UNIVERSITY OF ESSEX **DISSERTATION**

SCHOOL OF LAW

LLM/MA IN: LLM INTERNATIONAL HUMAN RIGHTS LAW
STUDENT'S NAME: CAMILA ANDREA SUAREZ ANGEL
SUPERVISORS'S NAME: CLARA SANDOVAL VILLALBA
DISSERTATION TITLE **ANALYSIS OF THE SPECIAL SANCTIONS OF THE SYSTEM UNDER INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL CRIMINAL LAW AND ITS APLICATION TO THE EXTRAJUDICIAL EXECUTIONS CASE**

COMMENTS: (PLEASE WRITE BELOW YOUR COMMENTS)

MARK:	
SIGNATURE:	**DATE:**

UNIVERSITY OF ESSEX

SCHOOL OF LAW

LLM in International Human Rights Law

2018-2019

Supervisor:

Clara Sandoval Villalba

DISSERTATION

ANALYSIS OF THE SPECIAL SANCTIONS OF THE SYSTEM UNDER INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL CRIMINAL LAW AND ITS APLICATION TO THE EXTRAJUDICIAL EXECUTIONS CASE

Name: Camila Andrea Suárez Angel

Registration Number (optional): 1802298

Number of Words: 19935

Date Submitted: 9/10/2019

ANALYSIS OF THE SPECIAL SANCTIONS OF THE SYSTEM UNDER INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL CRIMINAL LAW AND ITS APLICATION TO THE EXTRAJUDICIAL EXECUTIONS CASE

Table of Content

ACRONYMS

AC	Appeals Chamber
ACHR	American Convention on Human Rights
CA	Constitutional Amendment
CCC	Colombian Constitutional Court
CSTJRN	Comprehensive System for Truth, Justice, Reparation and Non-recurrence
DK	Democratic Campuchea
DRP	Domestic Reparations Program
ECCC	Extraordinary Chambers of the Courts of Cambodia
EE	Extrajudicial executions
FARC	Revolutionary Armed Forces of Colombia
GNR	Guarantees of Non-recurrence
GVHR	Gross violations of human rights
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICL	International Criminal Law
IHRL	International Human Rights Law
OTP	Office of the Prosecutor of the International Criminal Court
RPE	Rules of Procedure and Evidence
RS	Rome Statute
SJP	Special Jurisdiction for Peace
SSS	Special Sanctions of the System

TC	Trial Chamber
TFV	Trust Fund for Victims
TOAR	Projects of works and activities with reparative and restorative content.

1. Introduction

The 24th November 2016, the Colombian government and the Revolutionary Armed Forces of Colombia (FARC, its acronym in Spanish) guerrilla signed the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Peace Agreement, PA) to end the hostilities between both parties. Although, this is not the end of the armed conflict in Colombia, where several armed groups still engage in hostilities against the government or between themselves[1], it is an important effort to build democracy and reconciliation in a country that has faced more than sixty years of conflict[2].

The PA tried to transform the structural causes that gave birth to the conflict, therefore its ambitious content of five chapters, namely: (i) Comprehensive Rural Reform; (ii) Political Participation: A democratic opportunity to build peace; (iii) Agreement on the Bilateral and Definitive Ceasefire and Cessation of Hostilities and Laying down of Arms; (iv) Solution to the Illicit Drugs Problem; (v) Victims; and (vi) Implementation and verification mechanisms[3]. For the purposes of this dissertation, Chapter 5 about Victims is very important because it creates the Comprehensive System for Truth, Justice, Reparation and Non-recurrence (CSTJRN) in order to fight impunity, using a combination of judicial and extra-judicial mechanisms[4]. The Comprehensive System is composed by: (i) the Truth, Coexistence and Non-Recurrence Commission; (ii) the Special Unit for the Search for Persons deemed as Missing in the context of and due to the armed conflict; (iii) the Special Jurisdiction for Peace (SJP); (iv) Comprehensive reparation measures for peacebuilding purposes; and (v) Guarantees of Non-Recurrence[5].

The SJP develops the justice component of the CSTJRN. Justice and accountability were at the edge of the discussions of the process, which comes as no surprise because Colombia is under preliminary

[1] Indeed, the ICRC delegation in Colombia identified five armed conflicts in Colombia after the signature of the peace agreement. Comité Internacional de la Cruz Roja, 'Cinco Conflictos Armados En Colombia ¿qué Está Pasando?' (*6 December*, 2018) <https://www.icrc.org/es/document/cinco-conflictos-armados-en-colombia-que-esta-pasando>.
[2] National Centre of Historic Memory, *¡BASTA YA! Colombia: Memorias de Guerra y Dignidad* (1st ed., Imprenta Nacional 2013) 30.
[3] Goverment of Colombia; FARC guerrilla, 'Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace.' (2016) 8 <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf>.
[4] ibid 9.
[5] ibid.

observation by the Office of the Prosecutor of the International Criminal Court (OTP) since June 2004[6] and is subject to the jurisdiction of the Inter-American Court of Human Rights (IACtHR). Both judicial bodies have developed approaches to international law that are relevant for the Colombian Peace Process.

In this sense, the sanctions established for gross violations of human rights (GVHR) for persons that acknowledge responsibility consist in sanctions of no jail, which is an innovative approach in contexts of transition. The complexities and questions that raise from this issue are going to be explained in the next subchapter.

This essay is mainly a qualitative analysis on the International Treaties, the relevant jurisprudence and the academic literature on the different question raised by the main issue of this dissertation, which is how to apply International Human Rights Law (IHRL) and International Criminal Law (ICL) to the special sanctions of the system (SSS) and apply the identified standards to the extrajudicial executions (EE) case. For doing so, this dissertation is going to be divided in four chapters: (i) explanation of the legal issue to understand better the complexities that arise form the SSS; (ii) the application of IHRL and ICL to the SSS, specifically to its restorative and punitive components; and (iii) the analysis of the EE case.

2. Legal issues: the gaps and the challenges

2.1 Legal context: Inter-American Court of Human Rights case law and the International Criminal Court.

Members of FARC guerrilla consistently refused to face gaol as a way of punishment for the atrocities committed[7]. Nonetheless, the international obligations of the Colombian State with regards to the prohibition of amnesties and the duty to investigate and punish GVHR rendered this petition, at the

[6] International Criminal Court, 'Preliminary Examinations' <https://www.icc-cpi.int/pages/pe.aspx>.
[7] El Espectador, '"Timochenko" Ratifica Que Farc No Quieren Ir a La Cárcel Tras Proceso de Paz' (2013) <https://www.elespectador.com/noticias/paz/timochenko-ratifica-farc-no-quieren-ir-carcel-tras-proc-articulo-440430> accessed 15 August 2018.

very least, problematic. In effect, the Inter-American system of human rights has declared as inadmissible the laws prescribing amnesties, statutory limitations, and exclusion of liability clauses that prevent the investigation and punishment of the perpetrators of GVHR[8]. For the Court, these provisions are against the Convention and have no legal effect[9]. If unconditional amnesties prevent the investigation and punishment of the perpetrators of GHRV, it is against the American Convention of Human Rights (ACHR)[10].

On the other hand, the case law of the Court about limited amnesties has not been as developed as in the case of unconditional amnesties[11]. In this sense, where it cannot be proven that amnesty prevented the investigation and punishment of GVHR, the Court has not ruled against the amnesty law as such[12]. Regardless of the source of the limitation -legal or judicial interpretation- the Court seems to take the mentioned approach, suggesting that amnesties limited to cover less serious offences might not be against the ACHR[13].

Furthermore, in the case of armed conflicts the Court has had a different approach as it is stated in El Mozote case, where it admitted the viability of amnesties according to the article 6(5) of the Additional Protocol II, as long as it does not involve war crimes or crimes against humanity[14]. For the Colombian Constitutional Court (CCC), El Mozote case established that the validity of alternative measures like conditional or limited amnesties should be analysed in the context of each transitional process because the scenario of a negotiated peace settlement is legally and morally different from self-amnesties[15]. This statement relies on the paragraph 284-286 of the mentioned decision and the concurrent opinion of Judge Diego García Sayán. Nonetheless, it should be noted that the latter

[8] *Barrios Altos v Perú* (2001) Merits [41].
[9] *Case of Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* (2010); *Barrios Altos v. Perú* (n 7)ibid 43..*Case Gelman v Uruguay* (2011) Merits and Reparations [232].*Massacres of El Mozote and nearby places v El Salvador (Merits, reparations and costs)* [296].
[10] Louise Mallinde, 'THE END OF AMNESTY OR REGIONAL OVERREACH? INTERPRETING THE EROSION OF SOUTH AMERICA'S AMNESTY LAWS' (2016) 65 ICLQ 645, 658.
[11] ibid 661.
[12] *Case of Tiu Tojín v Guatemala Merits, Reparations and Costs* Serie C190 [89].*García Lucero et al v Chile, Preliminary Objection, Merits and Reparations* (2013) Series C26 [154].
[13] Mallinde (n 10) 664.Claudio Nash Rojas, 'Justicia Transicional y Los Límites de Lo (Posible) Punible. Reflexiones Sobre La Legitimidad Del Proceso de Paz En Colombia' 17 Opinión Jurídica 19, 26.
[14] *Massacres of El Mozote* (n 9) para 286.
[15] *C-007-18* [144].

opinion is not part of the case law of the IACtHR, nor the mentioned reasoning of the CCC is explicit in the Mozote's judgement.

The IACtHR has ruled on the Peace and Justice Law, a previous Colombian attempt to achieve peace that contemplated alternative sanctions of reduced prison times for those responsible of GVHR. In Rochela Massacre v. Colombia, the Court did not declare it as an amnesty, nor that it violated the ACHR, but regarding criminal processes suggested that the States should observe and guarantee due process, expeditious justice, adversarial defence, effective recourse, implementation of judgement and proportionality of the punishment [16]. Moreover, it also addressed this Law on the cases of Vereda La Esperanza[17] and Genesis Operation vs. Colombia, and in neither of those cases the Court made any statements against the legality of Peace and Justice Law or the proportionality of the sanction, even though in the later case the victims raised this issue[18].

With regards to the ICC, the OTP has issued several statements regarding the Peace Agreement. At the beginning, its statements seemed to be against some elements of the Justice component, but progressively it admitted that States have ample discretion in sentence matters and that effective criminal sentences can adopt different forms[19]. In any case, it should be recalled that the complementarity assessment that the OTP does over the Peace Agreement is very important in the light of article 17 of the Rome Statute (RS), which states that unwillingness or inability of a State Party to punish the crimes included in the Statute renders a situation admissible before the Court. Therefore, it is important that the Peace Agreement is not seen as unwillingness of the State to punish international crimes.

In this context, the punishment of GVHR and international crimes is at the edge of the PA (Special Jurisdiction for Peace) and is the focus of the present dissertation. However, the question addressed

[16] *Case of the Rochela Massacre v Colombia Merits, Reparations and Costs* (2007) Serie C163 [183–193]. Mallinde (n 10) 667.
[17] Inter-American Court of Human Rights, 'Vereda La Esperanza vs Colombia. Preliminary Objection, Merits, Reparations and Costs' Serie C341 21 November 2018 para 224.
[18] Inter-American Court of Human Rights, 'Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia. Premliminary Objection, Merits, Reparation and Costs.' Serie C270 20 November 2013 para 77.
[19] James Stewart, 'Transitional Justice in Colombia and the Role of the Internadonal Criminal Court'. To see a more detailed analysis, Nelson Camilo Sanchez Leon, 'Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia' 110 AJIL Unbound 172.

here is not “if” the sanctions created by the agreement are in accordance with International Law[20], but “how” it should address this branch of law to fulfil its reparative and punitive objectives. To explain further this idea, the next section will explain the content of the sanctions and the gaps and challenges it faces.

2.2 Special Sanctions of the System

One of the main features of the PA is its comprehensive understanding of the conflict. As consequence, it was not designed only for the members of the FARC guerrilla, but for members of other organized armed groups-paramilitaries, for instance-, members of the State in a broad sense- not only military forces- and civilians that are not members of the State. Overall, the SJP has jurisdiction over everyone who participated directly or indirectly on the armed conflict[21]. Nonetheless, in the case of non combatants, that is, members of the state that are not part of the armed forces and civilians, the submission to the SJP can only be voluntarily[22]. The SJP has jurisdiction over acts committed before the 1st December 2016.

It should be noted that the sanctions created by the PA are going to be ruled against those who are the most responsible of the crimes against humanity, genocide, war crimes, serious deprivations of liberty, torture, EE, forced disappearances, sexual violence, recruitment of children and forced displacement[23]. On the contrary, those who are not most responsible of the most serious crimes are entitled to receive amnesties as long as they contribute with truth and reparation for victims. This is, for sure, a contentious issue under international law. Some scholars state that it is impossible to prosecute every single person involved in serious crimes in transitional contexts[24], however, some

[20] Some important voices like Human Rights Watch have stated that the Peace Agreement’s sanctions are a way of impunity Human Rights Watch, ‘Colombia: Agreeing to Impunity’ (2015) <hrw.org/news/2015/12/21/hrw-analysis-colombia-farc-agreement.> accessed 10 August 2019. Later on, the NGO raised questions regarding the meaningfulness of the punishment. Human Rights Watch, ‘Colombia: Fix Flaws in Transitional Justice Law’ (2017) <https://www.hrw.org/news/2017/10/09/colombia-fix-flaws-transitional-justice-law> accessed 10 August 2019.
[21] Congress of the Republic of Colombia, Law 1957 of 2019 art. 63.
[22] *C-674-17* 403.
[23] Law 1957 of 2019 (n 21) para 42.*C-080-17* 389.
[24] Sanchez Leon (n 19); Expert Group, *The Belfast Guidelines on Amnesty and Accountability* (1st Ed, University of Ulster 2013).

other state that punishing only the most responsible is a way of impunity[25]. This is a very complex issue that goes beyond the reach of the present dissertation.

The PA and the legal framework that develops it[26], established several legal benefits ("tratamientos especiales de justicia") for those who decide to be part of the SJP, namely[27]: (i) special criminal procedure, (ii) special punishment regime[28], (iii) exclusion of financial and disciplinary responsibility, (iv) in the case of combatants, there is no obligation to pay compensation, notwithstanding the general obligation of the State to repair; (v) the guarantee of non-extradition; and (vi) special treatment regarding incompatibilities[29]. These benefits are only granted in exchange of full truth, reparation of victims and non-recurrence and, as consequence, the rights of victims are maximized, and the system is legitimized[30]. That is why those benefits are considered conditional[31]. It is also worth noting that the SJP is mainly a restorative justice system[32].

The PA contemplates three types of punishment for the persons subject to the jurisdiction of the SJP: (i) "sanciones propias" or special sanctions of the system (SSS); (ii) alternative sanctions; and (iii) ordinary sanctions[33]. Alternative and ordinary sanctions contemplate prison punishment. The former refers to convictions between five to eight years for those who acknowledge truth and responsibility before the First Instance Chamber in Cases of Absence of Acknowledgement of Truth and Responsibility reaches a decision. Those who do not acknowledge truth and responsibility are subject to ordinary sanctions, that is, prison punishment between fifteen to twenty years[34]. In other words, to avoid prison punishment, the acknowledgement of truth and responsibility must be performed before

[25] Human Rights Watch, 'Colombia: Agreeing to Impunity' (n 20).
[26] In is important to highlight
[27] *C-080-17* (n 23) 246.
[28] For the CCC, this regime encompasses the regulation on the enforcement of sanctions ruled by the SJP, which includes: the effective restriction on freedom in the case of the special sanctions of the system; the time spent in the special zones destinated to the demobilization by members of FARC guerrilla, which counts as punishment time; and the special prisons for militaries in the case of alternative and ordinary sanctions. ibid 250.
[29] Colombian law establishes incompatibilities to have contracts or to be member of the State when the person has a criminal conviction. Therefore, this provision aims that persons whose cases are judged by the SJP are not subject to this restriction, except when their freedom is effectively being restricted and in the case of State's security institutions, the judiciary and the Ombudsman's office (Besides to the Ombudsman itself, Colombia's legal system has The Contraloría General de la República- supervises the adequate use of public budget- and The Procuraduría General de la Nación -supervises the legality of the behaviour of members of the State-) . ibid 269.
[30] *C-007-18* (n 15) para 680.
[31] Ibid.
[32] *C-080-17* (n 23) 281.
[33] Goverment of Colombia; FARC guerrilla (n 3) para 60.
[34] Congress of the Republic of Colombia Law 1957 of 2019 (n 20) art. 130.

the Judicial Panel for Acknowledgement-a Justice Panel-, but those who do not recognized their responsibility have to face the accusation of the Investigation and Prosecution Unit before the Peace Tribunal. It should be noted that the SJP is constituted by Justice Panels[35] and The Peace Tribunal[36].

Those who acknowledge responsibility and full and detailed truth before the Judicial Panel for Acknowledgement would face the SSS between five to eight years. These sanctions include restrictions to freedoms and rights such as freedom of movement and residence and should guarantee non-recurrence[37]. To impose such restrictions, the judges should rule over the zones and the schedules for the performance of the sanctions, the residence of the punished while he or she performs the sanction, to authorize the movement to do any other activities that are not related with the sanctions, the institution responsible for verifying the fulfilment of the sanction, among others[38]. For the CCC, this is the retributive component of the SSS[39].

All the sanctions imposed bear a restorative component[40], nonetheless, this component has a particular strength in the case of the SSS. In this sense, the punished should propose a project of restorative and reparative activities (TOAR, Spanish acronym), which cannot contradict the public policies of the State, nor the traditions and culture of the beneficiary communities[41]. These activities can be performed in rural or urban areas and can include actions such as: participation or implementation of programs of reparation, programs of development, programs to promote the access to public services, programs of basic education, among others[42]. Furthermore, activities related with the clearing and removal of landmines, remnants of war, improvised explosive devices and unexploded ordnance are also included[43].

[35] The Justice Panels are: Judicial Panel for Acknowledgement of Truth, Responsibility and Determination of Facts and Conduct, Judicial Panel for Amnesty and Pardon, Judicial Panel for Determination of Legal Situations, for cases other than those above or in other unforeseen situations. Goverment of Colombia; FARC guerrilla (n 3) 162.
[36] The Peace Tribunal has four Chambers: First Instance Chamber in Cases of Acknowledgement of Truth and Responsibility, First Instance Chamber in Cases of Absence of Acknowledgement of Truth and Responsibility, Review Chamber, Appeals Chamber. ibid 169.
[37] Law 1957 of 2019 (n 20) art. 126.
[38] ibid art. 127; Goverment of Colombia; FARC guerrilla (n 3) para 60.
[39] *C-080-17* (n 23) 249.
[40] Law 1957 of 2019 (n 20) art. 138.
[41] ibid art. 141.
[42] ibid.
[43] ibid.

Additionally, the duty to repair as part of the restorative component of the SSS is not the only obligation of reparation that the perpetrators have under the conditional benefits provided by the SJP. They also must: (i) in the case of FARC members, they should give their assets to the State to guarantee reparations; (ii) give to the State the assets product of illegal activities; and (iii) as measure of satisfaction, the perpetrators must contribute to the truth and acknowledge their responsibility as a condition to access and remain in the SJP[44]. As mentioned before, the combatants do not have the obligation to compensate the harm caused which means that the right to a comprehensive reparation must be guaranteed by the State and not by individuals, except in the case of civilians[45]. In this sense, the pre-existent public policy for victims created through the Law 1448 of 2011, is still on charge to provide comprehensive reparation for victims, including compensation[46]. Indeed, the Constitutional Court has explicitly stated that the SJP doesn't have the competence to order measures of reparation that are not in charge of the persons submitted to its jurisdiction[47].

This is the first time in Colombia where the International Law has such prevalence in a PA[48], therefore, the blurred lines and the dark spots of this branch of law have been reproduced in the PA with FARC too. In particular, the SSS raise several questions with regards to its punitive and its reparative content: how to apply the international standards of reparation to a tribunal that only deals with criminal responsibility? how to asses proportionality in the case of alternative sanctions? How to deal with the different obligations in terms of reparation that civilian have as opposed to combatants? To what extent the administrative programs of reparations fulfil the obligation to repair under IHRL?

2.3 The extrajudicial executions case: a closed chapter?

It is a challenge to achieve justice when the amount of crimes committed is huge and traditional ways to rule might be insufficient. Therefore, the SJP approach is not about solving individual cases, but

[44] *C-080-17* (n 23) 279.
[45] ibid 331.
[46] ibid 342.
[47] ibid.
[48] Courtney Hillebrecht, Alexandra Huneeus and Sandra Borda, 'The Judicialization of Peace' (2018) 59 Harvard International Law Journal.

structural ones that are prioritized by the Judicial Panel for Acknowledgement of Truth [49]. For the purposes of this dissertation, it is very important to choose one ongoing case to contribute to the current debate on the SSS. Furthermore, it is fundamental to apply the conclusions of this essay to a practical case. Therefore, the case 003 about EE illegally presented as combat deaths, sometimes referred as "false positives", has interesting features that make it suitable for the purposed exercise.

In the first place, it was executed by the State Armed Forces on a big scale, which raises questions regarding the individual nature of the sanction and the generalized nature of the crime. In the second place, it is a case that is still alive in the memory of Colombians and, in the third place, it does not seem to be a closed chapter due to events where the military is involved in irregular treatment of civilians for achieving goals[50].

3. Special sanctions of the system and the International Human Rights Law and International Criminal Law

This section aims to analyse the reparative and punitive components of the SSS under IHRL and ICL. Therefore, the first subsection is going to focus on the restorative component and, the second one, on the punitive component.

3.1 Special Sanctions of the System and its reparative content

For the purposes of this subsection, reparations under ICL and IHRL are going to be analysed to identify applicable standards on the SSS.

3.1.1 International Criminal Law.

For the purposes of this subsection, the focus is going to be on the ICC and the ECCC because are the only international criminal courts that provide reparations after the conviction of perpetrators. This would provide some understanding of the reparative content of the sanction in contexts of criminal

[49] This is approach to cases was also applied by the Peace and Justice judges due to a Constitutional Reform that allowed the investigation to focus in the most responsible. See *C-579-13*.
[50] Nicholas Casey, 'Colombia Army's New Kill Orders Send Chills Down Ranks' (*The New York Times*, 2019) <https://www.nytimes.com/2019/05/18/world/americas/colombian-army-killings.html?ref=nyt-es&mcid=nyt-es&subid=article> accessed 31 August 2019.

proceedings. It should be noted that SJP has a restorative content when ruling on the SSS, nonetheless, it can be, on a certain degree, a retributive-corrective court when ruling on alternative or ordinary sanctions.

The reparations provided by the mentioned criminal tribunals and the SSS share some similarities, but also important differences. This means that not all the rules that regulate their reparation process are automatically applicable to the SSS ruled by the SJP, even when all these tribunals deal with reparations and criminal responsibility.

For instance, one of the most substantive differences is that reparation is not a form of penalty due to the discard of this possibility during the negotiation process of the RS[51]. On the contrary, the SSS are sanctions with a reparative and restorative content[52]. Additionally, one substantive similarity is the exclusion of the State responsibility in its decisions[53]. Nonetheless, the SJP decisions seem even more restricted in this regard due to the limitations imposed by the CCC, where the only attribution on reparation of the SJP is related with the sanction itself[54].

a. The International Criminal Court

To understand the content of reparations before the ICC established on art, 75 of the RS, this subsection is going to address: (i) general principles on reparations, (ii) causality, (iii) beneficiaries, (iv) liability to repair, (v) harm, (vi) types of reparation and (vii) victim's participation. It should be noted that these elements of reparations were considered important for the purposes of this dissertation, but the complexity of reparations before the ICC is greater than what is exposed here.

i. General principles on reparations

[51] Fiona McKay, 'Are Reparations Appropriately Adressed in the ICC Statute?' in Dinah Shelton (ed), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court.* (Trasnational Publishers Inc 2001) 168.
[52] *C-080-17* (n 23) pendiente.
[53] McKay (n 51) 170. Christoph Sperfeldt, 'Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court' (2017) 17 international criminal law review 351, 373.
[54] *C-080-17* (n 23) 342.

The provision of article 75 RS that states the Court shall establish principles relating to reparations raised questions on whether it should be determined for the purposes of a situation or a case or it should be independent from them[55]. Subsequently, the ICC Trial Chamber (TC) I issued the first decision establishing the principles on reparations for the *Lubanga* case. On this decision's appeal, the Appeals Chamber (AC) clarified that these principles should be general concepts formulated according to the specific circumstances of a case, but that can be "applied, adapted, expanded upon, or added by future Trial Chambers"[56]. In *Katanga* case, the TC II considered that the principles established by the AC in *Lubanga* case were applicable, mutatis mutandis, to that case too[57].

Some of the principles used by the ICC are: (i) the purposes of reparations are to oblige those responsible for the crimes to repair the harm they caused and to enable the Court to render offenders accountable for their acts[58]; (ii) other purposes of the reparations proceedings are: relief the suffering caused by the crimes, deter further violations, contribute to reintegration and afford justice by dealing with the consequences of the crimes[59]; (iii) dignity, non-discrimination and non-stigmatization, including a gender-inclusive perspective[60] ;(iv) promote reconciliation between the perpetrator, the victims and the affected communities[61] ; (v) it is an obligation of the convicted person to repair the harm caused by the crimes she/he was held responsible[62]; (vi) accessibility and consultation with victims[63]; (vii) reparations should be appropriate, prompt and proportional[64]; (viii) types of reparations besides compensation, rehabilitation and restitution can be awarded by the Court, even when they

[55] Carla Ferstman and Mariana Goetz, 'Reparations before the International Criminal Court: Th e Early Jurisprudence on Victim Participation and Its Impact on Future Reparations Proceedings' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity Systems in Place and Systems in the Making* (Brill Nijhoff 2009) 317.
[56] Appeals Chamber of the International Criminal Court, 'Judgment on the Appeals against the "Decision Establishing the Principles and Procedures to Be Applied to Reparations" of 7 August 2012 with AMENDED Order for Reparations (Annex A) and Public Annexes 1 and 2' [2015] No. ICC-01/04-01/06 A A 2 A 3 para 3., 55.
[57] Trial Chamber II of the International Criminal Court, 'Order for Reparations Pursuant to Article 75 of the Statute With One Public Annex (Annex I) and One Confidential Annex Ex Parte, Common Legal Representative of the Victims, Office of Public Counsel for Victims and Defence Team for Germain Katanga (Annex I' [2017] ICC-01/04-01/07 para 30.Trial Chamber I of the International Criminal Court, 'Decision Establishing the Principles and Procedures to Be Applied on Reparations' ICC-01/04-01/06 para 179.
[58] Appeals Chamber, Principles and Procedures to Be Applied to Reparations' (n 56) para 58.
[59] Trial Chamber I of the International Criminal Court (n 57) para 179.
[60] ibid 187–193.
[61] ibid 193.Appeals Chamber of the International Criminal Court, 'Judgment on the Appeals against Trial Chamber II's "Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo Is Liable"' (2019) Lubanga ICC-01/04-01/06 A7 A8 para 3.
[62] Appeals Chamber, Principles and Procedures to Be Applied to Reparations (n 56) para 99.
[63] Trial Chamber I of the International Criminal Court (n 57) para 202.
[64] ibid 241.

are not specifically mentioned in art. 75 RS[65]; (ix) types of reparation with a symbolic, preventive and transformative value might be appropriate[66]; (x) reparations are entirely voluntary, therefore, it requires the informed consent of the recipient to participate in the proceedings and to award reparations[67]; among others.

ii. Causality

Causality is a concept that comes from IHRL[68]. The IACtHR states that there should be a causal link between the facts of the case, the human rights violations, the harm generated and the reparation awards[69]. However, causality in the context of ICL is not related to a violation of human rights, but to the individual criminal liability of a convicted person and whose culpability for the crimes committed is established in a sentence[70]. The link between the crimes and the harm is established on a case by case basis[71].

Due to the inherent complexity on establishing consequences of facts, courts and legal systems have created methodologies to identify the legally relevant consequences of certain acts or facts, Indeed, International Law does not have a settled view on the appropriate standard of causation[72]. The ICC is not the exception and has been applying the "proximate cause" test[73], consisting in in identifying a but/for relationship between the harm and the crime[74]. However, the application of this test can lead to different conclusions between judges. For instance, Moffet and Sandoval point out that in Katanga case children posthumously born after the massacre of 24th February 2003 were not granted access

[65] ibid 237–239.
[66] ibid 222.
[67] ibid 204.
[68] Octavio Amezcua-Noriega, 'Reparation Principles under International Law and Their Possible Application by the International Criminal Court: Some Reflections' in Clara Sandoval-Villalba (ed), *Briefing Paper No. 1* (Transitional Justice Network University of Essex 2011) para 16.
[69] Inter-American Court of Human Rights, 'Ticona Estrada and Others v. Bolivia. Merits, Reparations and Costs. Serie C 191' para 110.
[70] Appeals Chamber, Principles and Procedures to Be Applied to Reparations (n 56) para 65.
[71] ibid 80.
[72] Marc Henzelin, Veijo Heiskanen and Guénael Mettraux, 'Reparation to Victims before the International Criminal Court: Lessons from International Mass Claims Processes' (2006) 17 Criminal Law Forum 317, 325.
[73] Some scholars think this test is unappropriated for the ICC, considering the fact that it has to deal with criminal responsibility, but the proximate cause test is broader and goes beyond than that. Mia Swart, 'The Lubanga Reparations Decision: A Missed Opportunity?' (2012) XXXII Polish Yearbook Of International Law 169, 186.
[74] Trial Chamber I of the International Criminal Court (n 57) para 250.

to rehabilitation measures because of the lack of "proximate cause" with the facts, whereas the IACtHR has recognized their right to reparation due to material and psychological harm[75].

iii. Beneficiaries

The definition of the concept of "victim" has been important not only for granting reparations, but also to allow victims to participate on the proceedings before the ICC. In the latter case, the ICC AC on *Lubanga* case defined four conditions to be considered victim, than latter were confirmed by the TC II on *Katanga* case, namely: "the applicant must be a natural or legal person; the applicant must have suffered harm; the crime which caused the harm must fall within the jurisdiction of the Court; and there must be a causal nexus between the harm suffered and the crime"[76]. In any case, victims that did not participate on the criminal proceedings are not excluded from reparations.

Additionally, in the case of collective reparations, the ICC has adopted an approach which considers that collective awards are directed towards communities understood as a group of people that suffered harm as a result of the crimes for which the perpetrator was convicted[77]. This approach should be carefully implemented to avoid creating differences into a group between those who are entitled to reparations and those who are not.

iv. Liability to repair

In one of its most recent decisions on reparations, the ICC reaffirmed that the reparations order must not go beyond the scope of the crimes for which the perpetrator was convicted[78]. Indeed, *Lubanga* claimed that the judges didn't consider that he was found responsible as co-perpetrator by ordering him to pay full amount on reparations[79]. However, the ICC AC considered that *Lubanga* didn't

[75] Clara Sandoval-Villalba and Luke Moffet, 'Reparations and the International Criminal Court: Judicial Experimentalism or Fitting Square Pegs in Round Holes? (Draft)'.
[76] Trial Chamber II, Order for Reparations (n 57) para 36; Appeals Chamber of the International Criminal Court, 'Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (2018) Lubanga ICC-01/04-01/06 OA 9 OA 10 paras 61–65.
[77] Appeals Chamber, Decision Establishing the Principles and Procedures (n 56) para 212.
[78] Appeals Chamber of the International Criminal Court, 'Judgment on the Appeals against Trial Chamber II's "Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo Is Liable"' (n 61) para 3.
[79] ibid 307.

demonstrated an error in the TC reasoning, because it did took into account the following criteria: (i) his presidency of the UPC/FPLC and his role as its political leader and Commander-in-chief; (ii) that his contributions were essential to the common plan to conscript, enlist and use children to participate actively on hostilities; and (iii) the gravity of the crimes and the widespread and large scale of its execution[80].

Additionally, the AC quotes previous decisions that state that a person's liability for reparations must be proportional to the harm caused and to his/her participation on the crime[81]. At the same time, the AC recalls the *Katanga* case ruling which stated that it is not inappropriate to hold the perpetrator liable for the full harm, even when other persons might have contributed to the harm too[82]. Although this might be apparently a contradiction, the Court still renders the reparation proportional to the harm caused, however, the burden to recover the portion of liability relies on the perpetrator and not in the victims[83].

Additionally, the economic condition of the convicted person is not taken into account when determining the reparations size[84]. It should be highlighted that most of the convicted persons at the ICC have been declared indigent and, therefore, reparations are being granted through the TFV.

v. Harm

The concept of harm is closely related to the idea of victim. The UN Guiding Principles define victims as persons who individual o collectively have suffered harm. Hence, harm includes "physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of human rights law, or serious

[80] ibid 309.
[81] Trial Chamber II of the International Criminal Court, 'Corrected Version of the "Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo Is Liable"' (2017) Lubanga ICC-01/04-01/06 para 269; Appeals Chamber, Decision Setting the Size of the Reparations (n 61) para 305.
[82] Trial Chamber II, Order for Reparations (n 57) para 178; Appeals Chamber, Decision Setting the Size of the Reparations Award (n 61) para 306.
[83] Classified authors, 'Expert Report on Reparation Presented to Trial Chamber III, International Criminal Court' [2017] ICC-01/05-01/08-3575 para 221.
[84] Trial Chamber II, Order for Reparations (n 57) para 245.

violations of international humanitarian law"[85]. This principle was quoted by the ICC to conclude that material, physical and psychological harm are included in the reparation proceedings of the Court[86]. The harm can be direct or indirect and it must be personal[87]. The assessment of the harm is a complex task that in the Lubanga case was delegated by the TC I to the TFV and in Katanga case it was made by the Court itself, although in the latter it applied the technique of standard valuation that tends to homogenize the victims and the harm suffered[88].

vi. Types of reparation

Article 75 of the RS considers in principle three measures of reparation: restitution, rehabilitation and compensation. Significantly, guarantees of non-recurrence (GNR) and satisfaction, included in the UN guiding principles, were not mentioned in the article[89]. It was considered that those measures were not associated with a context of international criminal law[90] and were considered not appropriate within the limits of the Court's mandate that excludes State responsibility[91]. In other words, state apologies, institutional reform and other examples of satisfaction and guarantees of non-recurrence are considered to involve State action and therefore were not mentioned on the RS. However, the ICC has clarified that article 75's measures are not exclusive. Additionally, the ICC's case law has shown that GNR and satisfaction are not excluded in cases of criminal responsibility[92].

According to the Rule 97(1) of the Rules of Procedure and evidence (RPE) the Court may award reparations on and individual or collective basis or both. For doing so, it should consider the scope and extent on any damage, loss or injury.

[85] United Nations General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2006) 21 March 6A/RES/60/147 n Principle 8.
[86] Trial Chamber I of the International Criminal Court (n 57) para 229.
[87] ibid 228.
[88] Diana Contreras Garduño, *Collective Reparations: Tensions and Dilemmas between Collective Reparations and the Individual Right to Recieve Reparations* (Intersentia 2018) 227.
[89] McKay (n 51) 170.
[90] Sperfeldt (n 53) para 369.
[91] Ferstman and Goetz (n 55) 340; Contreras Garduño (n 88) 194.
[92] Trial Chamber I of the International Criminal Court (n 57) para 222.

The ICC has issued reparation orders in three cases: *Al Mahdi, Lubanga* and *Katanga*. In all of them, collective reparations have been granted. In *Al Mahdi* case, the ICC granted both, individual and collective reparations. The facts of the case refer to the destruction of protected property by the accused that lead the ICC to grant individual and collective reparations. Taking into consideration the destruction of property as such, the Court ordered "collective reparations through the rehabilitation of the sites of protected buildings"[93] .

Regarding the economic loss, the Court granted: (i) individual reparations in the form of compensation to those who experienced economic loss because their livelihoods exclusively depended on the protected buildings; and (ii) collective reparations aiming to rehabilitate the community of Timbuktu to address the economic harm caused by the crime[94]. Regarding moral harm, the Court granted: (i) individual compensation for those whose ancestors' burial sites were damaged in the attack; and (ii) collective reparations for the community as a whole in the form of rehabilitation and symbolic measures to address the emotional distress caused by the destruction of the protected buildings[95], that were cherished monuments for the community and gave them a sense of protection[96].

Reparations regarding body harm or property damage caused to other buildings were not granted by the Court because the accused was convicted only for the protected buildings' attack[97]. Additionally, the Appeals Chamber determined that the TC VIII should maintain the control over the reparation proceedings undertaken by the TFV, including the control over eligibility decisions regarding individual reparations[98]. It should be recalled that the TFV is separate from the Court and part of its mission is to implement the ICC-ordered reparations[99].

In *Lubanga* case, the TFV had a substantive role due to its powers to determine the "nature and/or size of the reparation award"[100]. For the Court, the most appropriate forms of reparation for the case

[93] Trial Chamber VIII of the International Criminal Court, 'Reparations Order in the Case of the The Prosecutor v. Ahmad Al Faqui Al Mahdi.' (2017) 17 Aug. ICC-01/12-01/15 para 104.
[94] ibid 83.
[95] ibid 90.
[96] ibid 86.
[97] ibid 99,103.
[98] Appeals Chamber of the International Criminal Court, 'Judgment on the Appeal of the Victims against the "Reparations Order"' (2018) 8 March No. ICC-01/12-01/15 A para 98.
[99] International Criminal Court, 'Trust Fund for Victims' <https://www.icc-cpi.int/tfv> accessed 15 August 2019.
[100] Appeals Chamber, Decision Establishing the Principles and Procedures to Be Applied to Reparations (n 56) para 203.

were restitution, compensation, rehabilitation and other measures with a symbolic, transformative and preventative value[101]. In this sense, the TFV proposed a reparations plan focused on five measures, classified by Contreras-Garduño as: (i) physical and physiological rehabilitation, (ii) formal and informal education, (iii) socio-economic measures and vocational training, (iv) measures aiming to raise awareness on child soldering and to promote reconciliation, and (v) transformative measures directed to transform the causes of violence, like gender inequality and stigma[102]. The Court did not approve measures i, ii and iii because the TFV did not identify the potential victims[103], terms of reference of each program, cost, time limits[104] and extent of the harm caused to victims[105]. This situation will lead to the implementation of the symbolic measures first, before the service-based ones, which is not advisable due to the risk of victims to disconnect the services provided from the collective reparations frame[106].

In *Katanga* case, the TC II established that the collective reparation measures should take the form of support for housing, support for an income generating activity, support for education and psychological support[107]. The Court also ruled individual measures of reparations, to afford personal and symbolic acknowledge of the harm caused, to regain self-sufficiency and to make decisions for themselves in the basis of their needs.[108] Accordingly, it awarded USD 250 as a symbolic measure of compensation and acknowledgement of the suffering and harm caused[109].

vii. Victims' participation

This section is not going to be referred only to participation on the reparation proceedings, but participation in the legal proceedings before the ICC. In effect, the SJP as a restorative justice tribunal, place an important role on the participation of victims on the proceedings, including the consultation

[101] ibid 202.
[102] Contreras Garduño (n 88) 204.
[103] Trial Chamber II of the International Criminal Court, 'Public Document Order Instructing the Trust Fund for Victims to Supplement the Draft Implementation Plan' (2016) 9 Feb. ICC-01/04-01/06 para 12.
[104] ibid 22.
[105] ibid 25.
[106] Contreras Garduño (n 88) 205.
[107] Trial Chamber II, Order for Reparations (n 57) para 304.
[108] ibid 285.
[109] ibid 300.

of victims affected by the implementation of the SSS[110]. Undoubtfully, the participation of victims has a positive impact and contributes to the legitimacy of the process. However, it is impossible for all victims to participate in the proceedings because it can be an obstacle to provide justice in a timely manner[111]. Therefore, the main question is how to address the collective representation of victims in the proceedings.

The ICC has explored several models of victim participation: (i) a seventeen pages form only to participate in the proceedings; (ii) seven pages application form to participate in the proceedings and in the reparation stage; (iii) one page simplified application form which allow a description of the harm suffered and the charges presented; (iv) partially collective form in which groups of victims describe the common harm suffered that was only used at a pre-trial stage; or (v) to register as victims participants before the Registry without fulfilling application forms[112]. The information provided in the forms allows to find common interest among victims and to assign Legal Representatives accordingly[113].

In *Bemba* case 135 victims were allowed to participate in the proceedings and other 1200 applications were under examination[114]. According to the Court, the following criteria should be observed regarding legal representatives: (i) guarantee of meaningful participation of victims on the proceedings; (ii) efficiency and celerity of the process; and (iii) the participation of victims should not be against the rights of the accused and the right to a fair and impartial trial[115]. In this case, the grouping criteria of victims was decided on geographical grounds, which allowed to each legal representative to represent and equal number of victims and to communicate easily with the victims in the field[116]. Nonetheless, depending on the specific circumstances of the case, different criteria can be used.

[110] *C-080-17* (n 23) 305.
[111] ibid 309.
[112] Dmytro Suprun, 'Legal Representation of Victims before the Icc: Developments, Challenges, and Perspectives' (2016) 16 international criminal law review 972, 979.
[113] ibid 981.
[114] Trial Chamber III of the International Criminal Court, 'Decision on Common Legal Representation of Victims for the Purpose of Trial' (2010) 10 Nov. ICC-01/05-01/08 para 6.
[115] ibid 9.
[116] ibid 21.

Victim participation on the proceedings is stated in article 68(3) of the RS and Rule 89 of the RPE. The former establishes that when the "personal interest of the victims are affected", they shall be allowed to present their views and concerns. In practice, the Court has understood that according to its legal framework victims' participation is subject to the following: (i) demonstrate that they are victims and (ii) that their personal interests are affected by the trial which means that only victims of the crimes charged are entitled to participate[117] .

Victims can lead and challenge evidence when it affects their personal interest, for instance, because it influences the reparation proceedings or because it is prejudicial to them[118]. For doing so, the Chamber should observe (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interest, (iv) compliance with protection orders and disclosure obligations, (v) appropriateness, (vi) consistency with the rights of the accused and a fair trial[119].

b. Extraordinary Chambers for the Courts of Cambodia

The ECCC, like the ICC, can only render reparations against the convicted person and cannot rule over State responsibility[120]. It is mainly a retributive justice system like any other criminal court[121], unlike the SSS that have mainly a restorative and reparative content, and a minimum component of retribution.

[117] Appeals Chamber of the International Criminal Court, 'Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (2008) 11 Jul ICC-01/04-01/06 OA 9 OA 10 para 61,62.
[118] ibid 102, 103.
[119] ibid 104.
[120] JUAN PABLO PEREZ- LEON- ACEVEDO, 'INTERNATIONAL HUMAN RIGHTS LAW IN THE REPARATION PRACTICE OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIAP' in Giuliana Ziccardi Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence* (Oxford University Press 2018) 217.
[121] Antonio Cassese, *International Criminal Law* (2nd Ed., 2008) 369.

Rule 23(1)(b) of the Rules of Procedure of the ECCC state that civil parties (victims) are entitled to seek moral and collective reparations. [122] Accordingly, the ECC can only grant collective and moral reparations due to the great number of victims and the its limited mandate and resources[123].

In the following paragraphs, the following elements of reparations before the ECCC will be analysed[124]: (i) causality; (ii) beneficiaries; (iii) liability to repair; (iv) harm; (v) types of reparations and (vi) victims' participation.

i. Causality

The causality requirement is also necessary in the ECCC proceedings; however, it seems to be more difficult to prove the harm caused by crimes committed more than 30 years ago[125]. Additionally, according to the article 23 of the internal rules the test of causality seems to be stricter because it requires that the harm is a direct consequence of the crime charged, instead of a but/for relationship[126]. Some scholar consider that the "directness" established by the Internal Rules does not differ from the regional human rights standards[127], others consider that this approach is narrower than the Inter-American system one[128]. In any case, the ICC AC has expressly recognized "the requirement of a "direct and immediate link" is not necessarily as strict at the ECCC"[129]. This conclusion is grounded on the preference of the ECCC on collective reparations directed towards a large number of victims directly or indirectly affected by the crimes and the application of the presumption of collective injury[130].

ii. Beneficiaries

[122] Extraordinary Chambers in the Courts of Cambodia, 'Internal Rules (Rev.8)' (2011) <https://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC Internal Rules %28Rev.8%29 English.pdf> accessed 4 August 2019.
[123] PEREZ- LEON- ACEVEDO (n 120) 218.
[124] Principles of reparations won't be analysed because the decisions establishing principles on reparations are exclusive from the RS art. 75.
[125] Contreras Garduño (n 88) 222.
[126] ibid.
[127] PEREZ- LEON- ACEVEDO (n 120) 222.
[128] Dinah Shelton, *Remedies in International Human Rights Law* (3th ed., OUP 2015) 242.
[129] Appeals Chamber, Decision Setting the Size of the Reparations (n 61) para 126.
[130] ibid.

The beneficiaries of reparations before the ECCC are the civil parties that are recognized by the court. The only defining criterion for admissibility is to prove an injury resulting from the crime charged[131]. It includes direct and indirect victims that have suffered a personal injury because of the crimes[132]. Indirect victims are not limited to family members and can include extended family or people that do not share any kinship if the injury is proven[133]. Successors of the direct victim are also recognized as civil parties (iure hereditatis)[134]. In any case, given the moral and collective reparations awarded by the ECCC, the scope of reparations potentially goes beyond the victims of the case[135].

In accordance with the substantive definition of the civil party as discussed above, the Supreme Court Chamber holds that injury resulting from the crime charged is the only defining, and at the same time limiting, criterion for the admissibility of the civil party application before the ECCC

iii. Liability to repair

Under the ECCC legal framework, the obligation to repair is linked to the conviction of the defendant. Therefore, civil parties do not have standing to advance a claim before the ECCC for any other defendant, but the convicted person[136]. Moreover, the ECCC used to be limited by the viability of funds to issue reparation measures taking into consideration that it cannot take decisions involving the State's funds. This situation was amended, and donations are considered in order to grant the reparation measures[137].

It is interesting to note that in the cases were the perpetrators were found responsible as members of a joint criminal enterprise, the court did not establish individual injury against an individual accused[138].

---

[131] Extraordinary Chambers in the Courts of Cambodia. Supreme Court Chamber, 'KAING Guek Eav Alias Duch, Appeal Judgement (Public), 3 February 2012' (2012) No . 001/1 Case File/Dossier para 415.
[132] ibid 418.
[133] ibid.
[134] ibid 419.
[135] PEREZ- LEON- ACEVEDO (n 120) 227.
[136] Extraordinary Chambers in the Courts of Cambodia. Supreme Court Chamber (n 131) para 656.
[137] PEREZ- LEON- ACEVEDO (n 120) 216.
[138] Extraordinary Chambers in the Courts of Cambodia. Pre Trial Chamber, 'Prosecutor v. Nuon Chea et Al. (Case 002), Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, No. D411/3/6', (2011) 24 June para 72 <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D411_3_6_EN.PDF>.

iv. Harm

Article 23 bis b) establishes harm as physical, mental or psychological injury that must be a "direct consequence" of the crimes charged to the convicted. However, the ECCC has clarified that it does not necessarily has to be direct[139]. Additionally, like the ICC, the harm also must be personal[140].

Interestingly, on the *Duch* trial case the only described damage was the psychological and physical suffering[141]. One can conclude that this reasoning comes from the fact that the ECCC only grant symbolic and moral reparations of a collective nature and from the difficulties to prove material harm from facts that occurred 30 years ago.

One important landmark from this Court is the presumption of collective injury in cases of genocide or crimes against humanity that aim to target a group or population, when a victim submits that was "a member of the same targeted group or community as the direct victim and such is more likely than not to be true, psychological harm suffered by the indirect victim arises out of the harm suffered by the direct victim, brought about by the commission of crimes, which represent grave violations of international humanitarian law"[142].

v. Types of reparation

The first symbolic reparations ordered by the ECCC (*Case 001*) related to acknowledgement of responsibility and apologies[143] which has been criticized as a very restricted form of reparation[144]. In effect, the requests for commemoration day and official apologies were denied for falling exclusively on governmental prerogatives[145]; vocational training, micro-enterprise loans and business skills

[139] ibid 83.
[140] Extraordinary Chambers in the Courts of Cambodia. Trial Chamber, 'KAING Guek Eav Alias Duch, Judgement' (2010) 26 July No. 001/18-07-2007/ECCC/TC paras 640–641.
[141] ibid 641.
[142] Extraordinary Chambers in the Courts of Cambodia. Pre Trial Chamber (n 138) para 93.
[143] Extraordinary Chambers in the Courts of Cambodia. Trial Chamber, 'KAING Guek Eav Alias Duch, Judgement' (n 140) para 683.
[144] Bryan Barnet Miller, 'A Model of Victims' Reparations in the International Criminal Court' (2012) 33 La Verne L. Rev 255, 256.
[145] Extraordinary Chambers in the Courts of Cambodia. Trial Chamber, 'KAING Guek Eav Alias Duch, Judgement' (n 140) para 671.

training were rejected because they were beyond the scope of the available reparations before the Chambers[146]; the construction of memorials was denied because there was not enough specificity on the presented proposals[147]; request for medical care was also rejected because it might impose obligation to national health authorities[148]. Therefore, the only measure granted was the compilation of all statements of acknowledgement of responsibility and apologies made by the accused during the trial and upload them to the ECCC's official webpage[149].

After this situation, the reparation implementation regime was amended on September 2010. Significantly, article 23(3)(b) *quinquies* states that the Chamber might "a) order that the costs of the award shall be borne by the convicted person; or b) recognise that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding."[150]. Therefore, external funding and donations can be considered to grant collective and moral reparations before the ECCC. Additionally, for some scholars the Victim Support Section of the ECCC assumes *mutatis mutandis* functions partially similar to the TFV's ones[151].

On *Case 002/01,* the ECCC approved 11 out of 13 projects of reparation. These included: national Remembrance Day, previously approved by government authorities[152]; therapy and psychological assistance which had the required funding granted[153]; and documentation and education projects that had secured funding and its partners were willing to contribute to the projects[154]. The Chamber did not approve the construction of five public memorial sites through Cambodia that did not have enough detailed descriptions and itemized budget, and the construction of a memorial to Cambodian victims living in France that didn't secure enough funding[155].

[146] ibid 670.
[147] ibid 672.
[148] ibid 674.
[149] ibid 683.
[150] Extraordinary Chambers in the Courts of Cambodia (n 122) n article 23(3)(b) quinquies.
[151] PEREZ- LEON- ACEVEDO (n 120) 237.
[152] Extraordinary Chambers in the Courts of Cambodia. Trial Chamber, 'Case 002/01 Judgement. Nuon Chea and Khieu Samphan' (2014) 7 August No. 002/19-09-2007/ECCC/TC para 1126.
[153] ibid 1155.
[154] ibid 1156–1160.
[155] ibid 1161–1164.

On *Case 002/02*, the ECCC approved 14 out of the 15 projects proposed. The approved projects included GNR through an app to learn about the Khmer Rouge History, university workshops on the Khmer Rouge History and art performances in schools and universities to promote intergenerational dialogue on the experiences of victims[156]. Projects aiming at guaranteeing non-repetition and benefiting specific groups of victims like films and multimedia exhibitions to educate about the Cham experience on Democratic Kampuchea (DK) regime[157], "Phka Sla Kraom Angkar" classical dance production to raise awareness on the regulation of marriage on DK regime[158]; project to raise awareness on the Cham and Vietnamese victims' experience to promote intergenerational dialogue[159] and a civil and legal education pilot to allow civil parties to understand better their legal status according to the Cambodian law[160]. Projects that aimed to provide satisfaction like a book with the accounts of 30 civil parties that did not have to opportunity to give statements before the Court[161]; a song writing contest[162]; public exhibition of memory sketches performed by university students[163]; access to judicial records and civil parties' materials of the Khmer Rouge Trials[164]. Projects serving rehabilitation like the healing and reconciliation project for survivors of the Khmer Rouge[165] and the project to improve health and mental wellbeing and reducing the risk of poverty and social exclusion of ageing civil parties, ensuring access to health services and increasing their income security[166].

The only project that was not endorsed sought to produce two documentaries and testimonials of Cambodia's indigenous people in Ratanakiri and Mondulkiri provinces during the DK regime[167]. The reason for its exclusion is the fact that the charges of the case were not related with the discrimination and persecution of the indigenous people living in the mentioned provinces[168]. In any case, the Court

[156] Extraordinary Chambers in the Courts of Cambodia. Trial Chamber, 'Case 002/02 Judgement. Nouon Chea and Khieu Samphan' (2018) 16 Nov. No. 002/19-09-2007/ECCC/TC paras 4420–4422.
[157] ibid 4423.
[158] ibid 4424.
[159] ibid 4425.
[160] ibid 4431.
[161] ibid 4426.
[162] ibid 4427.
[163] ibid 4428.
[164] ibid 4429.
[165] ibid 4430.
[166] ibid 4432.
[167] Extraordinary Chambers in the Courts of Cambodia. Trial Chamber, 'Case 002/01 Judgement. Nuon Chea and Khieu Samphan' (n 152) para 4433.
[168] Extraordinary Chambers in the Courts of Cambodia. Trial Chamber, 'Case 002/02 Judgement. Nouon Chea and Khieu Samphan' (n 156) para 4466.

highlighted that donors can support those initiatives even when they are not endorsed by the Chamber[169].

It is important to highlight how the ECCC was able to deal with its limitations regarding State responsibility, the limited funding and the victims demands for reparation. Civil society organisations and international cooperation played an important role in the execution of the reparation measures. Additionally, the case law of the ECCC has demonstrated that measures of satisfaction and guarantees of non-recurrence can be granted to some extent even without the involvement of State responsibility.

vi. Victims' participation

Article 23 of the Internal Rules provides that the purpose of civil action before the ECCC are: (i) "Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution" [170] and (ii) seek collective and moral reparations. As it can be seen, victims' participation in the criminal proceedings must be in support of the prosecution's case or, at least, with its consent[171]. Victims' participation is also limited by the Chambers, for instance the questions to the parties and witnesses shall be asked through the president of the Chamber[172] and the order of the interventions in the hearings is decided by the Chamber[173].

Regarding collective participation, the system designed for it is described as follows "At the pre-trial stage, Civil Parties participate individually. Civil Parties at the trial stage and beyond shall comprise a single, consolidated group, whose interests are represented by the Civil Party Lead Co-Lawyers (…) Civil Party Lead Co-Lawyers shall file a single claim for collective and moral reparations"[174]. This provision is problematic due to the different positions that can arise between victims, but the

[169] ibid 4467.
[170] Extraordinary Chambers in the Courts of Cambodia (n 122) n art. 23.
[171] Susana SaCouto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project' (2012) 18 Mich. J. Gender & L. 297, 325.
[172] Extraordinary Chambers in the Courts of Cambodia (n 122) n art 91 (2).
[173] ibid art. 91 (1).
[174] ibid art. 23 (3).

prevalence of a unified position before the Chambers reached after a consensus with the Civil Parties lawyers [175]. This creates a huge risk of silence of the different experiences of victims.

3.1.2 International Human Rights Law. Inter-American Court of Human Rights

This subsection is going to focus on the case law of the IACtHR for two main reasons. Firstly, as mentioned earlier, Colombia is under the jurisdiction of the IACtHR and, secondly, this court has leading developments on reparations[176]. Additionally, even when the Inter-American Commission of Human Rights (IACHR) has issued recommendations aiming to redress the violations of the ACHR or the American Declaration of Rights and Duties of "Men", the IACtHR is more consistent with the subject and it leaves considerably less discretion to the States[177].

The elements to be analysed in this subsection are: (i) beneficiaries, (ii) harm, (iii) causality or causal link, (iv) types of reparations and (v) victims' participation. Additionally, taking into consideration the purposes of this dissertation, an analysis on the (vi) Colombian administrative reparations program and its impact on reparations issued by the Court will be held.

a. Beneficiaries

According to article 63(1) of the ACHR, when there is a violation of the Convention, the Court "shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated."[178] The Court has used the terms "victim" and "injured party" to refer to the beneficiaries of reparations. For Shelton, those terms had different scope in the Court's early cases, but it has gradually expanded the concept of victim and "appears now to leave the words as coextensive"[179]. As an example, she recalls the *Velazquez Rodríguez* case, the first case ruled by the Court, where Manfredo Velásquez, the direct victim of forced disappearance, was considered a victim and his wife and children were

[175] ibid art. 12 ter (3).
[176] Cecilia Medina Quiroga, 'The Inter-American Court of Human Rights: 35 Years' (2015) 33 Neth. Q. Hum. Rts. 121.
[177] Agustina Del Campo, 'Reparations in the Inter-American System: A Comparative Approach' (2007) 56 American University Law Review 1408.
[178] Organization of American States (OAS), 'American Convention on Human Rights, "Pact of San Jose"' entered into force 18 Jul 1978, signed 22 Nov 1969. art. 63.
[179] Shelton (n 128) 245.

considered injured parties[180]. Subsequently, she highlights that the Court has recognized as victims -not injured parties- the next of kin in cases of extrajudicial killings and forced disappearances[181].

Sandoval-Villalba considered that the tendency to treat those who used to be considered injured parties as victims does not means that the term "injured party" is no longer applicable in the Court's case law, although she recognized major setbacks with regards to this concept in cases like *La Cantuta v. Perú* and *Kimel v. Argentina*[182]. However, in most recent cases, the Court has explained that "injured party" refers to victims of any violation of the rights protected by the Court[183], suggesting that these terms are currently used alike. In fact, in another article on the subject she recognizes this narrow understanding of "injured party"[184].

The concept of victim has increasingly been subject to procedural constraints. Accordingly, the most recent Rules of the Court state in its article 35.1 that the report filled by the IACHR to the Court *must* identify the alleged victims. Moreover, since 2007 the Court's case law has established that the alleged victims should be mentioned in the complaint and the report filled by the Commission, which has the duty to identify the victims[185] . For the Court, this guarantees legal certainty and the State's right of defence[186].

However, the Court is allowed to take a flexible approach regarding collective and massacres cases according to article 35.2 of the Rules. For instance, *Genesis Operation* case relates to the facts surrounding the contra insurgency military operation known as "Genesis" and paramilitary incursions in the basin of the Cacarica river in Colombia, that lead to the murder of Marino López by

[180] ibid.
[181] ibid.
[182] Clara Sandoval-Villalba, 'The Concepts of "injured Party" and "Victim" of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights : A Commentary on Their Implications for Reparations' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity: systems in place and systems in the making* (Martinus Nijhoff Publishers 2009) 277–279.
[183] Inter-American Court of Human Rights, 'Gorigoitía v. Argentina Judgement of 2nd September 2019 (Preliminary Exception, Merits, Reparations and Costs)' [2019] Serie C 382 para 64; Inter-American Court of Human Rights, 'Martínez Coronado v. Guatemala Judgement of 10th May 2019 (Merits, Reparations and Costs)' [2019] Serie C 376 para 94; Inter-American Court of Human Rights, 'Muelle Flores v Perú. Judgement of 6th March 2019 (Preliminary Exception, Merits, Reparations and Costs)' [2019] Serie C 375 para 224.
[184] Ruth Rubio-Martin and Clara Sandoval-Villalba, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment' (2011) 33 Hum. Rts. Q. 1062, para 1069.
[185] Inter-American Court of Human Rights, 'Barbani Duarte and Others v. Uruguay. Judgement of 13 October 2011 (Merits, Reparations and Costs)' [2011] Serie C 234 para 42.
[186] Inter-American Court of Human Rights, 'Radilla Pacheco v. Mexico. Judgement of 23 November 2009 (Preliminary Exception, Merits, Reparations and Costs)' [2009] Serie C 209 para 110.

paramilitaries and the forced displacement of the inhabitant afro descendant communities[187]. The complexity of the facts, the high number of victims and the difficulties to access the region prevented the representatives of victims and the IACHR to identify clearly the victims when the later issued its merits report[188]. Therefore, considering the complexities of the case, the Court took into account the alleged victims reported by the victims' representatives in a later stage[189]. Nonetheless, this approach is far from being as broad as in the *Plan de Sánchez* case, where the Court held that the victims were the persons listed in the IACHR application and "those that may subsequently be identified, since the complexities and difficulties faced in identifying them lead to the presumption that there may be victims yet to be identified"[190] , even though in both cases the representatives faced similar difficulties to identify victims.

The Court has considered as beneficiaries of reparations: (i) the direct victim, his/her successors- when the former dies [191] and next of kin[192] in the case regarding EE and forced disappearances; (ii) next of kin in case of arbitrary detention, inhumane treatment, torture and sexual violence[193]; (iv) non-members of the victims' family that can demonstrate economic dependence on the victim through regular payments[194] and (v) communities[195]. Some scholars contested the recognition of communities as injured parties[196] maybe because the Court used to order collective reparations

[187] Operation Genesis (n 18) para 81.
[188] ibid 38.
[189] ibid 42.
[190] Inter-American Court of Human Rights, 'Case of Plan de Sánchez Massacre v. Guatemala. Judgment of April 29, 2004 (Merits)' [2004] Serie C 105 para 48.
[191] Inter-American Court of Human Rights, 'Neira Alegría y Otros Vs. Perú. Judgement of 19 September 1996 (Reparations y Costs)' Serie C 29 paras 63–65; Inter-American Court of Human Rights, 'Garrido y Baigorria Vs. Argentina. Judgement of 27 August 1998 (Reparations and Costs)' Serie C 39 para 50.
[192] Inter-American Court of Human Rights, 'Case of Bámaca-Velásquez v. Guatemala. Judgment of November 25, 2000 (Merits)' Serie C 70 para 160; Inter-American Court of Human Rights, 'Case of the "Street Children " (Villagran-Morales et Al.) v. Guatemala .Judgment of November 19, 1999 (Merits)' Serie C 73 para 174; Inter-American Court of Human Rights, 'Case La Cantuta Vs. Perú. Judgement of 29 November 2006 (Merits, Reparations and Costs)' Serie C 162 para 198.
[193] Inter-American Court of Human Rights, 'Case Loayza Tamayo Vs. Perú. Judgement of 27 November 1998 (Reparations and Cost)' Serie C 33 paras 90–92; Inter-American Court of Human Rights, 'Case De La Cruz Flores Vs. Perú. Judgement 18 November 2004 (Merits, Reparations and Costs)' Serie C 115 paras 135–136; Inter-American Court of Human Rights, 'Rosendo Cantú v. Mexico. Judgement of 31 August 2010 (Preliminary Exception, Merits, Reparations and Costs).' Serie C 219 paras 137–139; Inter-American Court of Human Rights, 'Women Victim of Sexual Violence in Atenco V. México. Judgement 28 November 2018 (Preliminary Exception, Merits, Reparations and Costs)' Serie C 371 para 321.
[194] Inter-American Court of Human Rights, 'Case of Aloeboetoe et Al. v. Suriname. Judgment of September 10, 1993 (Reparations and Costs)' [1993] Secrie C 15 para 68.
[195] Inter-American Court of Human Rights, 'Case of the Saramaka People v. Suriname. Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs)' Serie C 172 para 189; Inter-American Court of Human Rights, 'CASE OF THE KICHWA INDIGENOUS PEOPLE OF SARAYAKU v. ECUADOR. JUDGMENT OF JUNE 27, 2012 (Merits and Reparations)' Serie C 245 para 284.
[196] JUAN PABLO PEREZ- LEON- ACEVEDO, 'Las Reparaciones En El Derecho Internacional de Los Derechos Humanos, Derecho Internacional Humanitario y Derecho Penal Internacional.' (2007) 23 Am. U. Int'l L. Rev. 30.

without the explicit recognition of the community as victim like in *Ituango massacres* or *Plan de Sanchez* cases. However, in more recent cases the IACtHR has expressly recognized certain groups and communities as injured parties and beneficiaries of collective reparations[197].

Additionally, it is important to note that kinship has been broadly understood by the Court and goes beyond the idea of nuclear family[198]. Furthermore, the Court presumes moral damages caused to the parents, spouse/partner, children and siblings of the next of kin of victims[199]. However, this presumption is *iuris tantum* and can be contested by the State[200] .

The Court does not have an established rule with regards to posthumously born children and it seems to depend on the cessation of the effects of the violation at the time of birth. Likewise, in the case of the forced disappearance of *Gómez Palomino* the Court considered a posthumously born child of the victim as injured party[201] and held a similar position in a case of *False positives (extrajudicial executions)[202].* Nevertheless, in the *Genesis Operation* case it considered that the children born after the return to the Cacarica basin of the displaced communities were not victims because they did not endure the forced displacement conditions[203].

b. Harm

The Court has identified three types of harm: (i) non-pecuniary harm (*daño inmaterial*); (ii) material harm and (iii) collective harm. The non-pecuniary harm refers to the hardship and suffering caused by the violation of human rights, including the damage caused to victim's significative values and changes of a non-pecuniary nature in the living conditions[204]. This type of harm can be redressed

[197] Inter-American Court of Human Rights, 'Garífuna Triunfo de La Cruz and Its Members v. Honduras. Judgement of 8 October 2015 (Merits, Reparations and Costs)' [2015] Serie C 305 para 257.
[198] Ruth Rubio-Martin, Clara Sandoval-Villalba and Claudia Diaz, 'Repairing Family Members: Gross Human Rights Violations and Communities of Harm', *The Gender of Reparations: Unsetteling Sexual Hierarchies while Redressing Human Rights Violations* (2009) 240.
[199] See footnote 193
[200] Women Victim of Sexual Violence in Atenco V. México (n 194) para 320.
[201] Inter-American Court of Human Rights, 'Gómez Palomino v. Perú Judgement of 22 November 2005 (Merits, Reparations and Costs)' [2005] Serie C 136 para 119.
[202] Inter-American Court of Human Rights, 'Villamizar Durán y Otros v Colombia. Judgement 20, November 2018. (Preliminary Exceptions, Merits, Reparations and Costs)' Serie C 364 para 227.
[203] Operation Genesis v Colombia. (n 147) para 425.
[204] Inter-American Court of Human Rights, 'Case of the Pueblo Bello Massacre v. Colombia. Judgement of January 31, 2006 (Merits, Reparations and Costs)' Serie C 140 para 254.

through: (i) monetary compensation or providing goods and services which worth is defined on equitable grounds and reasonable judicial discretion or (ii) public actions aiming to recognize the victim's dignity and prevent the recurrence of human rights violations[205]. Its worth noting that the non-pecuniary harm was also known as moral harm[206], but the former is considered more broad-it adds to the concept of moral harm the alteration in living conditions- and more consistent with IHRL[207].

The material harm comprises "the loss of or detriment to the victims' income(sic), the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the *sub judice* case"[208].

Regarding collective harm, Contreras considers that the Court typically refers to it by stating that a human rights violation inflicted harm on some members of the community; on the community itself or when it recognizes a community as injured party[209]. However, the first scenario might be ambiguous as several members of a given community can be affected by a human rights violation without it necessarily affecting the group itself. Even when the Court deals with GHRV, it should clarify how the violation of human rights to members of the community affects the community as a whole. Is it because of the nature of the crimes, the high number of victims or the notoriety of the victim? The Court has not provided any answer yet.

Additionally, Contreras explains that the Court has awarded collective reparations in cases of individual or collective harm, but in some cases, it has refrained from ordering collective reparation measures even when it has acknowledged the collective harm like in the *Genesis Operation* case[210]. Nonetheless, this case should be analysed under the lens of complementarity and the existence of a comprehensive domestic reparations program (DRP). This topic is going to be analysed further below.

c. Causal link

[205] Inter-American Court of Human Rights, 'Case of Blanco Romero et Al v. Venezuela. Judgement of November 28, 2005 (Merits, Reparations and Costs)' Serie C 138 para 86.
[206] Neira Alegría y Otros Vs. Perú (n 192) para 53.
[207] PEREZ- LEON- ACEVEDO (n 196) 39.
[208] Case of Bámaca-Velásquez v. Guatemala (n 193) para 43.
[209] Contreras Garduño (n 88) 155.
[210] ibid 156.

For the Court there should be a causal link between the facts of the case, the recognized human rights violations and the measures of reparation to redress the harm[211]. Regarding the causality between the facts and the recognized human rights violated, in *Aloeboetoe* case the Court established that the responsible party should repair the immediate effects of its unlawful acts to the extent that has been legally recognized[212]. It has also referred to the "direct" damage caused by the facts of the case[213].

Additionally, regarding the reparation measures, there is not a single causality test applied by the Court and its reasoning seems to rely on a case-by-case basis. In general, the Court denies reparation measures because they are not related with the human rights violations of the case[214]. Nonetheless, it has also rejected reparation measures because it considers that the measures already ordered are enough and fulfil the purpose intended with the proposed measure[215]. Interestingly, it has also rejected reparation measures that might be adequate but do not achieve the purpose intended by the Court. For instance, in a case related with the statutory limitations imposed to victims of crimes against humanity in Chile who were seeking civil compensation, the Court recognized that the measure related with the harm caused was to order the State a domestic remedy which guarantees the access to civil reparations to the victims[216]. However, it considered that by ordering that measure the consequence would be that the victims would not have had access to a prompt remedy neither at the national nor the international level[217].

d. Types of reparation

[211] Gorigoitía v. Argentina (n 184) para 92.
[212] Case of Aloeboetoe et Al. v. Suriname (n 195) para 45.
[213] Case of the Saramaka People v. Suriname (n 196) para 199.
[214] Inter-American Court of Human Rights, 'Case Carvajal Carvajal and Others v. Colombia. Judgement of 13 March, 2018 (Merits, Reparations and Costs)' Serie C 352 para 221; Inter-American Court of Human Rights, 'Case Omeara Carrascal and Others v. Colombia. Judgement of 21 November, 2018 (Merits, Reparations and Costs)' Serie C 368 para 310.
[215] Case Carvajal Carvajal and Others v. Colombia (n 215) para 220; Case Omeara Carrascal and Others v. Colombia (n 215) para 310.
[216] Inter-American Court of Human Rights, 'Órdenes Guerra et Al v Chile. Judgement of 29 November, 2018, (Merits, Reparations and Costs)' Serie C 372 para 116.
[217] ibid 118.

The Court has consistently state that, if it is possible, a restitutio in integrum should be pursued in order to establish the *status quo ante*[218]. However, in most cases of human rights violations it is not possible, therefore the Court will order measures to redress the harm caused through compensation, restitution, rehabilitation, satisfaction and GNR[219]. These measures can be awarded individually or collectively.

Compensation consist in ordering a monetary award to the victims for the harm caused, although some consider that this measure is merely symbolic because the damage caused by GHRV can never be repaired[220]. In collective reparation cases regarding indigenous communities, the Court has ordered the State to create community funds as compensation for the harm caused[221].

Restitution aims to restore the victim to her/his original situation[222] and in the Court case law has comprised orders to release a university instructor arrested, tortured and accused of belonging to a terrorist group*, Loayza Tamayo,* and her reincorporation as a teacher in a public institution[223]; the restitution of goods and securities that were confiscated by the police when *Daniel Tibi* was detained[224]; nullify all judicial or administrative records[225]; among others. Collectively, it has ordered the restitution of lands to indigenous[226] and afro-descendant communities[227]. Significantly, in the latter case, the restitution referred to an effective use of lands because legally it belonged to the community[228].

Rehabilitation aims to redress the physical, moral and physiological consequences of the human rights violations[229]. The Court has ordered free healthcare at specialized institutes or hospitals of

[218] Gorigoitía v. Argentina (n 184) para 60; Inter-American Court of Human Rights, 'Case of Velásquez-Rodríguez v. Honduras Judgment of July 21, 1989 (Reparations and Costs)' Serie C 07 para 26.
[219] Gorigoitía v. Argentina (n 184) para 60.
[220] Contreras Garduño (n 88) 132.
[221] Inter-American Court of Human Rights, 'CASE OF THE XÁKMOK KÁSEK INDIGENOUS COMMUNITY v. PARAGUAY JUDGMENT OF AUGUST 24, 2010 (Merits, Reparations, and Costs)' Serie C 214 323; Contreras Garduño (n 88) 139.
[222] United Nations General Assembly (n 85) para principle 19.
[223] Case Loayza Tamayo Vs. Perú (n 194) para 192.
[224] Inter-American Court of Human Rights, 'Case of Tibi v. Ecuador. Judgment of September 07, 2004 (Preliminary Objections, Merits, Reparations and Costs)' Serie C 114 para 237e.
[225] Inter-American Court of Human Rights, 'Case of Cantoral-Benavides v. Peru.Judgment of December 3, 2001(Reparations and Costs)' Serie C 88 para 78.
[226] Inter-American Court of Human Rights, 'Sawhoyamaxa Indigenous Community v Praguay. Judgement 29 March, 2006 (Merits, Reparations and Costs)' Serie C 146 para 210.
[227] Operation Genesis v Colombia. (n 18) para 259.
[228] ibid 460.
[229] United Nations General Assembly (n 85) para principle 15.

referral, diagnostic procedures, medicines, hospitalization, surgery, mental health and traumatological rehabilitation[230]. However, this standard has been lowered in recent Colombian cases[231]. Regarding collective cases, the Court has ordered as reparation measures the provision of goods and basic services like potable water, medical and psychosocial attention, delivery of food to ensure an adequate diet, among others[232].

Satisfaction measures "seek to repair the non-pecuniary damage that does not have a pecuniary dimension, and also establish measures with a public dimension or repercussion"[233]. These measures seek the restoration of victim's dignity, an official reproof of the violations and, like the GNR, prevent the repetition of the facts[234]. These measures include: publication and dissemination of the judgement, public events of acknowledgement of responsibility, tributes to the victims, scholarships to study and commemorative scholarships, among others[235]. The Court has also ordered measures of satisfaction when ordering collective reparations, like in *Plan de Sánchez* case, where it granted: study and dissemination of the indigenous culture, maintenance and improvements of roads, bilingual teaching stuff, establishment of a health centre, among others[236].

For the Court GNR have a greater significance in ensuring the no repetition and prevention of the GVHR in the future[237]. The States are obligated to take all measures, included legal and administrative ones, necessary to protect human rights[238]. These measures are particular because they are forward looking, not victim-centric and structural[239]. Likewise, the Court has ordered the

[230] *Barrios Altos v. Perú* (n 8) para 50.3.
[231] Clara Sandoval-Villalba, 'Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes.' (2018) 22 The International Journal of Human Rights 1192, 1201.
[232] CASE OF THE XÁKMOK KÁSEK INDIGENOUS COMMUNITY v. PARAGUAY (n 222) 301.
[233] De La Cruz Flores Vs. Perú (n 194) 164.
[234] ibid 164.
[235] Felipe Calderón Gamboa, 'La Reparación Integral En La Jurisprudencia de La Corte Interamericana de Derechos Humanos: Estándares Aplicables Al Nuevo Paradigma Mexicano' (2013) 178–184 <http://www.corteidh.or.cr/tablas/r33008.pdf> accessed 1 October 2019.
[236] Plan de Sánchez Massacre v. Guatemala (n 191) para 110.
[237] Inter-American Court of Human Rights, 'CASE OF LUNA LÓPEZ v. HONDURAS JUDGMENT OF OCTOBER 10, 2013 (Merits, Reparations and Costs)' Serie C 269 para 234.
[238] ibid.
[239] David Attanasio, 'Extraordinary Reparations, Legitimacy, and the Inter-American Court.' (2016) 37 U. Pa. J. Int'l L. 839; Rubio-Martin and Sandoval-Villalba (n 184) 1088.

teaching of human rights to public servants, legal reform, investigate, prosecute and punish those responsible for GHRV, find the whereabouts of the victim, among others[240].

As seen in the description of reparations in ICL, GNR and satisfaction were considered inadequate in the context of reparations for criminal responsibility. Definitively, the broad scope of GNR under the case law of the IACtHR necessarily requires a strong state involvement. However, the case law of the ECCC has proven that it is possible to order these types of measures in contexts of criminal responsibility, although its scope is far more limited than under IHRL. This is one of the challenges the SJP must face.

e. Victims' participation

Since 2009 Rules of Procedure, the victims can present their views and concerns directly to the Court and do not have to rely on the Commission for doing so, however, only the latter and the States parties of the ACHR are legally entitled to refer a case before the Court[241]. As parties of the process, the legal representatives can propose the reparations that they estimate adequate to redress the harm caused.

The Court has addressed the participation of victims through different means, including: simply by adopting the recommendations made by victims[242]; order the State to implement collective reparation measures with the agreement of the community and under the supervision of the ACHR[243]; the implementation of satisfaction measures consulting victims[244] and the establishment of an implementation committee comprised by representatives of the victims and the State in order to agree on the implementation of projects related with health, education, public services and infrastructure[245]. It should be noted that most of these measures of participation have been issued in cases of

[240] Calderón Gamboa (n 235) 186–200.
[241] Organization of American States (OAS), Reglamento de la Corte Interamericana de Derechos Humanos. 2009, arts. 35, 36.
[242] Plan de Sánchez Massacre v. Guatemala (n 191) 93–11.
[243] Inter-American Court of Human Rights, 'Mayagna (Sumo) Awas Tigni v Nicaragua. Judgement of 31 August, 2001 (Merits, Reparations and Costs)' Serie C 79 para 167.
[244] Villamizar Durán y Otros v Colombia (n 203) para 210.
[245] Sawhoyamaxa Indigenous Community v Praguay (n 227) para 224,225.

indigenous communities, raising the question of whether it should be applied to non-ethnical communities[246].

Finally, the Court has also stated that in cases of GVHR, the State must guarantee the access and participation of victims in the criminal investigation and prosecution of those responsible[247]. Indeed, regarding the Peace and Justice process, a transitional justice criminal tribunal aiming to punish demobilized paramilitaries in Colombia, the Court held that the fact that the victims triggered a change in the charges is an indicium of their participation in the criminal procedure[248].

f. Colombian domestic reparation program and the IACtHR

In recent years, Colombia has developed a comprehensive legal framework for the assistance, attention and reparation for victims of armed conflict. These effort of the State has been recognized by the IACtHR. For instance, in the case of rehabilitation measures, in *Genesis Operation* case the IACtHR acknowledge the efforts of the state with regards to victims of armed conflict[249]. Furthermore, the Court ordered the treatment of the victims, including the provision of medicines through the public health care system, stating that victims should apply through the DRP[250].

In *Yarce and others* case, regarding the context of State and paramilitary violence against human rights defenders in Comuna 13, a neighbourhood in Medellín city, the Court acknowledged the health services provided by the State to victims of armed conflict and ordered a health and psychological treatment for the victims and if it is adequate, the treatment can be provided through the PAPSIVI, the domestic rehabilitation program for victims of armed conflict[251]. This has been its ruling regarding rehabilitation in the subsequent cases against Colombia that are related with the armed conflict[252].

[246] Contreras Garduño (n 88) 146, 147.
[247] *Case of Gomes Lund et al. ('Guerrilha do Araguaia') v Brazil* (n 9) para 257.
[248] Vereda La Esperanza vs Colombia (n 17) para 216.
[249] Operation Genesis v Colombia (n 18) para 452.
[250] ibid 453.
[251] Inter-American Court of Human Rights, 'Yarce and Others v Colombia. Judgement of 22 November, 2016 (Preliminary Exception, Merits, Reparations and Costs)' Serie C 325 para 340.
[252] Carvajal Carvajal and Others v. Colombia (n 215) para 217; Inter-American Court of Human Rights, 'Isaza Uribe and Others v Colombia. Judgement of 20 November, 2018 (Merits, Reparations and Costs)' Serie C 363 para 184; Omeara Carrascal and Others v. Colombia (n 215) para 300; Vereda La Esperanza vs Colombia. (n 17) para 278; Villamizar Durán y Otros v Colombia (n 203) para 206.

This position of the Court implies that in some cases it will qualify its orders, that is, it would not make an automatic referral to the DRP but will establish some conditions to the measures provided.

Nevertheless, in the author's view the Court has not qualified its orders in relation to compensation and collective measures. The only Colombian case in which the Court has recognized the DRP to compensate the harm was in the *Genesis Operation* case, where it only required the promptness of the payment and impliedly acknowledged it as an adequate compensation of forced displacement[253]. Subsequently, the Court implied that the DRP was not adequate to redress the murder of Marino López and ordered compensation to him and to his relatives without providing further explanations[254]. In this sense, the author considers that the Court did not qualify its order of compensation when it deemed the DRP adequate to redress the harm identified and, thus, does not agree with the position of some scholars on this regard[255]. Additionally, in relation to collective measures, the Court weather dismissed the claims of the representatives because they were related with the already existing public policy for victims[256] or because the victims already triggered the collective reparations program at the domestic level[257]. In any case, the extent of complementarity on reparations is not settled and generates uncertainty[258].

3.2 Special Sanctions of the System and its punitive component

3.2.1 Effective restriction

The effectiveness of the sanction is closely related with its real execution and the achievement of its goals. To assess effectiveness, the *Handbook on Restorative Justice Programs* suggests the identification of relevant data which can be collected on a systematic manner and continuously from the beginning or even before the actual implementation[259]. For these purposes, qualitative and

[253] Operation Genesis v Colombia (n 18) para 475.
[254] ibid 476.
[255] Sandoval-Villalba (n 231) 1199.
[256] Operation Genesis v Colombia (n 18) para 461.
[257] Vereda La Esperanza vs Colombia (n 17) para 291.
[258] Sandoval-Villalba (n 231) 1201.
[259] UNDOC, 'Handbook on Restorative Justice Programmes' (2006) Vienna Criminal Justice Handbook Series 81.

statistical data should be collected[260]. Relevant qualitative data can include: the time required to conduct the restorative process; the length of time required for case preparation; nature and contents of agreements; successful completion of outcome agreements; the rate and type of re-offenders; the attributes of victims, offenders and community residents that participate in restorative processes; the perceptions of the participants; among others[261]. As qualitative data, the Handbook suggest observation and interviews with the participants of the restorative processes[262]. Furthermore, it suggests that each restorative programme must determine how it will assess compliance[263]. These criteria are more accurate to assess the effectiveness of the SSS because of its restorative nature. As consequence, the effectiveness assessment in the case of alternative and ordinary sanctions must be different because its retributive nature.

3.2.2 Proportionality in the punishment

It is very difficult to assess proportionality in transitional justice contexts, because the ordinary parameters of justice are modified in order to achieve reconciliation and peace. Nevertheless, the requirement of proportionality in the SJP's sanctions is strengthened by the IACtHR in *Rochela massacre* case[264] and, even the international human rights framework on restorative justice[265]. Accordingly, the CCC also considers that the Constitutional Amendment (CA) establishes the duty to impose effective and proportional sanctions[266].

At the IHRL level, proportionality on the punishment has been addressed, but for purposes that are not relevant in the present analysis. Likewise, the European Court of Human Rights (ECHR) has ruled on gross disproportionally sentences that constitutes a human rights violation. In those cases, the Court has ruled over the extreme length of the punishment, instead of questions on the

[260] ibid 82.
[261] ibid.
[262] ibid.
[263] ibid 77.
[264] Although the IACtHR has also stressed proportionality in cases like *Cepeda Vargas*, la Rochela is fundamental in the sense that its ruling takes into consideration a transitional justice legal framework -Pace and Justice Law-.
[265] ECOSOC, 'United Nations Basic Principles on the Use of Restorative Justice in Penal Matters' para 7.
[266] *C-674-17* (n 22) 366.

appropriateness of the punishment or extremely short sentences[267]. Indeed, the SSS might face questions regarding the short length of the sanctions-5 to 8 years- in cases of GVHR[268].

In any case, relevant guidance has been given by the ICL with regards to relevant criteria for sentencing international crimes. Although the weight given to each criterion relies on judicial discretion[269], some patters on sentencing have been identified. D'ascoli has recognised three groups of influential factors of sentencing: general, case-related and procedural-related factors[270].

The general factors are the preliminary factors that influence sentencing in international tribunals, such as: principle of proportionality, purposes of punishment and sentencing practice in the State[271]. For instance, the ICC takes into account the twofold purpose of the sentence: the punishment as an expression of condemnation for the acts and the acknowledgment of the victims' suffering, and deterrence to deflect those aiming to commit similar acts[272]. Significantly, authors that claim that alternative punishments are proportional in the context of transitional justice, also stress the importance of the purposes of the punishment[273]. Likewise, the aims of SJP should be a main criterion to consider while sentencing.

The case-related factors comprise all circumstances specific to the case, including the commission of the crime and the perpetrator's personal situation which are analysed when revising the gravity of the crime and the aggravating and mitigating circumstances[274]. As for the gravity of the crime, the ICC has considered the damage caused to the victims and their families, the nature of the unlawful behaviour, the means employed to execute the crime, the degree of participation of the convicted

[267] Mary Rogan, 'Out of Balance: Disproportionality in Sentencing' (*Penal Reform International*, 2014) <https://www.penalreform.org/blog/balance-disproportionality-sentencing/> accessed 1 October 2019.
[268] Luisa Fernanda Caldas Botero, 'Aproximacion a Los Problemas Fundamentales de La Justicia Transicional. Especial Enfasis En Las Sanciones Imponibles En El Marco de La Jurisdiccion Especial Para La Paz' (2016) 37 DERECHO PENAL Y CRIMINOLOGI 105, 116.
[269] Silvia D'ascoli, *Sentencing in International Criminal Law. The Approach of the Two Ad Hoc Tribunals and Future Perspective for the International Criminal Court* (Hart 2011) 114; ICTY, 'Prosecutor v. Kupreškić et Al. Appeal Judgement' [2001] IT-95-16-A 430; ICTY, 'Prosecutor v. Dragan Nikolić. Sentencing Judgement' [2003] IT-94-2-S 145.
[270] D'ascoli (n 269) 124.
[271] ibid 131.
[272] Trial Chamber II of the International Criminal Court, 'Decision on Sentence Pursuant Article 76 of the Statute' (2014) 23 May ICC-01/04-01/07 para 38.
[273] Paul Seils, 'Squaring Colombia's Circle. The Objectives of Punishment and the Pursuit of Peace' 3; Caldas Botero (n 268) 116; Rodrigo Uprimny, Luz María Sánchez and Nelson Camilo Sanchez Leon, *Justicia Para La Paz* (DeJusticia 2014) 108.
[274] D'ascoli (n 269) 133.

person, the age and education of the convicted person, the degree of intent, the circumstances of manner, location and time, among others[275].

As aggravating circumstances some tribunals have included: recidivism or relevant prior criminal convictions, premeditation, reprehensive or futile motives, abuse of power or official capacity, commission of the crime on defenceless victims, cruelty in the commission of the crimes, multiple victims and discriminatory intent or any other bias[276]. Several criteria included as aggravating circumstances are also considered when analysing the "gravity of the crime", nonetheless, the distinction between them is not very clear[277]. It should be noted that the factors that are taken into account as gravity of the crime, cannot be used also as an aggravating circumstance[278]

As mitigating circumstances some tribunals have considered: the convicted person conduct after the act like efforts to compensate the victims or to cooperate with the Court, circumstances falling short of constituting grounds of criminal exclusion, youth of the accused, previous good character, acts product of provocation, anger or delusion, surrender, guilty plea, personal situation and family status [279]. In *Katanga,* the ICC gave limited weight to a convicted person's young age, his parenthood of six children and the kindly and protective disposition on civilians of his community as mitigating circumstances[280]. Additionally, it also considered his active participation in demobilisation efforts that were a positive contribution at the time[281] but did not find any statement during the proceedings that was a sincere statement of remorse[282]. It should be noted that according to D'ascoli classification, several mitigating circumstances constitute proceeding-related factors, as long as they are circumstances related with the proceedings and its development[283].

[275] Trial Chamber I of the International Criminal Court, 'Decision on Sentence Pursuant Article 76 of the Statute' (2012) 10 July ICC-01/04-01/06 44; International Criminal Court, Rules of Procedure and Evidence 2002 para 145(1)(C).
[276] International Criminal Court Rules of Procedure and Evidence (n 275) para 145(2)(b); D'ascoli (n 269) 133.
[277] D'ascoli (n 269) 134.
[278] Trial Chamber I of the International Criminal Court (n 275) para 78.
[279] International Criminal Court Rules of Procedure and Evidence (n 275) para 145(2)(A); D'ascoli (n 269) 133.
[280] Trial Chamber II, Decision on Sentence (n 277) para 88.
[281] ibid 115.
[282] ibid 119–121.
[283] D'ascoli (n 269) 134.

3.3 The application of International Human Rights Law and International Criminal Law to the special sanction of the system.

3.3.1 Projects for work or activities providing reparation and restoration (TOAR)

According to the CA 01 of 2017, the comprehensive reparation of victims is at the core of the Peace Agreement[284]. Nonetheless, when describing the purposes of the SJP it fails to attribute any reparation aim to it[285]. Additionally, the CCC has established that the SJP can only issue measures of reparation against those convicted by its jurisdiction[286]. The definition of the scope of reparations at the SJP is not settled due to the absence of any decision on this regard.

The mentioned CA established that the SSS have two components: (i) restorative and reparative and (ii) effective restriction of freedoms[287]. The former relates with the TOAR, that can be suggested by the accused but must be approved by the First Instance Chamber[288]. The law contemplates activities that can be suggested as TOAR like participation or implementation in programs of reparation, for the protection of the environment, alphabetization, local development, access to basic services, among others[289].

It should be noted that Colombia has a DRP that comprises collective reparation. By 2016, the Unit for Victims had 340 processes of collective reparation[290], therefore, it is very likely that there will be coincidences between collective reparations and the cases before the SJP. Both processes can be mutually reinforced, and some sanctions could include the development of the already existing collective reparation programs. Moreover, some kind of articulation can also be reached in relation to the reparation measures ordered by domestic administrative courts. Nevertheless, there is no legal

[284] Congress of the Republic of Colombia, Constitutional Amendment 01 of 2017 2017 p art. 7.
[285] ibid art. 9.
[286] *C-080-17* (n 23) 342.
[287] Constitutional Amendment 01 of 2017 (n 291) p art. 141.
[288] ibid.
[289] ibid.
[290] Lucas Correa and others, *El Futuro Que Queremos Construir: La Reparación Colectiva En Perspectiva de Vejez y Envejecimiento Como Una Oportunidad de Transformación Social* (Fundación Saldarriaga Concha 2016) 33.

provision that rule in this regard or any inhibition to order complex sanctions that comprise measures of reparation like those already existing under the DRP.

Additionally, the dissuasion potential of reparations should not be underestimated. Although, the IACtHR has established that the reparations are compensatory and not punitive[291], this does not mean that they cannot have a deterrent effect depending on the level of the award and the nature of the remedy[292] . It should be recalled that one of the purposes of reparations identified by the ICC was deter further violations.

Appropriate and comprehensive reparation measures should include GNR in the different ways in which it has been addressed in the ICL and IHRL like the public acknowledgment of responsibility, the participation in events and activities that aim to show the truth, the reasons of the conflict and the suffering of victims. Even when this can be ordered against an individual instead of the State, it should be noted that the legal framework of the Peace Agreement re-state the duty of the State to guarantee non-repetition[293].

Regarding the "liability to repair" principle and its application by the SJP, it might not be an issue in the case of combatants because comprehensive reparation is guaranteed by the State and they are expressly excluded from monetary compensation by law. However, this benefit was not provided to civilians, who still are obliged to provide full reparation, therefore some questions arise: (i) to what extent are the third civilians liable to repair on the cases were civilians and members of the State or armed groups jointly committed crimes? (ii) is the SJP entitled to demand full reparations on those civilians who have been admitted into the jurisdiction in order to receive and maintain their benefits? (iii) do the awards of reparations provided by civilians in the process before the SJP extinguish the possibility for victims to ask for reparations under ordinary courts?

To answer the first question, it should be noted that unlike the ICC, the SJP has structural cases where several perpetrators are facing the same process before the Court. Therefore, according to the case law of the ICC, the perpetrator should be declared liable to repair to the extent of his/her

[291] Velásquez-Rodríguez v. Honduras (n 219) para 38.
[292] Shelton (n 128) 21.
[293] Constitutional Amendment 01 of 2017 (n 291) p art. 28.

responsibility in the crimes, that is, it should be proportional to the harm caused by the civilian. Nevertheless, it is very difficult to assess the liability to repair of civilians because of the different ways in which they have participated in the conflict, such as: economic support and financing, land dispossession, medicines provision, suppling guns, participation in meetings, benefits through contracts, use of influences for private and political aims, among others[294].

In relation to the second question, if civilians are demanded to provide full reparation giving him/her the possibility to recover from other perpetrators his/her proportional amount for which he/she is liable, it could disincentive even more their participation in the system. Indeed, even in the case in which the SJP demands only proportional reparations, the amount of money can be very high due to the considerable number of victims. It should be noted that the CCC stated that their participation is on a voluntary basis and not mandatory, as it was first conceived in the CA[295]. The legal standard of the ICC to demand full reparation to the convicted is not adequate for the SJP because: (i) it does not have a Fund that provides reparations in the case that civilians cannot; (ii) in any case, victims of armed conflict can receive administrative reparations regardless of the perpetrator status (combatants or civilians); (iii) the SJP is mainly a restorative fora that aims for truth, reconciliation and peace, therefore, the reparation demands cannot be as high as to prevent the participation of those who want to contribute with truth and as much reparation as they can provide.

Additionally, the reparations provided by civil parties before the SJP should extinguish their obligation to repair under ordinary courts, otherwise, civilians would not contribute with full truth in order to avoid expose the full extent of their conduct that can lead to a civil claim where he /she can be defeated. These is an issue of extreme concern for civilians due to the CCC case law, which states that they are not excluded from obligation of compensation under the ordinary rules of responsibility[296].

Regarding causality, it was exposed its common use in ICL and IHRL. Likewise, there should be a link between the facts of the case, the crimes/GVHR committed, the harm caused, and the measures of reparation ordered. Even when the criminal processes before the SJP are not reparation process

[294] Sabine Michalowski and others, *ENTRE COACCIÓN Y COLABORACIÓN VERDAD JUDICIAL, ACTORES ECONÓMICOS Y CONFLICTO ARMADO EN COLOMBIA* (DeJusticia 2018) 66–100.
[295] *C-674-17* (n 22).
[296] *C-080-17* (n 23) 280.

as such, it does provide some sort of reparation. Therefore, the sanctions proposed in the list of sanctions of art. 141 of the Law 1957 of 2019, can be inadequate if they are not related with the facts of the case and the harm caused to the victims cannot be acknowledged through the execution of the reparation measure/SSS.

Considering the limitations on reparations, the author insists on articulate the existing public policy for victims and the SSS. Given the nature of the SSS and its restorative/punitive purposes, as well as the limitation imposed on reparation due by convicted individuals, collective reparations provide standards that might fit better in this design. Indeed, the administrative programs of reparations are still going to be applied while the sanctions are imposed, therefore, there is a lower risk to create tensions among the victims. Furthermore, some scholars have highlighted the relevance of collective reparations in restorative justice contexts[297].

One fundamental issue to discuss is the concept of beneficiaries of the measure. Considering the restorative purposes of the SSS a broad understanding of beneficiaries and victims should be taken. Indeed, a legalistic approach like the one adopted in recent cases by the IACtHR should be dismissed because it does not fit the purposes of the SJP.

According to the CCC, the principle 8 of the UN guiding principles should be observed when defining the concept of victim[298].However, as some scholars have pointed out, the IACtHR case law regarding the definition of victim can be broad in the sense that, as explained before, it considers as victims of a human rights violation by their own right the next of kin of victims of forced disappearances, EE, inhumane treatment, torture and sexual violence, without an assessment of appropriateness or concordance with the domestic law.[299] Furthermore, the IACtHR has not exclusively rely on the "immediate family" and has had a broad understanding of kinship[300]. Therefore, even when the CCC established the observation of the UN guiding principles, this is a minimum that should be complemented by the IACtHR case law.

[297] Linda Keller, 'Seeking Justice at the International Criminal Court: Victims' Reparations' (2007) 29 T. Jefferson L. Rev. 189, 190.
[298] *C-080-17* (n 23) 354.
[299] Sandoval-Villalba (n 182) 280.
[300] Rubio-Martin, Sandoval-Villalba and Diaz (n 198) 240.

Finally, the concept of "collective injury presumption" developed by the ECCC can be useful for the SJP in cases of structural human rights violations that occurred several years ago and where it is more difficult to prove victimhood. However, the question of whether a specific group or community was targeted should be considered by the court before granting this presumption to victims.

3.3.2 Victims' participation

The Justice Panel of Acknowledgement of Truth in the case of the SSS shall allow the maximum extent of victim participation possible since the accused is recognizing his/her responsibility. Articles 14 and 15 of the Law 1957 of 2019 provide several rights to victims with "legitimate and direct interest", including the right to provide evidence, being recognized as victims, challenge decisions, to be present in the hearings of acknowledgement of truth if the SJP allows it, among others. For the CCC, "legitimate and direct interest" cannot be interpreted against internationally recognized victims' rights[301]. Nonetheless, it is important to bear in mind the ICC jurisprudence with regards to victims' participation and the relevance to provide information to show the specific interest of victims in the decision taken by the judge in which they desire to participate. Otherwise, victims' participation can be an obstacle for the expeditiousness of proceedings, the rights of the accused and a fair trial.

Regarding the SSS, the question if victims can present evidence with regards to incomplete or false acknowledgments of truth rises. According to the CCC case law and the Law 1957, it will be possible because they can present evidence, in principle, with no limitation. However, victims' participation should be allowed in a manner that is not contrary to the rights of the accused, where he/she can challenge in a timely manner the evidence provided by victims. It should be recalled that depending of the level of inaccuracy or falsity of the acknowledgement of truth the accused can lose the benefits provided by the SJP.

Another issue that the SJP faces is the number of victims that might be entitled to participate in the proceedings. For the CCC, it is possible to have common legal representatives of victims in order to

[301] *C-080-17* (n 23) 355.

avoid delays in the trials[302]. The ICC have faced similar issues and to solve the problem it has gathered relevant information of victims that allows their grouping according to significant features they share. This will minimize the risk of invisibility of some victims whose voice can be silence if they do not find an appropriate legal representative that advocates for their rights and views, like it happens with the system created by the ECCC where only one consolidated view of the victims can be presented at trial.

Finally, it is important to highlight the non-discrimination and consultation with victims' principles of reparation stated in *Lubanga* case. Likewise, the SJP has a duty to promote the participation in the proceedings of the most vulnerable victims, specially, those who are not organized, illiterate and located in remote areas.

3.3.3 Effective restriction

Regarding the effectiveness of the sanction, the CCC establishes that the supervision on the SSS relays on the Peace Tribunal and the UN Verification Mission in Colombia[303]. Furthermore, effective restriction component is implied from the conditions of the execution of the SSS fixed by the judges, like residency of the convicted, the schedules to execute the sanction, the supervisory institution, among others[304].

Considering the *Handbook on Restorative Justice Programmes,* each program must determine how it will assess compliance. Therefore, it is important that each SSS issued identifies the main elements to be assessed in order to determine the compliance of the sanction. This can be decided after listening the expectations of the victims and the community in a public hearing.

3.3.4 Proportionality

[302] ibid 358.
[303] ibid 714.
[304] ibid 712; Law 1957 of 2019 (n 21) p art. 129.

The SSS are applied in cases where the nature of the crimes forbids amnesties[305]. These sanctions have a length between five to eight years, therefore, a margin of 3 years is very tight to graduate proportionality between the punishment, the gravity of the crime and the level of responsibility of the perpetrator[306].

In the author's view, there is no mandatory rule of international law that states how a sentence should be imposed. The sentencing criteria developed under ICL are merely guidance that should be weighted according to the circumstances of each case. Significantly, the purposes pursued with the sanction should be beard in mind while sentencing. In the case of the SJP, those purposes are the fulfilment of the rights of victims and the consolidation of peace[307].

Several of the ICL sentencing criteria were reproduced by the law of procedure, such as: gravity of the crime, the way it was committed, the vulnerability of the crimes, the extent of the damage caused, the level of responsibility, intent, moment and characteristics of the truth statement, reparation and GNR[308]. The most recent law on the subject, also established the following criteria: the level and promptness of the truth statements, level of responsibility, the gravity of the crime and the reparation commitments[309].

Nevertheless, in the author's view the truth statements and the reparation commitments should be carefully analysed when sentencing to avoid double benefits for the convicted person. If the contribution to truth and reparation are a condition to access to the SSS, it shouldn't also be considered as a mitigating factor. In this sense, if the ICL establishes that the factors that are considered for the gravity of the crime cannot be used also as an aggravating circumstance; the same logic should apply to the attenuating circumstances. An exception should be made in cases where the conduct of the convicted person goes beyond the legal requirements or when the purposes of the sanction indicate otherwise.

[305] Congress of the Republic of Colombia Law 1957 of 2019 (n 21) p art. 42.
[306] Juan Jorge Piernas Lopez, 'The International Criminal Court and National Jurisdictions In Light of the Principle of Complementarity', (2015) 31 ANUARIO ESPANOL DE DERECHO INTERNACIONAL 151.
[307] Constitutional Amendment 01 of 2017 (n 291) p art. 13.
[308] Congress of the Republic of Colombia, Law 1922 of 2018 2018 p art. 64.
[309] Law 1957 of 2019 (n 21).

The SSS are already shortened sentences that are very benevolent considering the seriousness of the crimes and provide a tight margin of sentence graduation of three years. For this reason, the author considers that, in principle, the sentence imposed should be of eight years and, from there, the judges should start to consider mitigating factors and lower levels of responsibility to reduce the sentence. However, this approach is very unlikely to be applied due to the already established aggravating factors on the legal framework.

4. The extrajudicial executions case (Case 003)

Due to the scale and the responsibility of State armed forces in EE of civilians that then were pretended to be deaths in combat, several judgements of the administrative courts have been issued to condemn the State. Indeed, the IACtHR recently issued a decision on the matter in the *Villamizar Durán* case.

The administrative courts have granted several measures of reparation due to the nature of the crime, including: monetary compensation, public apologies, a documentary with the facts of the case and its exhibition before victims and with their agreement, the diffusion of the acknowledgment of responsibility through newspapers and radios, psychological treatment, a commemoration panel with the description of the facts, the acknowledgment of responsibility and a commitment of non-recurrence[310]. Additionally, the IACtHR awarded: compensation -although it only granted it in cases where the domestic administrative courts did not due to the complementarity principle- [311], investigate to punish those responsible[312], psychosocial attention[313], the diffusion of the sentence[314] and a public event to acknowledge responsibility[315]. It should be noted that both tribunals deal with State responsibility.

[310] Consejo de Estado- Sección Tercera, 'Case No. 05001-23-31-000-2009-00344-01(56451)' [2018] Judge Stella Conto; Consejo de Estado- Sección Tercera, 'Case No. 13001-23-31-000-2006-00753-01(43770)' [2018] Judge Stella Conto.
[311] Inter-American Court of Human Rights, 'Villamizar Durán y Otros v Colombia. Judgement 20, November 2018. (Preliminary Exceptions, Merits, Reparations and Costs)' (n 202) para 226.
[312] ibid 204.
[313] ibid 206.
[314] ibid 208.
[315] ibid 210.

On the contrary, the SJP deals exclusively with individual criminal responsibility[316], therefore, its main purpose is to stablish criminal responsibilities over the case. However, it should not be discarded the possibility to include reparative orders in agreement with the State like the ECCC did, without making any statement over State responsibility.

Evidence from this type of EE comes from 1980 and was accentuated in 2004[317].In 2009, the IACHR identified the following patterns of the crime: are in the midst of anti-subversive operations, although the witnesses state there was no combat; in a high number of cases the victim is illegally detained from his/her workplace or home, and then moved to the place where he/she is executed; the victims are generally peasants, members of indigenous peoples, workers, vulnerable population or social leaders; the victims are reported as guerrilla members death in combat; they are found wearing military uniforms and equipment but witnesses said they were last seen wearing regular clothes and unarmed; sometimes they are previously accused of being members of guerrilla by anonymous informants or sometimes they are just randomly chosen; the disappearance of the identity documents of the victim; sometimes there are signs of torture; the perpetrators receive professional and economic incentives and awards for the "positives" executed; among others[318]. Furthermore, in some cases civilians were involved in the commission of the crimes by deceiving victims to translate them to the places where they were executed.

4.1 Reflections on victim participation

On February 2019, the Judicial Panel of Acknowledgment of Truth issued one of its first decision on victim participation of the case 003, the case of EE. In this decision, it recognized as victims mainly children, siblings, parents and partners/spouses of the direct victim. Significantly, one direct victim of murder attempt was recognized as victim of the process even when the extrajudicial execution was not accomplished[319]. This is an adequate approach that recognizes the possible affectation of the

[316] Congress of the Republic of Colombia Constitutional Amendment 01 of 2017 (n 284) para art. 5; *C-080-17* (n 23) para 279.
[317] Special Rapporteur on extrajucial sumary and arbitrary executions, 'Informe Del Relator Especial Sobre Las Ejecuciones Extrajudiciales, Sumarias o Arbitrarias, Philip Alston' (2010) Misión a C United Nations para 10 <https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add.2_sp.pdf>.
[318] IACHR, *Annual Repport* (2009) para 67. Chapter IV.
[319] Special Jurisdiction for Peace-Judicial Panel for Acknowledgement of Truth, 'Decision of 06 February 2019. Case 003' 34.

victim due to the nature of the facts-even when it was not fully executed- and the need to rebuild the trust of the victim with the State through the restorative process. It should be recalled that taking into consideration the gravity of the crimes and the effects it might have on the victims, in cases of torture or inhumane treatment the next of kin can be recognized as victim too, even when the direct victim is not dead or disappeared. Therefore, if besides the attempt of murder, the victim would have suffered torture or inhumane treatment, his/her next of kin can be recognized as victims too according to the case law of the IACtHR described before.

It should be noted that only close family members applied to be recognized as victims. However, the SJP should take a broad approach over kinship in order to capture the full extent of victimhood in each case when applications of extended family members are presented. Moreover, the SJP contemplates the case of the dependants as victims and requires declaration before public notary as proof of it[320], which is a much lower standard of proof than provide evidence of regular payments by the direct victim like in the IACtHR.

Additionally, the SJP restated the rights of victims to participate in the proceedings but limited it in the sense that it should be adequate to the stage of the process[321]. The author agrees with this approach since the rights of the accused and the right to a fair trial must be protected as well. Indeed, the next 17th October victims are going to be able to present their views on the statements of truth already made by perpetrators[322]. This is a significant step in a dialogic truth-building, that can lead to further explanations by perpetrators and can give the victims a sense of agency within the process.

4.2 Expectations on the restorative component of the SSS

It is very difficult to propose any measure of SSS without knowing the thoughts of the victims of the case. In broad terms, as stated before, there should be a causal link between the facts of the case, the crimes committed, and the restorative sanctions imposed. Therefore, in the present case, possible sanctions can comprise: the building of monuments as measures of satisfaction; maybe the

[320] ibid 20.B.
[321] ibid 35.
[322] RCN Radio, 'JEP Citó a Los Familiares de Los 'falsos Positivos de Soacha' (2019). Also see art. 27D Law 1922 of 2018.

implementation of the already ordered measures of reparation by the administrative courts; participation in the teaching of human rights within the armed forces restating the prohibition of EE -this might need the voluntary participation of the State- , among others. The author has to recognize that in some cases it might be impossible to make all perpetrators participate of this kind of measures, therefore, they might be able to participate in collective measures of reparation that are not specifically directed to undo the harm of the false positives, but can positively impact the communities that were affected by those crimes.

In any case, the relevance of grant GNR is fundamental in a case that has been occurring since 1980 and has not stopped since then. As stated in the previous subchapter, the potential of GNR even when they are ordered against individuals and not the State should not be underestimated.

In the case of civilians, it is very unlikely that they are prosecuted as most responsible for the crimes committed[323]. They participated in the commission of crimes, but the greatest responsibility relies on the military. For the CCC, civilians still have the obligation of full compensation of victims according to the ordinary rules. However, there is a need for an interpretative solution that allows the harmonization of the duty of civilians to repair and the need for a comprehensive truth of how they did support the military in the commission of crimes and why.

4.3 Expectations on effective punishment and proportionality

Besides the determination of the conditions of the execution of the SSS, the SJP should define which elements of the sanction are going to be monitored in order to consider it as effective, such as: the days worked, the results achieved, the impact of the works on victims, among others. In terms of proportionality of the sanction, the SJP should note: the nature of the crimes which eroded the trust in military forces; the widespread executions of crimes; the high number of victims; the damage caused to the families while accusing the victims of being members of guerrillas; the suffering caused by threats against families that denounced the crimes; the premeditation of the crimes which

[323] SJP concentrates its efforts to prosecute those who are most responsible.*C-080-17* (n 23) 307.

sometimes had sophisticated mechanisms to deceive victims with the support of civilians; the victims were totally defenceless to the munitions and capacity of the militaries; the abuse of official capacity of the militaries who sometimes detained victims that followed the instruction of them as authorities; the bias in the execution of crimes that sometimes were directed against people perceived as supporters of guerrillas -specially, this pattern occurred during the 90's[324]- , for example, social leaders and members of unions. All these reasons can support the maximum punishment of eight years save in the cases of mitigating circumstances like the exercise of extreme duress over the perpetrator that cannot be considered as a defence in the process but that can be inferred from the facts of the case.

5. Conclusion

Although the SSS are a unique way of punishment created under a context of transition, IHRL and ICL provide some guidance on fundamental issues. Nonetheless, due to the specific nature of the SSS the international standards should be applied on the maximum extent possible, always bearing in mind the core role of the victims in the SJP.

The Colombian experience on this regard is very relevant because it implements solutions that try to deal with the tensions arising in transitional justice process in an innovative way. The SSS balance requirements of truth, justice and reparations and the alternative punishment that are likely to be accepted by the parties. This is even more important in contexts where the parties reach agreements through dialogue because none of them was defeated.

The SSS have not been imposed yet and, therefore, the author's aim was to raise question on fundamental issues that are still under analysis and construction.

[324] IACHR (n 318) 9.

BIBLIOGRAPHY

Amezcua-Noriega O, ‘Reparation Principles under International Law and Their Possible Application by the International Criminal Court: Some Reflections’ in Clara Sandoval-Villalba (ed), *Briefing Paper No. 1* (Transitional Justice Network University of Essex 2011)

Appeals Chamber of the International Criminal Court, ‘Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008’ (2008) 11 Jul ICC-01/04-01/06 OA 9 OA 10

——, ‘Judgment on the Appeals against the “Decision Establishing the Principles and Procedures to Be Applied to Reparations” of 7 August 2012 with AMENDED Order for Reparations (Annex A) and Public Annexes 1 and 2’ [2015] No. ICC-01/04-01/06 A A 2 A 3

——, ‘Judgment on the Appeal of the Victims against the “Reparations Order”’ (2018) 8 March No. ICC-01/12-01/15 A

——, ‘Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008’ (2018) Lubanga ICC-01/04-01/06 OA 9 OA 10

——, ‘Judgment on the Appeals against Trial Chamber II’s “Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo Is Liable”’ (2019) Lubanga ICC-01/04-01/06 A7 A8

Attanasio D, ‘Extraordinary Reparations, Legitimacy, and the Inter-American Court.’ (2016) 37 U. Pa. J. Int’l L.

Barnet Miller B, ‘A Model of Victims’ Reparations in the International Criminal Court’ (2012) 33 La Verne L. Rev 255

Caldas Botero LF, ‘Aproximacion a Los Problemas Fundamentales de La Justicia Transicional. Especial Enfasis En Las Sanciones Imponibles En El Marco de La Jurisdiccion Especial Para La Paz’ (2016) 37 DERECHO PENAL Y CRIMINOLOGI 105

Calderón Gamboa F, ‘La Reparación Integral En La Jurisprudencia de La Corte Interamericana de Derechos Humanos: Estándares Aplicables Al Nuevo Paradigma Mexicano’ (2013) <http://www.corteidh.or.cr/tablas/r33008.pdf> accessed 1 October 2019

Casey N, ‘Colombia Army’s New Kill Orders Send Chills Down Ranks’ (*The New York Times*, 2019) <https://www.nytimes.com/2019/05/18/world/americas/colombian-army-killings.html?ref=nyt-es&mcid=nyt-es&subid=article> accessed 31 August 2019

Cassese A, *International Criminal Law* (2nd Ed., 2008)

Classified authors, ‘Expert Report on Reparation Presented to Trial Chamber III, International Criminal Court’ [2017] ICC-01/05-01/08-3575

Comité Internacional de la Cruz Roja, ‘Cinco Conflictos Armados En Colombia ¿qué Está Pasando?’ (*6 December*, 2018) <https://www.icrc.org/es/document/cinco-conflictos-armados-en-colombia-que-esta-pasando>

Consejo de Estado- Sección Tercera, ‘Case No. 05001-23-31-000-2009-00344-01(56451)’ [2018] Judge Stella Conto

——, ‘Case No. 13001-23-31-000-2006-00753-01(43770)’ [2018] Judge Stella Conto

Contreras Garduño D, *Collective Reparations: Tensions and Dilemmas between Collective Reparations and the Individual Right to Recieve Reparations* (Intersentia 2018)

Correa L and others, *El Futuro Que Queremos Construir: La Reparación Colectiva En Perspectiva de Vejez y Envejecimiento Como Una Oportunidad de Transformación Social* (Fundación Saldarriaga Concha 2016)

D’ascoli S, *Sentencing in International Criminal Law. The Approach of the Two Ad Hoc Tribunals and Future Perspective for the International Criminal Court* (Hart 2011)

Del Campo A, ‘Reparations in the Inter-American System: A Comparative Approach’ (2007) 56 American University Law Review

ECOSOC, ‘United Nations Basic Principles on the Use of Restorative Justice in Penal Matters’

El Espectador, ‘“Timochenko” Ratifica Que Farc No Quieren Ir a La Cárcel Tras Proceso de Paz’ (2013) <https://www.elespectador.com/noticias/paz/timochenko-ratifica-farc-no-quieren-ir-carcel-tras-proc-articulo-440430> accessed 15 August 2018

Expert Group, *The Belfast Guidelines on Amnesty and Accountability* (1st Ed, University of Ulster 2013)

Extraordinary Chambers in the Courts of Cambodia. Pre Trial Chamber, 'Prosecutor v. Nuon Chea et Al. (Case 002), Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, No. D411/3/6', (2011) 24 June <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D411_3_6_EN.PDF>

Extraordinary Chambers in the Courts of Cambodia. Supreme Court Chamber, 'KAING Guek Eav Alias Duch, Appeal Judgement (Public), 3 February 2012' (2012) No . 001/1 Case File/Dossier

Extraordinary Chambers in the Courts of Cambodia. Trial Chamber, 'KAING Guek Eav Alias Duch, Judgement' (2010) 26 July No. 001/18-07-2007/ECCC/TC

——, 'Case 002/01 Judgement. Nuon Chea and Khieu Samphan' (2014) 7 August No. 002/19-09-2007/ECCC/TC

——, 'Case 002/02 Judgement. Nouon Chea and Khieu Samphan' (2018) 16 Nov. No. 002/19-09-2007/ECCC/TC

Extraordinary Chambers in the Courts of Cambodia, 'Internal Rules (Rev.8)' (2011) <https://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC Internal Rules %28Rev.8%29 English.pdf> accessed 4 August 2019

Ferstman C and Goetz M, 'Reparations before the International Criminal Court: Th e Early Jurisprudence on Victim Participation and Its Impact on Future Reparations Proceedings' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity Systems in Place and Systems in the Making* (Brill Nijhoff 2009)

Goverment of Colombia; FARC guerrilla, 'Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace.' (2016) 8 <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf>

Henzelin M, Heiskanen V and Mettraux G, 'Reparation to Victims before the International Criminal Court: Lessons from International Mass Claims Processes' (2006) 17 Criminal Law Forum 317

Hillebrecht C, Huneeus A and Borda S, 'The Judicialization of Peace' (2018) 59 Harvard International Law Journal

Human Rights Watch, 'Colombia: Agreeing to Impunity' (2015) <hrw.org/news/2015/12/21/hrw-

analysis-colombia-farc-agreement.> accessed 10 August 2019

——, ‘Colombia: Fix Flaws in Transitional Justice Law’ (2017) <https://www.hrw.org/news/2017/10/09/colombia-fix-flaws-transitional-justice-law> accessed 10 August 2019

IACHR, *Annual Repport* (2009)

ICTY, ‘Prosecutor v. Kupreškić et Al. Appeal Judgement’ [2001] IT-95-16-A

——, ‘Prosecutor v. Dragan Nikolić. Sentencing Judgement’ [2003] IT-94-2-S

Inter-American Court of Human Rights, ‘Case Carvajal Carvajal and Others v. Colombia. Judgement of 13 March, 2018 (Merits, Reparations and Costs)’ Serie C 352

——, ‘Case De La Cruz Flores Vs. Perú. Judgement 18 November 2004 (Merits, Reparations and Costs)’ Serie C 115

——, ‘Case La Cantuta Vs. Perú. Judgement of 29 November 2006 (Merits, Reparations and Costs)’ Serie C 162

——, ‘Case Loayza Tamayo Vs. Perú. Judgement of 27 November 1998 (Reparations and Cost)’ Serie C 33

——, ‘Case of Bámaca-Velásquez v. Guatemala. Judgment of November 25, 2000 (Merits)’ Serie C 70

——, ‘Case of Blanco Romero et Al v. Venezuela. Judgement of November 28, 2005 (Merits, Reparations and Costs)’ Serie C 138

——, ‘Case of Cantoral-Benavides v. Peru.Judgment of December 3, 2001(Reparations and Costs)’ Serie C 88

——, ‘CASE OF LUNA LÓPEZ v. HONDURAS JUDGMENT OF OCTOBER 10, 2013 (Merits, Reparations and Costs)’ Serie C 269

——, ‘Case of the "Street Children " (Villagran-Morales et Al.) v. Guatemala .Judgment of November 19, 1999 (Merits)’ Serie C 73

——, ‘Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia. Premliminary Objection, Merits, Reparation and Costs.’ Serie C270 20

November 2013

——, ‘CASE OF THE KICHWA INDIGENOUS PEOPLE OF SARAYAKU v. ECUADOR. JUDGMENT OF JUNE 27, 2012 (Merits and Reparations)’ Serie C 245

——, ‘Case of the Pueblo Bello Massacre v. Colombia. Judgement of January 31, 2006 (Merits, Reparations and Costs)’ Serie C 140

——, ‘Case of the Saramaka People v. Suriname. Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs)’ Serie C 172

——, ‘CASE OF THE XÁKMOK KÁSEK INDIGENOUS COMMUNITY v. PARAGUAY JUDGMENT OF AUGUST 24, 2010 (Merits, Reparations, and Costs)’ Serie C 214

——, ‘Case of Tibi v. Ecuador. Judgment of September 07, 2004 (Preliminary Objections, Merits, Reparations and Costs)’ Serie C 114

——, ‘Case of Velásquez-Rodríguez v. Honduras Judgment of July 21, 1989 (Reparations and Costs)’ Serie C 07

——, ‘Case Omeara Carrascal and Others v. Colombia. Judgement of 21 November, 2018 (Merits, Reparations and Costs)’ Serie C 368

——, ‘Garrido y Baigorria Vs. Argentina. Judgement of 27 August 1998 (Reparations and Costs)’ Serie C 39

——, ‘Isaza Uribe and Others v Colombia. Judgement of 20 November, 2018 (Merits, Reparations and Costs)’ Serie C 363

——, ‘Mayagna (Sumo) Awas Tigni v Nicaragua. Judgement of 31 August, 2001 (Merits, Reparations and Costs)’ Serie C 79

——, ‘Neira Alegría y Otros Vs. Perú. Judgement of 19 September 1996 (Reparations y Costs)’ Serie C 29

——, ‘Órdenes Guerra et Al v Chile. Judgement of 29 November, 2018, (Merits, Reparations and Costs)’ Serie C 372

——, ‘Rosendo Cantú v. Mexico. Judgement of 31 August 2010 (Preliminary Exception, Merits, Reparations and Costs).’ Serie C 219

——, ‘Sawhoyamaxa Indigenous Community v Praguay. Judgement 29 March, 2006 (Merits, Reparations and Costs)’ Serie C 146

——, ‘Ticona Estrada and Others v. Bolivia. Merits, Reparations and Costs. Serie C 191’

——, ‘Vereda La Esperanza vs Colombia. Preliminary Objection, Merits, Reparations and Costs’ Serie C341 21 November 2018

——, ‘Villamizar Durán y Otros v Colombia. Judgement 20, November 2018. (Preliminary Exceptions, Merits, Reparations and Costs)’ Serie C 364

——, ‘Women Victim of Sexual Violence in Atenco V. México. Judgement 28 November 2018 (Preliminary Exception, Merits, Reparations and Costs)’ Serie C 371

——, ‘Yarce and Others v Colombia. Judgement of 22 November, 2016 (Preliminary Exception, Merits, Reparations and Costs)’ Serie C 325

——, ‘Case of Aloeboetoe et Al. v. Suriname. Judgment of September 10, 1993 (Reparations and Costs)’ [1993] Secrie C 15

——, ‘Case of Plan de Sánchez Massacre v. Guatemala. Judgment of April 29, 2004 (Merits)’ [2004] Serie C 105

——, ‘Gómez Palomino v. Perú Judgement of 22 November 2005 (Merits, Reparations and Costs)’ [2005] Serie C 136

——, ‘Radilla Pacheco v. Mexico. Judgement of 23 November 2009 (Preliminary Exception, Merits, Reparations and Costs)’ [2009] Serie C 209

——, ‘Barbani Duarte and Others v. Uruguay. Judgement of 13 October 2011 (Merits, Reparations and Costs)’ [2011] Serie C 234

——, ‘Garífuna Triunfo de La Cruz and Its Members v. Honduras. Judgement of 8 October 2015 (Merits, Reparations and Costs)’ [2015] Serie C 305

——, ‘Gorigoitía v. Argentina Judgement of 2nd September 2019 (Preliminary Exception, Merits, Reparations and Costs)’ [2019] Serie C 382

——, ‘Martínez Coronado v. Guatemala Judgement of 10th May 2019 (Merits, Reparations and Costs)’ [2019] Serie C 376

——, ‘Muelle Flores v Perú. Judgement of 6th March 2019 (Preliminary Exception, Merits, Reparations and Costs)’ [2019] Serie C 375

International Criminal Court, ‘Preliminary Examinations’ <https://www.icc-cpi.int/pages/pe.aspx>

——, ‘Trust Fund for Victims’ <https://www.icc-cpi.int/tfv> accessed 15 August 2019

Keller L, ‘Seeking Justice at the International Criminal Court: Victims’ Reparations’ (2007) 29 T. Jefferson L. Rev. 189

Mallinde L, ‘THE END OF AMNESTY OR REGIONAL OVERREACH? INTERPRETING THE EROSION OF SOUTH AMERICA’S AMNESTY LAWS’ (2016) 65 ICLQ 645

McKay F, ‘Are Reparations Appropriately Adressed in the ICC Statute?’ in Dinah Shelton (ed), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court.* (Trasnational Publishers Inc 2001)

Medina Quiroga C, ‘The Inter-American Court of Human Rights: 35 Years’ (2015) 33 Neth. Q. Hum. Rts.

Michalowski S and others, *ENTRE COACCIÓN Y COLABORACIÓN VERDAD JUDICIAL, ACTORES ECONÓMICOS Y CONFLICTO ARMADO EN COLOMBIA* (DeJusticia 2018)

Nash Rojas C, ‘Justicia Transicional y Los Límites de Lo (Posible) Punible. Reflexiones Sobre La Legitimidad Del Proceso de Paz En Colombia’ 17 Opinión Jurídica 19

National Centre of Historic Memory, *¡BASTA YA! Colombia: Memorias de Guerra y Dignidad* (1st ed., Imprenta Nacional 2013)

Organization of American States (OAS), ‘American Convention on Human Rights, “Pact of San Jose”’ 18 Jul 197 22 Nov 1969

PEREZ- LEON- ACEVEDO JP, ‘Las Reparaciones En El Derecho Internacional de Los Derechos Humanos, Derecho Internacional Humanitario y Derecho Penal Internacional.’ (2007) 23 Am. U. Int’l L. Rev.

——, ‘INTERNATIONAL HUMAN RIGHTS LAW IN THE REPARATION PRACTICE OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIAP’ in Giuliana Ziccardi Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence* (Oxford University

Press 2018)

Piernas Lopez JJ, 'The International Criminal Court and National Jurisdictions In Light of the Principle of Complementarity', (2015) 31 ANUARIO ESPANOL DE DERECHO INTERNACIONAL

RCN Radio, 'JEP Citó a Los Familiares de Los 'falsos Positivos de Soacha' (2019)

Rogan M, 'Out of Balance: Disproportionality in Sentencing' (*Penal Reform International*, 2014) <https://www.penalreform.org/blog/balance-disproportionality-sentencing/> accessed 1 October 2019

Rubio-Martin R and Sandoval-Villalba C, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment' (2011) 33 Hum. Rts. Q. 1062

Rubio-Martin R, Sandoval-Villalba C and Diaz C, 'Repairing Family Members: Gross Human Rights Violations and Communities of Harm', *The Gender of Reparations: Unsetteling Sexual Hierarchies while Redressing Human Rights Violations* (2009)

SaCouto S, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project' (2012) 18 Mich. J. Gender & L. 297

Sanchez Leon NC, 'Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia' 110 AJIL Unbound 172

Sandoval-Villalba C, 'The Concepts of "injured Party" and "Victim" of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights : A Commentary on Their Implications for Reparations' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity: systems in place and systems in the making* (Martinus Nijhoff Publishers 2009)

——, 'Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes.' (2018) 22 The International Journal of Human Rights 1192

Sandoval-Villalba C and Moffet L, 'Reparations and the International Criminal Court: Judicial Experimentalism or Fitting Square Pegs in Round Holes? (Draft)'

Seils P, ‘Squaring Colombia’s Circle. The Objectives of Punishment and the Pursuit of Peace’

Shelton D, *Remedies in International Human Rights Law* (3th ed., OUP 2015)

Special Jurisdiction for Peace-Judicial Panel for Acknowledgement of Truth, ‘Decision of 06 February 2019. Case 003’

Special Rapporteur on extrajucial sumary and arbitrary executions, ‘Informe Del Relator Especial Sobre Las Ejecuciones Extrajudiciales, Sumarias o Arbitrarias, Philip Alston’ (2010) Misión a C United Nations

<https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add.2_sp.pdf>

Sperfeldt C, ‘Rome’s Legacy: Negotiating the Reparations Mandate of the International Criminal Court’ (2017) 17 international criminal law review 351

Stewart J, ‘Transitional Justice in Colombia and the Role of the Internadonal Criminal Court’

Suprun D, ‘Legal Representation of Victims before the Icc: Developments, Challenges, and Perspectives’ (2016) 16 international criminal law review 972

Swart M, ‘The Lubanga Reparations Decision: A Missed Opportunity?’ (2012) XXXII Polish Yearbook Of International Law 169

Trial Chamber I of the International Criminal Court, ‘Decision Establishing the Principles and Procedures to Be Applied on Reparations’ ICC-01/04-01/06

——, ‘Decision on Sentence Pursuant Article 76 of the Statute’ (2012) 10 July ICC-01/04-01/06

Trial Chamber II of the International Criminal Court, ‘Decision on Sentence Pursuant Article 76 of the Statute’ (2014) 23 May ICC-01/04-01/07

——, ‘Public Document Order Instructing the Trust Fund for Victims to Supplement the Draft Implementation Plan’ (2016) 9 Feb. ICC-01/04-01/06

——, ‘Corrected Version of the “Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo Is Liable”’ (2017) Lubanga ICC-01/04-01/06

——, ‘Order for Reparations Pursuant to Article 75 of the Statute With One Public Annex (Annex I) and One Confidential Annex Ex Parte, Common Legal Representative of the Victims, Office of Public Counsel for Victims and Defence Team for Germain Katanga (Annex I’ [2017] ICC-01/04-01/07

Trial Chamber III of the International Criminal Court, 'Decision on Common Legal Representation of Victims for the Purpose of Trial' (2010) 10 Nov. ICC-01/05-01/08

Trial Chamber VIII of the International Criminal Court, 'Reparations Order in the Case of the The Prosecutor v. Ahmad Al Faqui Al Mahdi.' (2017) 17 Aug. ICC-01/12-01/15

UNDOC, 'Handbook on Restorative Justice Programmes' (2006) Vienna Criminal Justice Handbook Series

United Nations General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2006) 21 March 6A/RES/60/147

Uprimny R, Sánchez LM and Sanchez Leon NC, *Justicia Para La Paz* (DeJusticia 2014)

Barrios Altos v Perú (2001) Merits

C-007-18

C-080-17

C-579-13

C-674-17

Case Gelman v Uruguay (Merits and reparations)

Case of Gomes Lund et al ('Guerrilha do Araguaia') v Brazil

Case of the Rochela Massacre v Colombia Merits, Reparations and Costs (2007) Serie C163

Case ofTiu Tojín v Guatemala Merits, Reparations and Costs Serie C190

García Lucero et al v Chile, Preliminary Objection, Merits and Reparations (2013) Series C26

Massacres of El Mozote and nearby places v El Salvador (Merits, reparations and costs)

Congress of the Republic of Colombia, Constitutional Amendment 01 of 2017 2017

——, Law 1922 of 2018 2018

——, Law 1957 of 2019 2019

International Criminal Court, Rules of Procedure and Evidence 2002

Organization of American States (OAS), Reglamento de la Corte Interamericana de Derechos Humanos. 2009