cannot grant amnesty for serious crimes under international law*".[90]

Moreover, the Office of the United Nations High Commissioner for Human Rights issued a report on 'Rule of Law Tools for Post-Conflict States' in which it affirms that the UN position is that it would endorse a peace agreement if no promises for amnesties were made regarding genocide, war crimes, crimes against humanity or gross violations of human rights.[91]

Despite the discussion regarding the status of granting amnesties under customary international law, one point that seems to be settled is that national amnesties cannot bar international, hybrid, or foreign courts from exercising their jurisdiction.[92] The rationale is that '[t]hird States and internationalized courts (which are not grounded solely in the domestic legal order) are simply not bound by other States' domestic amnesties.'[93]

The ICTY dealt with this argument and rejected any effect of a national amnesty upon international jurisdiction.[94] Similarly, the Statutes of the SCSL,[95] ECCC,[96] and Special

---

[90] SCSL, *Prosecutor v. Augustine Gbao*, Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Appeals Chamber, 25 May 2004, at § 9 (emphasis added).

[91] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States: Amnesties, page 3 (2009).

[92] Antonio Cassese, et.al "Cassese's International Criminal Law", Chapter 17, page 315, (2013).

[93] Robert Cryer, et al. "An introduction to International Criminal Law and Procedure", Chapter 22, page 539 (2019).

[94] ICTY, *Prosecutor v. Anto Furundžija*, Judgment, Trial Chamber II, 10 December 1998, § 155.

[95] Article 10.Amnesty - An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

[96] Article 40 new - The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7, and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.

Tribunal Lebanon (STL)[97] provide that amnesties granted to persons who perpetrated crimes falling within their jurisdiction do not bar prosecution. At this point, an observation regarding the definition of war crime for these tribunals is relevant.

The Statute of the SCSL defines war crimes as violations of Common Article 3 to the Geneva Conventions and Additional Protocol II[98] and 'other serious violations of international humanitarian law',[99] which means that amnesties granted to persons who committed this crime do not bar prosecution before this Court. For instance, in the case of *Prosecutor v. Gbao*, the Court sustained this argument:

> "[…] The crimes mentioned in Articles 2-4 of the Statute of the Special Court (crimes against humanity; violations of Article 3 common to the Geneva Conventions and Additional Protocol II, and other serious violations of international humanitarian law) are international crimes entailing universal jurisdiction. Article IX of the Lomé Agreement cannot constitute a legal bar to the exercise of jurisdiction over international crimes by an international court or a state asserting universal jurisdiction. Equally, it does not constitute a legal bar to the establishment of an international court to try crimes against humanity".[100]

On the other hand, the Statute of the ECCC defines war crimes as only grave breaches of the Geneva Conventions.[101] Therefore, while the SCSL, as a result of being established to

---

[97] Article 6. Amnesty - An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution.

[98] Article 3, SCSL Statute.

[99] Article 4, SCSL Statute.

[100] SCSL, *Prosecutor v. Augustine Gbao*, Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Appeals Chamber, 25 May 2004, at § 8.

[101] Article 6. The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:
• wilful killing;
• torture or inhumane treatment;
• wilfully causing great suffering or serious injury to body or health;
• destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
• compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

deal with situations in the context of a non-international armed conflict, does not mention the term 'grave breaches' as war crimes, the ECCC does not address, expressly, a prohibition to grant amnesties for serious violations of IHL.

Nevertheless, the ECCC ruled that the prohibition of granting amnesties in relation to international crimes constituting "grave breaches" would rise from the duty to investigate and prosecute entailed in the 1949 Geneva Conventions.[102] Concerning the other crimes, it would – still – not exist a customary international law prohibition to bestow amnesties onto these situations, but it would not preclude third States, internationalized and domestic courts to assess the amnesty and consider it as conflicting with international law. The ECCC stated to that effect that:

> "Based on the foregoing, the Chamber concludes that *an emerging consensus prohibits amnesties in relation to serious international crimes, based on a duty to investigate and prosecute these crimes and to punish their perpetrators.* As previously indicated, relevant treaty obligations impose an absolute prohibition in relation to genocide, torture and grave breaches of the 1949 Geneva Conventions. Although state practice in relation to other serious international crimes is arguably insufficiently uniform to establish an absolute prohibition of amnesties in relation to them, this practice demonstrates at a minimum a retroactive right for third States, internationalised and domestic courts *to evaluate amnesties and to set them aside or limit their scope should they be deemed incompatible with international norms.* These norms further evidence a clear obligation on states to hold perpetrators of serious international crimes accountable and to provide victims with an effective remedy and support the conclusion that amnesties for these crimes (especially when unaccompanied by any form of accountability) are incompatible with these goals".[103]

• wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;
• unlawful deportation or transfer or unlawful confinement of a civilian;
• taking civilians as hostages.

[102] ECCC, *Prosecutor v. Ieng Sary*, Decision on Ieng Sary's Rule 89 Preliminary Objections (Ne Bis In Idem and Amnesty and Pardon), Trial Chamber, 3 November 2011, at § 53.

[103] *Ibid.* (emphasis added).

Concerning the STL, there is no provision on war crimes. The Statute only states that the Tribunal shall try "all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others".[104]

On the same note, the International Criminal Court (ICC) does not have a provision explicitly prohibiting amnesties. The Rome Statute, in its preamble, affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".[105]

The Statute also provides that States parties are "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes"[106] and they have a "duty to exercise its criminal jurisdiction over those responsible for international crimes".[107] These are not legal obligations, but a failure to follow these "guidelines" might trigger the ICC powers to prosecute offenders itself.

Furthermore, since the ICC is an international court, a national amnesty, as already discussed, does not bar the court to exercise its mandate in relation to the perpetration of international crimes. In fact, the practice of the Office of Prosecutor to the ICC does not seem to welcome the initiative of granting amnesty to international crimes. This was the case, for instance, of the statement of Ms. Fatou Bensouda, Chief-Prosecutor of the ICC, before the Security Council in the case of Libya,[108] or in the interim report issued on the case of Colombia:

> "Thus, while the Office welcomes the adoption of a national policy to prioritize the investigation and prosecution of cases against those who bear the greatest responsibility for the most serious crimes, *it would view with concern any measures that appear designed to shield or hinder the establishment of criminal responsibility of individuals for crimes within the jurisdiction of the Court*. Even in relation to

[104] Attachment, STL Statute.

[105] Rome Statute, Preamble, § 4.

[106] Rome Statute, Preamble, § 5.

[107] Rome Statute, Preamble, § 6.

[108] United Nations Security Council, 6855th meeting, UN Doc. S/PV.6855, 7 November 2012, at page 3.

> apparently low-level offenders, proceedings related to the alleged commission of war crimes or crimes against humanity should ensure that as much as possible is known about the specific crimes committed by each accused person".[109]

To conclude, there is no consensus yet as of whether the prohibition of amnesties to perpetrators of international crimes has become a norm under customary international law. It is suggested that it is still "crystallising" as custom. Nevertheless, national amnesties do not preclude international tribunals from exercising their powers over those crimes.

[109] ICC, Office of the Prosecutor, Situation in Colombia, Interim Report, November 2012, § 205 (emphasis added).

Question 3:

3. What is the stance of international law regarding the treatment of police forces in non-international armed conflicts? What is the status of police forces in non-international armed conflicts? Can members of police forces be considered as protected persons under international humanitarian law? If so, under what circumstances?

Under normal circumstances, law enforcement officials (police forces) constitute a separate entity from the armed forces of a State. This would grant them the status of civilians under IHL. This can be derived from article 50 of Additional Protocol I, which defines the term civilians, as police officers fall out of the different categories of combatants foreseen in article 4 of the Third Geneva Convention and article 43 of API.

This status and the protection granted thereof may be altered under two circumstances. The first one is enshrined in Article 43 of API, which allows integration of armed law enforcement officials into a State's armed forces; implicitly granting them the status of combatants.

On this note, the ICRC has established that "uniformed units of law enforcement agencies can be members of the armed forces if the adverse Party has been notified of this, so that there is no confusion on its part".[110] This incorporation is usually carried out through a formal act, and in absence of one, the status of such groups will be judged on the facts and in the light of the criteria for defining armed forces.[111]

In any event, when these police units fulfil the criteria of armed forces, they are considered combatants. Noting that even if this is a rule contained in the IAC framework, its application during NIACs is essential for the correct implementation of the principle of distinction[112] during the conduct of hostilities.

[110] ICRC, Commentary to Additional Protocol I (1987) at § 1683.

[111] CIHL, Rule 4.

[113] API, art. 51.3, APII, art. 13.3 and CIHL Rule 6.

A second scenario affecting the legal protection of law enforcement officers as civilians would be their participation in the conduct of hostilities. Since the law contemplates no special treatment for police officers, their actions must be understood as those of a civilian. Hence, the general rule is that "civilians are protected against attack, unless and for such time as they take a direct part in hostilities."[113]

Yet, this notion remains quite vague and in order to provide some clarity the ICRC issued an "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law". According to this document, in order to determine if civilians are indeed directly participating in hostilities, the following criteria must be met:

1. They carry out specific acts which are likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, may inflict death, injury or destruction on persons or objects protected against direct attack (threshold of harm);

2. There is a direct causal link between the act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part (direct causation);

3. The act is specifically designed to attain the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[114]

This exception is of particular importance for these subjects because activities that require the resort to the use of force may be confused with direct participation in hostilities.[115] This becomes even more difficult in contexts where a NIAC is taking place, since law

[113] API, art. 51.3, APII, art. 13.3 and CIHL Rule 6.

[114] ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009) at 93.

[115] ICRC Report, The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms, Report prepared by Dr Gloria Gaggioli (ICRC, Geneva, November 2013). See also the ICRC Report on International Humanitarian Law and the challenges of contemporary armed conflicts, 31IC/11/5.1.2, ICRC, Geneva, October 2011, in particular pp. 18-19.

enforcement activities against "ordinary criminals" may be hard to distinguish with the conduct of hostilities under the armed conflict.

Hence, if their activities are limited to regular law enforcement operations and lack one of the aforementioned criteria, they would retain their civilian status and the protection it grants. On the other hand, if they directly engage in the conduct of hostilities by fulfilling the three requirements, their legal protection as civilians would be waived, turning them into lawful target for as long as they engage in said activities.

In Colombia, different caveats must be taken into account when assessing the legal status of the police forces under IHL. First of all, a strictly legalistic perspective shows that under Article 218 and Law 62 of 1993 the police are a law enforcement body of civilian character. This is despite the fact that Article 10 of that Law places the police under the control of the Ministry of Defence; this fact does not alter its civilian nature.[116]

A contextual approach, closer to the reality of armed conflict in Colombia, offers a different categorization of the police in which the line between law enforcement activities involving the use of force and the direct participation in hostilities become blurry.[117] This is best exemplified by the process of *militarization* of the police that led to the creation of elite forces and counter-guerrilla units on the one hand, and the conduct of military operations in conjunction with the armed forces on the other.[118]

In addition to this, Constitutional Amendment 1 of 2015 merges police forces with military forces under the term "public forces" in relation to the investigation and prosecution of conflict-related offences, thus implying that the police may be involved not only in law enforcement, but also in the conduct of hostilities. When considered together, these factors would deprive those police officers, either belonging to counter-guerrilla units or acting in conjunction with the armed forces, from the protection given by the civilian status under IHL.

[116] Articles 1 and 5 of Law 62 of 1993.

[117] Constitutional Court, Judgements C-453 of 1994, C-444 of 1995, C-421 of 2002, T-1206 of 2001 and C-1214 of 2001.

[118] Constitutional Court, Judgements C-453 of 1994.

In light of the above, it can be said that, in principle, the status of the police forces under IHL is that of civilians. However, their status and/or protection may change in case they take direct participation in hostilities. This scenario seems to have taken place in the Colombian context given the process of *militarization* of the police described above.

Question 4:

4. Constitutional Amendment 1 of 2017 and Law 1957 of 2019, as well as the Constitutional Court's Ruling C-674 of 2017 and C-080 of 2018, establish that JEP must focus on the investigation, prosecution and sanction of "the most responsible for the most serious and representative crimes". In accordance with this, it is asked:

4.1 Have the statutory or hybrid international criminal tribunals (Nuremberg, Tokyo, Yugoslavia, Rwanda, Sierra Leone, Cambodia, East Timor, Kosovo, International Criminal Court) used that notion of "most responsible for the most serious and representative crimes" to investigate, prosecute and sanction behaviours under their jurisdiction? If so, what have been the criteria or parameters for its application?

As will be shown below, the majority of international criminal tribunals have taken into account the notions of most responsible and grave crimes. In doing so, some tribunals[119] have used these concepts as criteria for the selection and prioritization of cases, while for others, these concepts constitute limits to their jurisdiction provided for in their respective Statute.[120]

4.1.1 The Military Tribunals

4.1.1.1 Nuremberg

According to its Preamble, the scope of this international military tribunal was to prosecute the "Major War Criminals of the European Axis."[121] The idea was initially set forth in the Declaration on German Atrocities (Moscow declaration), in which it was stated that:

[119] Mainly the ICC, the ICTY, the ICTR and the Special Court for Sierra Leone (SCSL).

[120] Mainly the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Extraordinary African Chambers (EAC) and the Special Tribunal for Lebanon (STL).

[121] United Nations, *Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945, available at: <https://www.refworld.org/docid/47fdfb34d.html> accessed 17 March 2020.

> "The above declaration [concerning sending Germans who had committed atrocities back to the territory where these acts were perpetrated] is without prejudice to the case of the major criminals whose offenses have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies."[122]

Therefore, the notion of "major criminals", similar to that of individuals who "bears the most responsibility", was intrinsic to the tribunal's jurisdiction. Article 1 of the London Agreement defined who would be those war criminals 'whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.'[123]

On his report to the U.S President, Justice Jackson, Chief of Counsel for the United States, explained that this military tribunal would build its cases "against the major defendants concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan".[124]

Moreover, he gave some guidance regarding how to asses who those individuals were, by saying "individuals and officials who were in authority in the government, in the military establishment, including the General Staff, and in the financial, industrial, and economic life of Germany who by all civilized standards are provable to be common criminals".[125]

However, in practice, this criterion was defined arbitrarily because "no guiding principles of selection had been agreed on".[126]

---

[122] Moscow Declaration on Atrocities by President Roosevelt, Mr. Winston Churchill and Marshal Stalin, issued on November 1, 1943, available at <https://www.cvce.eu/content/publication/2004/2/12/699fc03f-19a1-47f0-aec0-73220489efcd/publishable_en.pdf> accessed on 17 March 2020.

[123] Article 1, London Agreement.

[124] Justice Jackson's Report to the President on Atrocities and War Crimes, 7 June 1945, available at <https://avalon.law.yale.edu/imt/imt_jack01.asp> accessed on 17 March 2020.

[125] *Ibidem.*

[126] Telford Taylor, "The Anatomy of the Nuremberg Trials: A Personal Memoir", Chapter 5, page 90 (1992).

4.1.1.2 Tokyo

The International Military Tribunal for the Far East (IMTFE) applied the Nuremberg tribunal's rationale, which, according to Article 1 of the IMTFE's charter, was to ensure the "prompt trial and punishment of the major war criminals in the Far East".[127] Once again, the concept of "major war criminals", understood also as those "most responsible", was part of the tribunal's jurisdiction.

Nonetheless, it does not seem clear that the selection of accused and, consequently, the selection of cases was being guided by parameters other than politics because the "comprehensive list" of war criminals was the responsibility of General MacArthur with President Truman's support and not including Emperor Hirohito was a reflection of this parameter.[128]

4.1.2 The *Ad hoc* Tribunals

4.1.2.1 International Criminal Tribunal for the Former Yugoslavia (ICTY)

The competence for the ICTY was broad since it determined that it would prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991".[129] This did not necessarily involve the prosecution of high-level perpetrators.[130]

Article 16 of the ICTY Statute gave an independent power to the Prosecutor to investigate and prosecute, which meant that it was solely the responsibility of the Prosecutor to select cases to be brought before the tribunal.[131] According to article 19(1) of the same Statute,

---

[127] Article 1, Charter of the IMTFE.

[128] Timothy P. Maga, "Judgment at Tokyo: The Japanese War Crimes Trials", Chapter 2, page 35 (2001).

[129] Article 1, ICTY Statute.

[130] The bench of Judges, in 1995, disagree with the Prosecution bottom-up approach (targeting low-level suspects and only at a later stage moving up the ladder of command to indict persons in senior positions) once it had the view that the role of the tribunal was to target the military and political leaders or the high-ranking commanders, based on the notion of command responsibility as laid down in Article 7(3) of the Statute. See: Antonio Cassese, *The ICTY: A Living and Vital Reality*. 2 J. Int'l Crim. Just. 585 (2004).

[131] Article 16. The Prosecutor
1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

the trial chamber only had the power to review the decision made by the prosecution on the grounds of whether the evidentiary threshold of a "*prima facie* case" had been met.[132] In other words, this implied that it was not for the judges to review the prosecutor's discretion in deciding who to bring to justice.[133]

In October of 1995, the ICTY-Office of the Prosecutor (ICTY-OTP) adopted its first policy on the selection of cases, stressing that "the person to be targeted for prosecution" should meet one of the criteria. The ICTY-OTP explained this yardstick in terms of factors that would have to be taken into account:

- Position in hierarchy under investigation;
- political, military, paramilitary or civilian leader;
- leadership at municipal, regional or national level;
- nationality;
- role /participation in policy/strategy decisions;
- personal culpability for specific atrocities;
- notoriousness /responsibility for particularly heinous acts;
- extent of direct participation in the alleged incidents;
- authority and control exercised by the suspects;
- the suspect's alleged notice and knowledge of acts by subordinates;
- arrest potential;
- evidence /witness availability;

---

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations. 5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

[132] Article 19. Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

[133] In the same sense: Partial Dissenting Opinion of Judge Wald, Judgement, *Jelisic* (IT-95^10-A), Appeals Chamber, 5 July 2001, §4.

- media /government/NGO target; and
- potential roll-over witness/likelihood of linkage evidence.[134]

It did not address the concept of "most responsible," and, as argued by Professor Bergsmo, it was a list of a mixture of factors without any clear characteristic in common, such as gravity.[135]

In 1998, assessing its work, the ICTY-OTP concluded that only a few of its cases related to persons with leadership responsibility.[136] This analysis led to a review of the cases, resulting in the withdrawal of charges against 14 accused. In the statement given by the Chief Prosecutor at the time, she explained that this was part of a re-evaluation of the ICTY-OTP strategy. It also meant that from now on, "it would focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences".[137]

The ICTY was asked to rule on this shift in the prosecution's policy. In the *Čelebići* case, one of the Defendants challenged the Prosecutor's decision to withdraw the 14 charges. Mainly, he argued that he was the victim of a selective prosecution because he was a "low-level accused" that did not "benefit" from the withdrawal of charges (he was the only Muslim while those against whom charges had been withdrawn were Serbian), contravening the principle of equality intrinsically laid down in Article 21 of the ICTY Statute.[138]

Although the Appeals Chamber ultimately dismissed the appeal, it set out some guidelines regarding the case selection policy of the Prosecutor. First, it stipulated that despite the Prosecutor's broad discretion regarding the initiation of investigations and indictments, this power was not unlimited but subject to certain limitations contained in

[134] Morten Bergsmo et.al, "The Backlog of Core International Crimes Case Files In Bosnia And Herzegovina", Chapter 5, page 99 (2010).

[135] Ibid, page 100.

[136] Morten Bergsmo, "Criteria for Prioritizing and Selecting Core International Crimes Cases", Chapter 5, page 34 (2010).

[137] ICTY, Press Release, Office of the Prosecutor, Statement by the Prosecutor following the withdrawal of the charges against 14 accused, CC/PIU/314-E, 8 May 1998.

[138] ICTY, *The Prosecutor v Delalić,* Judgment, Appeals Chamber, 20 February 2001, § 598 and 612. ('Čelebići').

the Statute and Rules of Procedure and Evidence of the Tribunal.[139] Accordingly, the Prosecutor is only allowed to exercise her functions in accordance 'with full respect of the law,' which includes 'recognized principles of human rights'[140], one such principle being equality before the tribunal.[141]

The Appeals Chamber then stated that the burden of proof lay on the accused to prove that this principle had been violated, by showing that the prosecution was based on an "unlawful or improper (including discriminatory) motive"; and that "other similarly situated persons were not prosecuted".[142] The Appeals Chamber rejected the grounds for appeal, holding that the prosecutorial policy was not only limited to persons holding higher levels of responsibility but also included notorious offenders, a category that the defendant fit into.[143]

In 2000, through the Resolution 1329 (2000) by the Security Council,[144] the ICTY completion strategy, consisting mainly in the possibility of referring cases back to national jurisdictions pursuant to Rule 11*bis* of the Rules of Procedure and Evidence (RoPE), was adopted. Said referrals were justified, among other criteria, on the level of responsibility of the accused, which implied that intermediate and low level perpetrators should be prosecuted by national courts, when appropriate,[145] as well as 'gravity of the crimes charged.'[146]

---

[139] *Idem.* at § 602.

[140] *Idem.* at § 604.

[141] *Idem.* at § 605.

[142] *Idem.* at § 607.

[143] *Idem.* at § 614.

[144] United Nations Security Council, Resolution 1329, UN Doc. S/RES/1329 (2000), 5 December 2000. (Resolution 1329).

[145] Resolution 1329, preamble, § 7-8.

[146] Rule 11 *bis*. Referral of the Indictment to Another Court
(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard.
(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall, in accordance with Security Council Presidential Statement S/PRST/2002/21, consider the gravity of the crimes charged and the level of responsibility of the accused.

In addition to these measures the UN Security Council passed Resolution 1534 which required the judges to ensure that new indictments focused on the "most senior leaders suspected of being most responsible for crimes" in the Tribunal's jurisdiction.[147]An interesting point is that the Security Council's language seems to suggest that "the senior leaders" are also the "most responsible" for the commission of crimes.[148]

It transpires from the above that this Tribunals' understanding of the notion of most responsible is linked to the level of seniority of the perpetrators, a factor that, together with gravity, led to the deferral of cases to national jurisdictions. As described in the ICTY Manual on Developed Practices, "defining who are the "most senior leaders", the Referral bench focuses on those who, by virtue of their position and function in the relevant hierarchy, both de jure and de facto, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the "most senior" rather than as "intermediate".[149] The case-law of the Referral bench illustrates this description and also develops the standards for applying the concept of gravity.[150] For instance, in the *Prosecutor v. Milošević* case, the Referral Bench, when assessing the gravity of the crimes charged against *Milošević,* took into account duration, number of civilians affected, extent of property damage, and number of military personnel involved.[151]

4.1.2.2 International Criminal Tribunal for Rwanda (ICTR)

The ICTR, as a twin tribunal to the ICTY, also had a broad mandate. It was established to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and

[147] United Nations Security Council, Resolution 1534, UN Doc. S/RES/1534 (2004), 26 March 2004.

[148] Morten Bergsmo, "Criteria for Prioritizing and Selecting Core International Crimes Cases", Chapter 5, page 40 (2010).

[149] ICTY, Manual on Developed Practices, page 168 (2009).

[150] ICTY, *Prosecutor v. Dragomir Milošević*, Decision on Referral of Case pursuant to Rule 11*bis*, Referral Bench, 8 July 2005, at § 19-22; ICTY, *Prosecutor v. Ademić et al.*, Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule 11*bis*, Referral Bench, 14 September 2005, at § 28-30;ICTY, *Prosecutor v. Gojko Janković*, Decision on Referral of Case under Rule 11*bis* (With Confidential Annex), Referral Bench, 22 July 2005, at § 18-19.

[151] ICTY, *Prosecutor v. Dragomir Milošević*, Decision on Referral of Case pursuant to Rule 11*bis*, Referral Bench, 8 July 2005, at § 24.

31 December 1994".[152] Following the ICTY, the Prosecutor for the ICTR was also granted the discretionary power to investigate and prosecute.[153]

Designing a prosecution strategy for this conflict was challenging because it concerned three categories of international crimes, namely genocide, crimes against humanity, and war crimes, where between 30% and 50% of the population was involved in the killings.[154]

It seems that the notion of investigating, prosecuting, and punishing persons "most responsible" for the crimes under the jurisdiction of this tribunal was not as present as it was in the ICTY. With the completion strategy stipulated by the Security Council,[155] the prosecution policy suggested that the focus was not necessarily on individuals who bear the most responsibility but on individuals who perpetrated the most "serious" violations of international law.

Accordingly, since the ICTR did not define "seriousness", the Prosecutor based her decision on the nature of the crime and the role played by each perpetrator, concluding that the crime of genocide fell into the category of "serious" crime.[156]

Bearing this in mind, the Prosecutor "consciously decided to include all of the various groups represented in the atrocities to ensure that different types of involvement were covered".[157] Hence, the targeting strategy of the Prosecutor was not exclusively limited to

[152] Article 1, ICTR Statute.

[153] Article 15: The Prosecutor
1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.

[154] Morten Bergsmo, "Criteria for Prioritizing and Selecting Core International Crimes Cases", Chapter 6, page 50 (2010).

[155] United Nations Security Council, Resolution 1503, UN Doc. S/RES/1503 (2003), 28 August 2003.

[156] Morten Bergsmo, "Criteria for Prioritizing and Selecting Core International Crimes Cases", Chapter 6, page 56 (2010).

[157] *Ibid.*

persons with the "highest responsibility", but the criterion applied was their "level of participation and their standing in society".[158]

This practice is evident in the case-law of the ICTR, which demonstrates that charges were brought against members of the government in power, the ruling party, the National Republican Movement for Democracy and Development (MRND) and the senior military leadership,[159] senior members of the Rwanda Defence Force (FAR), Civil Defence forces and the leaders of the *Interahamwe*,[160] directors and senior employees of the radio RTLM and newspaper *Kangura*[161] and members of the clergy (based on their individual participation).[162]

4.1.3 The International Criminal Court (ICC)

In contrast to the tribunals that came before it, the ICC engages in a phase of preliminary examination after which, if there is reasonable basis to proceed with an investigation, the OTP may request its opening to the Pre-Trial Chamber. The selection and prioritization of situations and cases by the Prosecutor is part of the exercise of her discretionary powers. However, the OTP has offered guidance as to what criteria is used to determine what situations and cases are selected and prioritized. These criteria are: i) the gravest crimes, ii) the most responsible alleged perpetrators and iii) the types of victimization, including sexual and gender-based crimes and crimes against children.[163]

---

[158] *Ibid.*

[159] For example: ICTR, The *Prosecutor v. Jean Kamuhanda*, Case No. ICTR-99-54;ICTR, *The Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-01-71; ICTR, *The Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14; ICTR, *The Prosecutor v. Clement Kayishema*, Case No. ICTR95-I; ICTR, *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T.

[160] For example: ICTR, *The Prosecutor v. Augustin Bizimungu,* Case No. ICTR-00-56B-A; ICTR, *The Prosecutor v. Major Innocent Sagahutu*, Case No. ICTR-00-56-A; and ICTR, The Prosecutor v. George Rutaganda, Case No. ICTR-96-3 (Interahamwe leader).

[161] For example: ICTR, The Prosecutor v. *Ferdinand Nahimana*, Case No. ICTR-96-11; ICTR, *The Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICTR-97-19.

[162] For example: ICTR, The *Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-01-70; ICTR, The *Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66.

[163] ICC, Office of the Prosecutor, Regulations, ICC-BD/05-01-09, 23 April 2009, Regulation 34; ICC, Office of the Prosecutor, Policy Paper on Case Selection and Prioritization, 15 September 2016, § 35-46.

Choosing who should be investigated and eventually prosecuted is one of the cornerstones of the prosecutorial strategy. The OTP's policy on this matter should take into consideration the following criteria:

(i) The guidance set up in the Preamble of the Rome Statute, such as 'the most serious crimes of concern to the international community as a whole must not go unpunished'[164] and the 'establish[ment of] 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';[165]

(ii) Articles 5 and 17 of the Rome Statute which provide, respectively, a limitation on the Court's jurisdiction regarding the 'most serious crimes of concern to the international community as a whole',[166] and the possibility to dismiss a case if it does not reach a gravity threshold;[167]

(iii) Prosecutorial discretion to assess if a case serves the "interests of justice."[168]

[164] Rome Statute, preamble, §4.

[165] Rome Statute, Preamble, §9.

[166] Article 5. Crimes within the jurisdiction of the Court
The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction under this Statute with respect to the following crimes:
(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.

[167] Article 16. Issues of admissibility
1.Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(d) The case is not of sufficient gravity to justify further action by the Court.

[168] Article 53 (1)(c) and (2) (c), Rome Statute.

Therefore, as a general rule, the OTP concludes that it 'should *focus* its investigative and prosecutorial efforts and resources on *those who bear the greatest responsibility*, such as the leaders of the State or organisation allegedly responsible for those crimes.'[169]

In a recent strategic plan issued, the OTP expanded even further its understanding and strategy with respect to the selection of a case based on the notion of the "most responsible".

> "Where deemed appropriate, the Office will implement a building-upwards strategy by first investigating and prosecuting a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable prospect of conviction for the most responsible.
>
> Pursuing this in-depth and open-ended approach, the Office will first focus on a wide range of crimes to properly identify organisations, structures and individuals allegedly responsible for their commission. It will then consider mid- and high-level perpetrators in its investigation and prosecution strategies to build the evidentiary foundations for subsequent case(s) against those most responsible. The Office will also consider prosecuting lower level perpetrators where their conduct was particularly grave and has acquired extensive notoriety".[170]

Hence, the OTP determined the criteria when assessing the concept of "most responsible" on a case-by-case basis depending on the evidence available during the investigation proceedings and not necessarily entailing the *de jure* hierarchical role of an individual within a structure. Aspects that should be scrutinized are, among others, 'the nature of the unlawful behaviour; the degree of their participation and intent; the existence of any motive involving discrimination; and any abuse of power or official capacity.'[171]

---

[169] ICC, Office of the Prosecutor, Paper on some policy issues before the Office of the Prosecutor, September 2003, page 7 (emphasis added).

[170] ICC, Office of the Prosecutor, Strategic Plan 2016-2018, § 36.

[171] *Ibid,* § 43.

Concerning the gravity and seriousness of the crime as criteria for selection and prioritization of cases, The Prosecutor stated in her Policy Paper on case selection that the notions of "gravest crimes" is measured on a quantitative and qualitative basis including an assessment on the nature, scale manner of commission and impact of the crimes.[172] The Scale is measured by, "inter alia, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread (high intensity of the crimes over a brief period of low intensity of crimes over an extended period)".[173] The manner of commission of a crime takes into account factors such as systematicity or organization, cruelty, vulnerability of victims, etc.[174] Finally, the impact of the crime could be measured by the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities".[175]

4.1.4 Hybrid Tribunals

4.1.4.1 Specialist Panels for Serious Crimes - East Timor

The Special Panels for Serious Crimes (SPSC) established by the UN Transitional Authority in East Timor (UNTAET) had the mandate to deal with serious criminal offences[176] which, according to Article 1.3, are listed as: (i) genocide; (ii) war crimes; (iii) crimes against humanity; (iv) murder; (v) sexual offences; and (vi) torture. In Regulation No. 2000/15, which created the SPSC, it does not encompass the concept of "most responsible for the most serious and representative crimes" in its text.

A first attempt at the Serious Crime Unit (specialized unit for the Public Prosecution Service) was to adopt a policy to pursue 10 "priority cases" involving crimes against humanity and massacres or murder of multiple victims. The criteria for choosing these

[172] ICC, Office of the Prosecutor, Policy Paper on Preliminary Examinations, 1 November 2013, § 61-66.

[173]ICC, Office of the Prosecutor, Policy Paper on Case Selection and Prioritization, 15 September 2016.

[174] *Ibid.*

[175] *Ibid.*

[176] United Nations Transitional Administration in East Timor (UNTAET), Regulation n. 2000/15, UNTAET/REG/2000/15, 6 June 2000, Article 1.1.

cases was the number and type of victims, the seriousness of the crimes and their political significance, and the availability of evidence.[177]

In early 2002, under the command of a new Deputy General Prosecutor for Serious Crimes (DPGSC), Ms. Siri Frigaard, the shape of investigation changed. She continued to indict and prosecute low-ranking Timorese connected to the 10 priorities case previous selected (most related to murders) but she also implemented a new strategy, focusing on high-level Indonesian suspects who had played a leadership role in organizing or perpetrating crimes against humanity in 1999.[178]

> "The justification for the decision by the DPGSC Siri Frigaard in 2002 to pursue indictments for a group of key high-ranking Indonesian officers is clear. To have done otherwise would have meant that those most responsible for the violence in East Timor in 1999 would have not only enjoyed total impunity but would not even have had a record of their crimes provided for the international community and the people of East Timor".[179]

It is noteworthy that the Serious Crime Unit, had its hands tight to seek a policy on the perpetrators who "bear the greatest responsibility" or were "most responsible" due to the lack of resources and the fact that all of the mid-level and high-ranking suspects were in Indonesia, outside the jurisdiction of the Special Panels (and the Special Panels could not count on the cooperation of the Indonesia Government).[180] Even though it tried,

---

[177] International Center for Transitional Justice, Prosecutions Case Studies Series, "The Serious Crimes Process in Timor-Leste: In Retrospect", March 2006, page 19, available at <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf> accessed on 17 March 2020. On a different view: David Cohen, Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor", East-West Center Special Reports, No. 9, June 2006, pages 13 and 14.

[178] International Center for Transitional Justice, Prosecutions Case Studies Series, "The Serious Crimes Process in Timor-Leste: In Retrospect", March 2006, page 20, available at <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf> accessed on 17 March 2020.

[179] David Cohen, "Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor", East-West Center Special Reports, No. 9, June 2006, page 15.

[180] Ibid.

according to the information provided by the International Bar Association, only low-level offenders faced justice in that system.[181]

4.1.4.2 Specialist Chambers and Specialist Prosecutor's Office - Kosovo

The Law No. 05/L-053 established the Specialist Chambers and Specialist Prosecutor's Office, which had, as a mandate, to ensure criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo.[182]

The Prosecutor has the power to investigate and prosecute persons responsible for the crimes falling within the jurisdiction of the Specialist Chambers which does not entail the notion of "most responsible for the most serious and representative crimes."[183]

Besides, it is relevant to stress that the Council of Europe Parliamentary Assembly Report on "inhuman treatment of people and illicit trafficking in human organs in Kosovo" affirmed that '[w]henever a conflict has occurred, all criminals must be prosecuted and held responsible for their illegal acts, whichever side they belonged to and irrespective of their political role.' This argument may be interpreted as not making any distinction between who should be investigated and prosecuted by this hybrid tribunal.

To this date, there is no document available suggesting that the concept of "most responsible for the most serious and representative crimes" was adopted either by the Specialist Chambers or the Specialist Prosecutor's Office through a prosecution strategy.

1. **The Special Court for Sierra Leone (SCSL)**

The SCSL stated in Article 1 of its Statute that it would exercise its jurisdiction over persons "who bear the greatest responsibility".[184] Also, Article 15 of the same Statute determines the Prosecutor's role, which, *inter alia*, is to investigate and prosecute persons

[181] Special Panel for Serious Crimes (East Timor), available at <https://www.ibanet.org/Committees/WCC_EastTimor.aspx> accessed on 17 March 2020.

[182] Law on Specialist Chambers and Specialist Prosecutor's Office, Law No.05/L-053, Article 1(2).

[183]Rules of Procedure and Evidence before the Kosovo Specialist Chambers including Rules of Procedure for the Specialist Chamber of the Constitutional Court, Article 35(1).

[184] Article 1, SCSL Statute.

who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[185]

Therefore, for selecting a case to go to trial, it must be understood how to define who those individuals 'who bear the greatest responsibility' are. In the case of *Prosecutor v. Moinina Fofana*, the Defence challenged the Court's jurisdiction on the grounds that the accused did not belong in the class of "persons who bear the greatest responsibility".[186]

The prosecution, in its response, argued that it is a matter of the prosecution's discretion to determine who the individuals were that fell into this category. It explained that 'the only sensible interpretation of the words "those who bear the greatest responsibility" is that of Prosecutorial discretion whereby the Prosecution is called upon to decide, based upon all of the evidence it has collected in the course of its investigations, which persons it considers to bear the greatest responsibility for the crime within the jurisdiction of the Special Court and to indict those persons.'[187]

Accordingly, it was for the Trial Chamber to decide if the expression "persons who bear the greatest responsibility" referred to the personal jurisdiction of the Court or whether this was concerned with the prosecutorial strategy. An assessment of the *travaux preparatoires* led the Court to conclude that while the term was a jurisdictional requirement and of course, guided prosecutorial strategy, it did not constrain it. This meant that it was the Prosecution's decision, based on the evidence available, to decide who fulfilled this criterion.[188]

---

[185] Article 15, SCSL Statute.

[186]SCSL, *Prosecutor v. Moinina Fofana*, Preliminary Defence Motion on the Lack of Personal Jurisdiction, Trial Chamber, 17 November 2003.

[187] *SCSL, Prosecutor v. Moinina Fofana*, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, Trial Chamber, 3 March 2004, at § 6.

[188] *Ibid,* § 30.

4.1.4.3 The Extraordinary Chambers in the Courts of Cambodia (ECCC)

As with the SCSL, the ECCC exercises jurisdiction over those most responsible.[189] However, Article 1 of the UN-Cambodia Agreement also provides for jurisdiction over "senior leaders of Democratic Kampuchea […] for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia".[190]

In the view of the Office of Co-Prosecutors (OCP), there is a distinction between "senior leaders" and "most responsible". The former consists in 'those individuals who were in the highest political, governmental and/or military positions at the national level during the DK period and whom it believes had direct or superior responsibility for crimes committed during that time.'[191]

The "most responsible" should encompass 'individuals who, apart from being most responsible for chargeable crimes, participated in the crimes directly and were superiors of subordinates who committed those crimes while under their effective control. These individuals will have held positions of political, governmental, and or military leadership.'[192]

Finally, for selecting the "senior leaders" or those "most responsible", a gravity threshold should be considered by the OCP. This standard implies examining the scale of the crimes, the nature of the crimes and the manner of their commission, including 'the number and vulnerability of the victims, the systematic nature of the crimes, the presence of elements of particular cruelty, as well as crimes involving discrimination.'[193]

---

[189] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (UN-Cambodia Agreement), Article 1: "The purpose of this law is to [...] bringing to trial those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979" (emphasis added).

[190] UN-Cambodia Agreement, Article 1.

[191] Roberto Bellelli, "International Criminal Justice", Chapter 7, page 150 (2016).

[192] *Ibid*.

[193] *Ibid.*

4.2 What are the similarities, common features or differences between the notion of "most responsible for serious and representative crimes" that the statutory or hybrid criminal courts, as well as the judicial systems of other countries, have applied when investigating, prosecuting and sanctioning offenses under their jurisdiction, and the treatment that Colombia's Constitutional Court and its Supreme Court of Justice have given to such notion?

The concept of "most responsible" for the "most serious and representative crimes" was introduced in Colombia as part of the "legal framework for peace" by Constitutional Amendment 1 of 2012. The Constitutional Court, when reviewing this expression in judgment C-579/13, determined that these criteria for selection and prioritization of cases applied without prejudice to the State's international obligations under human rights and humanitarian law. This concept was later used in Constitutional Amendment 1 of 2017 to define the criteria for selection and prioritization of cases to be investigated and prosecuted at the JEP. However, neither of these instruments defined what "most responsible" or "most serious and representative crimes" mean.

This was the task of Statutory Law 1957 of 2019, which, in Article 19, stated that gravity is to be understood as "the degree of harm to individual and collective fundamental rights, the violence and systematicity in the commission of the crimes". The same Article goes on to describe representativity as "the potential effect to show the modus operandi and patterns of criminality".

The law did not define the term most responsible. In its place it set as the selection and prioritization criterion the individual's "active or determinative participation in the commission of the crimes under the JEP's jurisdiction". Then, Article 19 goes beyond the concept of most responsible for the most serious and representative crimes by introducing two additional factors: i) vulnerability of the alleged victims on the basis of historical, social or cultural patterns of discrimination on the basis of ethnicity, gender, age, disability, sexual orientation and/or gender identity"; and ii) availability of evidence.

In reviewing the constitutionality of Law 1957, the Constitutional Court in judgement C-080 of 2018 found that the gravity criterion refers to those crimes within the subject-matter jurisdiction of the ICC and representativity refers to a repetitive fact-pattern in which said crimes were allegedly committed. In relation to the most responsible criterion, the Court acknowledged and reconciled the differences in the wording of Constitutional Amendment 1 of 2017 ("most responsible") and of Law 1957 ("those with active or determinative participation") and considered as equally valid factors for selection and prioritization of cases individuals that are i) most responsible and those that have ii) actively or iii) deliberately participated in the commission of the crimes.[194]

Finally, it is the understanding of the Constitutional Court that the selection and prioritization of cases at the JEP must lead to the creation of macro-cases that denote "systemic crimes".[195] A similar approach has been taken by Colombia's Supreme Court when applying these criteria in the context of the Justice and Peace Law (Law 975) of 2005. Here, the Court understood the focus on macro-criminality as a necessary tool for "investigation of the most responsible and a way to unveil the criminal structure and modus operandi [of the perpetrators]".[196]

This overview, together with the findings of the answer to question 4.1., are indicative of the similarities and differences between the JEP and the studied International Criminal Tribunals with respect to the prioritization and selection of cases. First of all, the JEP's selection and prioritization strategy is in line with the ICC's understanding of "most responsible" being independent from the notion of seniority or the *de facto* responsibility based solely on hierarchical structures that characterized the later practice of the ICTY. This approach also favours the degree of participation and intent of the perpetrators as it is common practice at the ICC. Additionally, it could be said that the understanding of the gravity criterion applicable in Colombia is similar to that of the ICC. In both systems, the assessment on gravity is based, inter alia, on the nature, scale, manner of commission and impact of the crimes as well as its systematicity or degree of organization. It must be said, however, that the analysis of gravity at the ICC and the JEP take into account

[194] Constitutional Court, Judgement C-080 of 2018.

[195] *Ibid.*

[196] Supreme Court of Justice, Judgement SP5831-2016/46061, 4 May 2016.

different sets of factors. At the ICC, for example, these include the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread (high intensity of the crimes over a brief period of low intensity of crimes over an extended period). At the JEP on the other hand, factors of gravity include historical, social or cultural patterns of discriminations on the basis of ethnicity, gender, age, disability, sexual orientation and/or gender identity.

These and other similarities between selection and prioritization in Colombia and other international and hybrid tribunals is presented in Annex 2 which includes a table on all tribunals and their criteria. [197]

[197] Notice: even if the question included a reference to national jurisprudence, due to time restraints, it could not be addressed.

Question 5:

5. According to article 23 of Law 1820 of 2016, amnesties cannot be granted for war crimes. Consequently, when a conduct is classified under this category of international crimes, according to article 25 of the Law, the Judicial Panel for Amnesties or Pardons submits it to the Judicial Panel for the Acknowledgement of Truth and Responsibility or the Judicial Panel for the Definition of Legal Situations.

Colombia explicitly incorporated the notion of war crimes to its legal system through Law 742 of 2002, which approved the Rome Statute. However, Colombia, pursuant to Article 124 of the Rome Statute, determined that the International Criminal Court would not have jurisdiction to prosecute war crimes for seven years from the entry into force of the treaty, a period which ended on November 1st, 2009.

As noted above, the JEP, in accordance with Constitutional Amendment 1 of 2017 and Law 1957 of 2019, can legally qualify the offenses under its subject-matter jurisdiction based on the Colombian Criminal Code and/or international human rights law, international humanitarian law and international criminal law, always observing the principle of most favourable legislation. In accordance with this, it is asked:

Before dwelling into the questions of this section, a few observations are in order. First, while it appears to be argued that Law 742 of 2002 introduced the notion of war crimes in Colombia's legal system, a closer look at that Law suggests that its effect is simply to "approve" or "domesticate" the Rome Statute of the ICC; such approval does not necessarily entail the incorporation of crimes under the jurisdiction of the Court into national legislation as this is not an obligation derived from adherence to the Statute. In other words, by approving or domesticating the Rome Statute, Law 742 of 2002 recognizes the exercise of the ICC's jurisdiction in Colombia.

Second, in light of the answer to question 1.2. above, the notion of war crimes has been present in Colombia's criminal code of 2000. The code included a vast, albeit incomplete, catalogue of war crimes. Now that these points have been clarified, this study will proceed with a response to questions 5.1. to 5.4.

5.1 Is it appropriate or not to use the Rome Statute to prosecute crimes that were committed before the entry into force of that international treaty?

The Rome Statute creates the ICC and grants it the power to investigate and prosecute the crimes of Genocide, Crimes Against Humanity and War Crimes committed in the territory or by a national of a State party upon its ratification.[198] Retroactive application of this treaty would occur if the ICC exercised its jurisdiction prior to that date. This would violate the principle of non-retroactivity envisaged in Article 24 of the Statute.

That said, some provisions of the Rome Statute allow for its retroactive application in certain cases. First, the Rome Statute can apply retroactively in case a State makes a declaration under Article 12(3) to that effect. With this declaration, a State which is not party to the Statute can grant the Court jurisdiction for crimes that occurred prior to said declaration; thus, applying the Rome Statute retroactively. This was the case with Ukraine's Article 12(3) declaration that covered crimes in 2013, even though the declarations were logged in 2014 and 2015.

Another exception to the non-retroactivity rule is that enshrined in Article 13(b) of the Rome Statute: United Nations Security Council (UNSC) referrals. A referral by the UNSC to this effect allows the ICC to exercise jurisdiction over a State not party to the Statute and to investigate and prosecute conducts that occurred prior to the referral. As an example, UNSC Resolution 1593 of 2005 referred the situation in Sudan (Darfur) and allowed the ICC to investigate alleged crimes committed since 1 July 2002. Crimes committed before 1 July 2002, however, may not be tried by the ICC under any circumstance.[199]

[198] Article 11 of the Rome Statute.

[199] Robert Cryer, et al. "An introduction to International Criminal Law and Procedure", Chapter 8. page 150 (2019): "Even if the Security Council were minded to refer a situation to the ICC in which the alleged crimes were committed before the entry into force of the Statute, the Court would not be able to exercise its jurisdiction, since it is a creature

As to the particular case of the JEP judiciary, it must be said that in principle the same rules apply. While it is true that Article 5 of Constitutional Amendment 1 of 2017 and Article 23 of Law 1957 of 2018 allow JEP judges to directly apply treaty and customary international law, the fact remains that the principle of non-retroactivity, in addition to the strict interpretation of the principle of legality in Colombia's legal tradition, enshrined in Article 29 of its Constitution and Article 6 of the Colombian Criminal Code [200], would bar the retroactive application of a treaty, especially concerning criminal or related proceedings. In other words, JEP judges are barred from retroactively applying the Rome Statute, that is, granting the ICC jurisdiction over crimes against humanity before 1 November 2002 and war crimes before 1 November 2009.

Notwithstanding the foregoing, building on the possibility to legally qualify conducts by directly applying customary international law as envisaged by Article 5 of Constitutional Amendment 1 of 2017, JEP judges may directly apply those provisions of the Rome Statute that are reflective of custom at the time of the offence, regardless of the entry into force of the Statute. This is because, while the application of the Rome Statute refers to the exercise of ICC's jurisdiction, the provisions of the Statute regarding its subject-matter jurisdiction are mostly to be seen as a reflection of customary international law.[201]

Legislation introducing crimes under the jurisdiction of the ICC into national legislation in Canada, New Zealand and the United Kingdom, allow these crimes to be prosecuted previous to the entry into force of the Statute in 1 July 2002, provided they are representative of custom at the time of their occurrence.[202]

In light of this, it becomes clear that the retroactive application of a treaty is not necessarily prohibited. In case where the war crimes provisions of the treaty are a reflection of customary norms, the application of such rule would be legitimate. Hence,

---

of the Statute, not of the Security Council, and, although the Council's resolutions may override the treaty obligations of States (UN Charter, Art. 103), they cannot change the powers of an independent organization".

[200] The Political Constitution of the Republic of Colombia, Article 29, and the Colombian Criminal Code, Article 6, read as follows: "No person shall be tried in the absence of pre-existing legislation to the facts charged [...]".

[201] For further reference, see: Yudan Tan, "The Rome Statute as Evidence of Customary International Law" (2019).

[202] See e.g. Canadian Crimes Against Humanity and War Crimes Act 2000 that expressly recognized the Rome Statute as a reflection of custom; New Zealand International Crimes and International Criminal Courts Act 2000; UK Coroners and Justice Act 2009 provides for jurisdiction over war crimes since 1 January 1991.

JEP judges can apply the customary rule contained in certain provisions of the Rome Statute to events prior 1 July 2002; especially those concerning war crimes, for which its customary status is beyond any doubt.[203] Attention must be given, however, to the time in which a particular war crime crystallised into customary international law on a case-by-case basis.[204]

5.2 Is it appropriate or not to use the Rome Statute to prosecute crimes that were committed during the time of the opt-out clause exercised by Colombia?

Drawing from the answer to question 5.1., it must be said that the retroactive application of a treaty is prohibited under all circumstances. This includes during the time of the opt-out clause of article 124 of the Rome Statute. In the case of Colombia, that means that the direct application of the Rome Statute is only possible with regard to war crimes from 1 November 2009 onwards.

However, as explained above, Article 5 of Constitutional Amendment 1 of 2017 allows JEP judges to directly apply customary international law. In this sense, if provisions of the Statute were already considered to be reflective of custom that crystallised prior to 2002, there is no reason to believe that this circumstance changed during the time of the opt-out clause between 2002 and 2009. Therefore, while not directly, the use of the Rome Statute by JEP judges to legally classify conducts as war crimes that are reflective of customary international law at the time of the offence is appropriate before 1 July 2002 and during the period of the opt-out clause (2002-2009).

[203] Yudan Tan, "The Rome Statute as Evidence of Customary International Law" (2019).

[204] *Idem*: "War crimes for violations of Common Article 3 in non-international armed conflict were generally accepted before the 1998 Rome Conference, while war crimes for other serious violations in non-international armed conflicts were crystalized at the 1998 Rome Conference"

5.3 Are there principles and/or rules of international criminal law, international humanitarian law and international human rights law that allow or bar the application the Rome Statute in the two cases mentioned before?

Thus far this text has hinted at a series of general principles of international law that may be in tension with the application of those provisions of the Rome Statute that are representative of customary international law. These principles are the principle of non-retroactivity and the principle of legality. On its face, the retroactive application of a treaty would imply a sacrifice of these general principles. However, as explained in the two cases above, the principles of legality and non-retroactivity are not affected when the application of the treaty provision is in fact the application of the customary international law rule that it reflects.

Another separate issue relates to the tension that is created when customary international law forms the basis for criminal prosecution. This tension is more prominent in countries with a traditional understanding of the principle of legality in their criminal system – *nullum crime sine lege scripta* –. Much ink has been spilt on this debate that dates back from the genesis of modern International Criminal Law.[205] The argument on violation of the principle of legality was put forward by defendants in the Nuremberg and Tokyo IMTs and in the *ad hoc* tribunals. All of these arguments were rejected on the basis of the applicability of customary international law. With the advent of the codified moment that signified the Rome Statute of the ICC, the use of customary international law was significantly reduced, but it continues to play a role in that Court; this is in part due to its inclusion as a source under Article 21 of the Statute.[206] This has been found permissible

[205] See, *inter alia*: Larissa van den Herik, The Decline of Customary International Law as a Source of International Criminal Law (March 31, 2015). Forthcoming in C. Bradley (ed.), Custom's Future: International Law in a Changing World (Cambridge University Press); Leiden Law School Research Paper; Grotius Centre Working Paper 2014/038-ICL. Available at SSRN: https://ssrn.com/abstract=2587622; Fausto Pocar, "Transformation of customary law through ICC practice", Cambridge University Press (2018); Beth Van Schaack, Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals (2007). Santa Clara Univ. Legal Studies Research Paper No. 07-47; Georgetown Law Journal, Vol. 97, 2008. Available at SSRN: https://ssrn.com/abstract=1056562; Grover, "A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court", The European Journal of International Law Vol. 21 no. 3 (2010).

[206] See, *inter alia*: Beth Van Schaack, Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals (2007). Santa Clara Univ. Legal Studies Research Paper No. 07-47; Georgetown Law Journal, Vol. 97, 2008. Available at SSRN: https://ssrn.com/abstract=1056562; Fausto Pocar, "Transformation of customary law through ICC practice", Cambridge University Press (2018)

and in line with the principle of legality when the particular offence is said to be "criminal under general principles of law recognized by the community of nations".[207] Today, the JEP operates in a state characterized by its traditional understanding of the principle of legality. However, as it has been stressed throughout these pages, the Colombian Constitution has bestowed this tribunal with the power to directly apply international criminal law, be it treaty or custom.

5.4 What is the international practice in this regard?

5.4.1 Do countries party to the treaty apply it directly or do they do so under domestic legislation?

This question was partly addressed in response to questions 1.1.2. above. In question 1.1.2. it was argued that despite the fact that the Rome Statute did not impose the obligation to modify domestic legislation to mirror its provisions upon ratification, States parties would have an interest to do so in order to meet the complementarity test. In other words, adopting this legislation would facilitate State parties being considered willing and able to investigate and prosecute crimes under the jurisdiction of the Court in the context of article 17 of the Statute. However, as described in question 1.1.2., this complementarity test can be met even if domestic legislation does not match the provisions of the Rome Statute insofar as the domestic legislation suffices to investigate and prosecute crimes under the jurisdiction of the Court.

Ultimately, however, the way in which States incorporate international law into their national system depends entirely on their approach to international law. A State with a monist approach, on the one hand, as it does not account for any distinction between the national and international legal orders, may directly apply the Rome Statute. On the other hand, a State with a dualist approach may need to enact legislation "accepting" or "domesticating" the international treaty in question, in this case the Rome Statute.

[207] See: Article 7 of the European Convention on Human Rights; ECtHR, Kononov v Latvia.

5.4.2 Have criminal or transitional judicial authorities in other countries used the Rome Statute as a legal basis for the prosecution of crimes that were committed before the entry into force of the treaty?

As it was pointed out in the answer to question 5.1., several States investigate and prosecute those crimes over which the ICC would have jurisdiction in one way or another. As a legal basis for that criminal prosecution, some States with a civil law tradition and a strict interpretation of the principle of legality, have enacted legislation either mirroring the Rome Statute or adapting its provisions to reflect their own legal terminology while others with a common law tradition have applied it directly. Either way, States have allowed for the prosecution of "Rome Statute crimes" before the entry into force of that treaty. For example, the Canadian Crimes Against Humanity and War Crimes Act 2000 explicitly recognized the applicability of Articles 6, 7 and paragraph 2 of Article 8 of the Rome Statute from July 17, 1998 due to their customary law status.[208]

Furthermore, in New Zealand, the International Crimes and International Criminal Courts Act 2000, the jurisdiction over the crime of Genocide can go back to 28 March 1979, over Crimes Against Humanity the prosecution can go back to 1 January 1991 and finally and for war crimes it can go as far back as 1958.[209]

Finally, in the United Kingdom[210], the Coroners and Justice Act 2009 provides for jurisdiction over war crimes since 1 January 1991.

[208] Canadian Crimes Against Humanity and War Crimes Act 2000. Art 4: For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law

[209] New Zealand International Crimes and International Criminal Courts Act 2000

[210] UK Coroners and Justice Act 2009.

6. Annex 1: Comparison between war crimes in IAC, NIAC and in the Colombian Criminal Code

Crime	IAC	NIAC	Colombian Criminal Code
Wilful killing	RS art. 8(2)(a)(i) Art. 50/ 51/ 130/147 of GC I to IV Art. 8 (2) respectively CIHL Rule 156	See: violence to life	Artículo 135. Homicidio en persona protegida.
Torture or inhuman treatment, including biological experiments	RS art. 8(2)(a)(ii) Art. 50/ 51/ 130/147 of GC I to IV Art. 8 (2) respectively CIHL Rule 156	See: violence to life	Artículo 137. Tortura en persona protegida. Artículo 146. Tratos inhumanos y degradantes y experimentos biológicos en persona protegida.
Wilfully causing great suffering, or serious injury to body or health	RS art. 8(2)(a)(iii) Art. 50/ 51/ 130/147 of GC I to IV Art. 8 (2) respectively CIHL Rule 156		Artículo 136. Lesiones en persona protegida
Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly	RS art. 8(2)(a)(iv) Art. 50/ 51/147 of GC I, II and IV respectively CIHL Rule 156		Artículo 154. Destrucción y apropiación de bienes protegidos.

Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power	RS art. 8(2)(a)(v) Art. 130 and 147 of GC III and GC IV respectively CIHL Rule 156		Artículo 150. Constreñimiento a apoyo bélico
Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial	RS art. 8(2)(a)(vi) Art. 130 and 147 of GC III and GC IV respectively CIHL Rule 156		Artículo 149. (...) privación del debido proceso.
Unlawful deportation or transfer or unlawful confinement	RS art. 8(2)(a)(vii) Art. 147 GC IV CIHL Rule 156		Artículo 149. Detención ilegal (...). Artículo 159. Deportación, expulsión, traslado o desplazamiento forzado de población civil.
Taking of hostages	RS art. 8(2)(a)(vii) Art. 147 GC IV CIHL Rule 156	RS art. 8(2)(c)(iii) Common Article 3 (1) (a) of GC I to IV CIHL Rule 156	Artículo 148. Toma de rehenes.
Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities	RS art. 8(2)(b)(i) Art. 85 (3) (a), plus art. 51(2) AP I CIHL Rule 156	RS art. 8(2)(e)(i) CIHL Rule 156	
Intentionally directing attacks against civilian objects	RS art. 8(2)(b)(ii) Art. 52 (1) AP I CIHL Rule 156		

Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations	RS art. 8(2)(b)(iii) Art. 9 of the 1994 UN Convention Art. 71 (2) of AP I CIHL Rule 156	RS art. 8(2)(e)(iii) Art. 9 of the 1994 UN Convention CIHL Rule 156	
Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated	RS art. 8(2)(b)(iv) Art. 85 (3) (b) of AP I CIHL Rule 156	CIHL Rule 156	
Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives	RS art. 8(2)(b)(v) Art. 85 (3) (d) of AP I Art. 25 of HR IV CIHL Rule 156	CIHL Rule 156	
Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion	RS art. 8(2)(b)(vi) Art. 85 (3) (e) of AP I Art. 23 (c) of HR IV CIHL Rule 156		Artículo 145. Actos de barbarie.
Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy	RS art. 8(2)(b)(vii) Art. 85 (3) (f) of AP I		Artículo 143. Perfidia.

or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury	Art. 23 (f) of HR IV CIHL Rule 156		
The transfer, directly or indirectly, by the Occupying Power of parts of its ownmcivilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory	RS art. 8(2)(b)(viii) Art. 85 (4) (a) of AP I CIHL Rule 156		
Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives	RS art. 8(2)(b)(ix) Art. 85 (4) (d) of AP I Art. 27 (1) and 56 of HR IV Art. 15 of the 1999 CCP OP CIHL Rule 156	RS art. 8(2)(e)(iv) Art. 15 of the 1999 CCP OP CIHL Rule 156	Artículo 154. Destrucción y apropiación de bienes protegidos. (lugares de culto) Artículo 156. Destrucción o utilización ilícita de bienes culturales y de lugares de culto.
Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons	RS art. 8(2)(b)(x) Art. 11 of AP I CIHL Rule 156	RS art. 8(2)(e)(xi) CIHL Rule 156	

Killing or wounding treacherously individuals belonging to the hostile nation or army	RS art. 8(2)(b)(xi) Art. 85 (4) (f) of AP I Art. 23 (b) of HR IV CIHL Rule 156	RS art. 8(2)(e)(ix) (the text refers to "combatant adversary" instead of "individuals belonging to the hostile nation or army) CIHL Rule 156	Artículo 143. Perfidia.
Declaring that no quarter will be given	RS art. 8(2)(b)(xii) Art. 23 (d) of HR IV CIHL Rule 156	RS art. 8(2)(e)(x) CIHL Rule 156	Artículo 145. Actos de barbarie.
Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war	RS art. 8(2)(b)(xiii) Art. 23 (g) of HR IV CIHL Rule 156	RS art. 8(2)(e)(xii) CIHL Rule 156 (seizing property of the adverse party not required by military necessity)	
Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party	RS art. 8(2)(b)(xiv) Art. 23 (1) (h) of HR IV CIHL Rule 156		
Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war	RS art. 8(2)(b)(xv) Art. 23 (2) of HR IV CIHL Rule 156		

Pillaging a town or place, even when taken by assault	RS art. 8(2)(b)(xvi) Art. 28 of HR IV CIHL Rule 156	RS art. 8(2)(e)(v) CIHL Rule 156	
Employing poison or poisoned weapons	RS art. 8(2)(b)(xvii) Art. 28 of HR IV CIHL Rule 156 (using prohibited weapons)	RS art. 8(2)(e)(xiii) CIHL Rule 156 (using prohibited weapons)	Artículo 142. Utilización de medios y métodos de guerra ilícitos.
Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices	RS art. 8(2)(b)(xviii) CIHL Rule 156 (using prohibited weapons)	RS art. 8(2)(e)(xiv) CIHL Rule 156 (using prohibited weapons)	Artículo 142. Utilización de medios y métodos de guerra ilícitos.
Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions	RS art. 8(2)(b)(xix) 1899 Hague Declaration (IV, 3) CIHL Rule 156 (using prohibited weapons)	RS art. 8(2)(e)(xiv) CIHL Rule 156 (using prohibited weapons)	Artículo 142. Utilización de medios y métodos de guerra ilícitos.
Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material	RS art. 8(2)(b)(xx) Art. 23 (1) (e) of HR IV CIHL Rule 156 (using prohibited weapons)		Artículo 142. Utilización de medios y métodos de guerra ilícitos.

and methods of warfare are the subject of a comprehensive prohibition			
Committing outrages upon personal dignity, in particular humiliating and degrading treatment	RS art. 8(2)(b)(xxi) CIHL Rule 156	RS art. 8(2)(c)(ii) Common Article 3 (1) (a) of GC I to IV CIHL Rule 156	
Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence	RS art. 8(2)(b)(xxii) CIHL Rule 156	RS art. 8(2)(e)(vi) CIHL Rule 156	Artículo 138. Acceso carnal violento en persona protegida. Artículo 139. Actos sexuales violentos en persona protegida. Artículo 141. Prostitución forzada o esclavitud sexual.
Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations	RS art. 8(2)(b)(xxiii) CIHL Rule 156 (Human shields)	CIHL Rule 156 (Human shields)	Artículo 142. Utilización de medios y métodos de guerra ilícitos.
Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law	RS art. 8(2)(b)(xxiv) CIHL Rule 156	RS art. 8(2)(e)(ii) CIHL Rule 156	Artículo 155. Destrucción de bienes e instalaciones de carácter sanitario.
Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including	RS art. 8(2)(b)(xxv) CIHL Rule 156	CIHL Rule 156	Artículo 153. Obstaculización de tareas sanitarias y humanitarias.

wilfully impeding relief supplies as provided for under the Geneva Conventions			
Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities	RS art. 8(2)(b)(xxv) (age 15) Optional Protocol on the Involvement of Children in Armed Conflict art. 4.2 (age 18) CIHL Rule 156 (age 15)	RS art. 8(2)(e)(vi) CIHL Rule 156 (age 15)	Artículo 162. Reclutamiento ilícito. (age 18)
Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects	Art. 85 (3) (c) of AP I CIHL Rule 156		Artículo 157. Ataque contra obras e instalaciones que contienen fuerzas peligrosas.
Unjustifiable delay in the repatriation of prisoners of war or civilians	Art. 85 (4) (b) of AP I CIHL Rule 156		
The practice of apartheid or other inhuman or degrading practices involving outrages on personal dignity based on racial discrimination	Art. 85 (4) (c) of AP I CIHL Rule 156		Artículo 147. Actos de discriminación racial.
Slavery and deportation to slave labour	CIHL Rule 156	CIHL Rule 156 (Slavery)	
Collective punishments	CIHL Rule 156	CIHL Rule 156	
Despoliation of the wounded, sick, shipwrecked or dead	CIHL Rule 156		Artículo 151. Despojo en el campo de batalla.

Attacking or ill-treating a parlementaire or bearer of a flag of truce	CIHL Rule 156		
Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture		RS art. 8 (2)(c)(i) Common Article 3 (1) (a) of GC I to IV CIHL Rule 156	Artículo 135. Homicidio en persona protegida. Artículo 136. Lesiones en persona protegida Artículo 137. Tortura en persona protegida.
The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable		RS art. 8 (2)(c)(iv) Common Article 3 (1) (a) of GC I to IV CIHL Rule 156	
Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand		RS art. 8 (2)(e)(viii) CIHL Rule 156	
			Artículo 144. Actos de terrorismo.
			Artículo 152. Omisión de medidas de socorro y asistencia humanitaria
			Artículo 153. Obstaculización de tareas sanitarias y humanitarias.

			Artículo 158. Represalias.
			Artículo 160. Atentados a la subsistencia y devastación.
			Artículo 161. Omisión de medidas de protección a la población civil.
			Artículo 163. Exacción o contribuciones arbitrarias.
			Artículo 164. Destrucción del medio ambiente.

7. Annex 2: Tribunals and "most responsible for the most serious and representative crimes"

Court or Tribunal		Criteria
International Military Tribunals	Nuremberg	Preamble: Major War Criminals of the European Axis
	Tokyo	Article 1 of its Statute: The major war criminals in the Far East
Ad hoc Tribunals	ICTY	OTP declaration: focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences. SC Resolution 1329: national jurisdiction referrals as intermediate and low perpetrators should be prosecuted by national courts. SC Resolution 1534: most senior leaders suspected of being most responsible for crimes.
	ICTR	Prosecution policy: individuals who perpetrated the most "serious" violations of international law; also based on their 'level of participation and their standing in society.'
	ICC	Policy Paper on Case Selection and Prioritization: i) the gravest crimes, ii) the most responsible alleged perpetrators and iii) the types of victimization.
Hybrid Tribunals	Special Panels for Serious Crimes - East Timor	Serious Crime Unit strategy: "priority cases" and focusing on high-level suspects.
	Specialist Chambers and Specialist Prosecutor's Office - Kosovo	No document available suggests that the concept of "most responsible for the most serious and representative crimes" was adopted.
	Special Court for Sierra Leone	Article 1 of its Statute: jurisdiction over persons "who bear the greatest responsibility". Article 15: investigate and prosecute persons who bear the greatest responsibility.
	Extraordinary Chambers in the Courts of Cambodia	Article 1 of its Statute: jurisdiction over senior leaders. Office of Co-Prosecutors (OCP): there is a distinction between "senior leaders" and "most responsible".