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Acts of terrorism as war crimes in the Colombian armed conflict

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Abstract: The connections between terrorism and International Humanitarian Law (IHL) are deep, long-standing, and complex, especially given the absence of a definition of 'terrorism' in international law. From an IHL perspective, not only are certain acts of terror committed in the context of an armed conflict considered potential war crimes, there are implications in the very qualification of those who commit such acts as possible combatants, with the IHL repercussions derived from them. On the other hand, its application to the specific armed conflict of Colombia adds another layer of complexity by contextualizing theory in an actual, concrete case which, furthermore, brings into focus the problems that arise and the solutions international legal theory offers in matters of terrorism and IHL.

Keywords: Terrorism, International Humanitarian Law, war crimes, Colombian armed conflict, International Criminal Court.

(A) PRELIMINARY CONSIDERATIONS

The connections between terrorism and International Humanitarian Law (IHL) are deep, long-standing, and complex[1]. In one respect, the issue and its analysis falls squarely

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1 See, among others, AA.VV., *Terrorism, Counter-Terrorism and International Humanitarian Law*, 17th Bruges Colloquium, 20-21 October 2016; A. Cassese, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law", 12 *European Journal of International Law* 993 (2001); A. Cuerda Riezu & F. Jiménez García (coord.), *Nuevos desafíos del Derecho Penal Internacional. Terrorismo, crímenes internacionales y derechos fundamentales*, Tecnos, Madrid, 2009; E. Chadwick, *Self-determination, Terrorism and the International Humanitarian Law of Armed Conflict*, Martinus Nihoff Publ., The Hague, 1996; A. Dahl, "The Legal Status of the Opposition Fighter in Internal Armed Conflict", 3-4 *Revue de Droit Militaire et Droit de la Guerre* 137 (2004); T. M. Franck, "Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror", 98 *American Journal of International Law* 686 (2004); G. Gaja, "Combating Terrorism: Issues of *Jus ad Bellum* and *Jus in Bello* The Case of Afghanistan", en *Anti-terrorist measures and human rights*, B. Wolfgang (ed.), Martinus Nijhoff Publ., 2004, pp. 161-170; A. Gioia, "Terrorismo internazionale, crimini di guerra e crimini contro l'umanitá", *Revista di Diritto Internazionale*, 1/2004, pp. 5-69; ICRC, *ICRC report on IHL and the challenges of contemporary armed conflicts*, "Chapter 5: Terrorism, Counterterrorism measures, and IHL", ICRC, November 2019, pp. 57-64; P. Klein, "Le droit international à l'épreuve du terrorisme", 321 *Recueil de Cours de l'Académie de Droit International* 203 (2006), pp. 203-484; D. O'Donnell, "International treaties against terrorism and the use of terrorism during armed conflict and by armed forces", 864 *Revista Internacional de la Cruz Roja* 853 (2006); M. Pérez González, "Terrorismo y conflictos armados. La prohibición de los actos terroristas por el Derecho Internacional Humanitario", en *Lucha contra el terrorismo y Derecho Internacional*, Cuadernos de Estrategia, nº 133, Ministerio de Defensa, Madrid, 2006, pp. 83-105; F. Pignatelli y Meca, "El terrorismo como crimen de lesa humanidad y crimen de guerra en el Estatuto de Roma de la Corte Penal Internacional", en *Lucha contra el terrorismo y Derecho Internac-*

within the domain of international law, especially given the absence of a definition of 'terrorism' in international law. From an IHL perspective, however, not only are certain acts of terror committed in the context of an armed conflict considered potential war crimes, there are implications in the very qualification of those who commit such acts as possible combatants, with the IHL repercussions derived therefrom.[2] Moreover, the application to a specific armed conflict — namely, the armed conflict in Colombia — adds another layer of complexity by contextualizing theory in an actual, concrete case which, furthermore, brings into focus the problems that arise and the solutions international legal theory offers in matters of terrorism and IHL.

From the outset we must consider the fact that, as RAMÓN CHORNET observes, terrorism is an historical concept, of which "it is impossible to try to conduct an analysis of the legal meaning of international terrorism without considering its historic depiction or, if you prefer, its contextualization."[3] This poses considerable problems with regard to its definition and treatment, to the extent that some authors reject the idea of settling on a single definition and legal treatment. According to HIGGINS:

> "'Terrorism' '*is a term without legal significance*. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both. […]. The term is at once a shorthand to allude to a variety of problems with some common elements, and a method of indicating community condemnation for the conduct concerned."[4]

However, the existence of a uniform legal framework for counterterrorist action, clearly and precisely defined, is not only possible — despite being technically and certainly politically challenging — but essential if the aim is to act within the principles of international legality (i.e.: the rule of law, banishing arbitrariness and reducing

ional, Cuadernos de Estrategia, nº 133, Ministerio de Defensa, Madrid, 2006, pp. 207-249; J. L. Rodríguez Villasante, "Terrorismo y Derecho Internacional Humanitario", en *Derecho Internacional Humanitario*, J. L. Rodríguez Villasante (ed.), Tirant lo Blanch- Cruz Roja, 2ª ed. Valencia, 2007, pp. 217-254.

2 From an opposing viewpoint, taking as a starting point the existence of terrorists (though there is no definition of "terrorism" in international law) and, therefore, the fight against terrorism and its effects, vis-à-vis the position defended here, which is based on the existence of armed conflict, as defined by IHL and the legal ramifications derived therefrom, SCHARF calls attention to the danger of applying IHL to acts of terror: "The proposal to define terrorism as the peacetime equivalent of war crimes necessitates application of the laws of war to terrorists. The approach would fill some of the gaps of the current anti-terrorism treaty regime. It might permit the exercise of more forceful measures that might not be permissible under the rubric of law enforcement. It would give the prosecution the ability to argue the doctrine of command responsibility, which was not previously applicable to peacetime acts. It will also encourage terrorist groups to play by the rules of international humanitarian law. Conversely, the approach virtually declares open season for attacks on government personnel and facilities. It would encourage insurrection by reducing the personal risks of rebels, and it would enhance the perceived standing of insurgents by treating them as combatants rather than common criminals." M. P. Scharf, 'Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects', 36 *Case Western Reserve Journal of International Law*, 359-374 (2004), at 373-374.

3 C. Ramón Chornet, *Terrorismo y respuesta de fuerza en el marco del Derecho Internacional* (Tirant lo Blanch, Valencia, 1992), at 32.

4 R. Higgins, 'The General International Law of Terrorism' in R. Higgins and M. Flory (eds.), *Terrorism and international law* (Routledge, London, 1997), at 28. Emphasis added.

discretionality to a minimum) and to do so effectively, with the efficacy only offered by the legitimacy of acting in accordance with the law.[5]

First, we must recognize that the consequences of having no definition of "terrorism" are myriad and heterogeneous. Some are entirely legal, others are political; in certain instances, they are purely practical, while in others they are theoretical or philosophical. All, however, are evident in the Colombian conflict, as we will see. Second, we will determine how the application of IHL given that our analysis applies to an armed conflict, albeit not of international scope will help shed light on doubts and provide answers to the difficulties posed by the absence of a definition of "terrorism" under international law.

The above leads us to focus our analysis on the relationship between terrorism and IHL, and to examine the possibility that the commission of terrorist acts in the context of armed conflicts can be classified as a serious violation thereof and, therefore, a war crime.[6] Still, applying international legal theory specifically to the Colombian conflict is no easy task, though it does, in fact, apply and will, therefore, help us demarcate complex issues, address germane political debates that arise in the case at hand, and do so based on the rule of law and, thus, on the applicable international law in force, in an effort to attain the necessary legal certainty.

As I say, application to the Colombian context is not easy[7], since the political debates are based on principle, posed in relation to the very legal classification and nature of the conflict itself. On that foundation, different narratives are constructed that affect the core issues that emerge when we talk about terrorism and IHL. Naturally, not all narratives constructed thusly are legally admissible. Therefore, in what follows, we will

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5 For an in-depth analysis of the absence of a definition of 'terrorism' in international law and its legal ramifications, see, among others, R. P. Barnidge, "Arriving at an understanding of a term", in *Terrorisme et droit international*, M. J. Glennon & S. Sur (dir.), Académie de Droit International de la Haye, Martinus Nijhoff Pub., Leiden/Boston, 2008, pp. 157-193; G. Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jaques Derrida*, University of Chicago Press, Chicago, 2003; P. Carrasco Jiménez, *La definición de terrorismo desde una perspectiva sistémica*, Plaza y Valdés, Madrid, 2009; C. Espósito, *El desacuerdo sobre el alcance de la definición de terrorismo internacional en el proyecto de Convenio general sobre terrorismo internacional de Naciones Unidas*, FRIDE, 2004; E. Hugues, "La notion de terrorisme en Droit international: en quête d'une définition juridique", *Journal du Droit International*, 3/2002, pp. 753-771; P. Klein, "Le droit international à l'épreuve du terrorisme", 321 *Recueil de Cours de l'Académie de Droit International* 203 (2006), pp. 203-484; B. Saul, *Defining terrorism in international law*, Oxford University Press, Oxford, 2006; A. Schimid, "Terrorism: The Definitional Problem", 36 *Case Western Reserve Journal of International Law* 375 (2004); F. Vacas Fernández, *El terrorismo como crimen internacional* (Tiran lo Blanch, Madrid, 2011); specifically, Part I: 'La difícil cuestión de la definición internacional de terrorismo y sus consecuencias jurídicas', pp. 38-205.

6 For a different perspective of this relationship, focused on the fight against terrorism rather than the application of IHL as a possible solution to the debate surrounding the definition of 'terrorism' in international law, see, among others, C. Paulussen, 'Testing the Adequacy of the International Legal Framework in Countering Terrorism: The War Paradigm', *ICCT: The Hague Research Paper*, 2012; M. P. Scharf, *Defining Terrorism as the Peacetime Equivalent …*, *supra* n. 1; J. de Roy Van Zuijdewijn, 'Peace, Terrorism, Armed Conflict and War Crimes', 26 *Security and Human Rights* (2015) 207-223; VVAA, *Terrorism, Counter-Terrorism and International Humanitarian Law*, 17th Bruges Colloquium, 20-21, October 2016, College of Europe-ICRC, 2017.

7 See V. de Currea Lugo, "Dificultades del Derecho Humanitario en el caso colombiano", en *Derecho Internacional Humanitario*, J. L. Rodríguez Villasante (ed.), Tirant lo Blanch- Cruz Roja, 2ª ed. Valencia, 2007, pp. 733-759.

apply current law specifically to the Colombian conflict, beginning with the essential issue of the legal classification of the conflict, in order to then delve deeper into the matters that rightfully emerge when we talk about IHL and terrorism.

(B) THE LEGAL CLASSIFICATION OF THE COLOMBIAN CONFLICT

The classification of the Colombian conflict as *armed conflict* is, in fact, a matter of debate. Classifying a conflict as *armed* is by no means inconsequential, as we have seen; hence, the discourse and political wrangling that has developed around the issue in Colombia. Now then, the debate must be confined exclusively to the political sphere because, as we will establish, from an international law perspective, the issue lends itself to minimal debate, precisely because of the clarity of the applicable regulation and the response it offers.

In effect, though the term "conflict" is not strictly speaking legal, the expression "armed conflict" is, implying the application of a whole special normative corpus of international law: IHL.[8] By contrast, the non-consideration of a given confrontation as an 'armed conflict' but as a "situation of internal disturbances and tensions", suspends its application to it of course, this does not affect International Law of Human Rights (ILHR), which invariably applies in these situations[9]-, as established in the Fourth Geneva Convention, Additional Protocol II, Article 1.2:

> "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[10]

To this we must add a pertinent political consideration which, in conjunction with the above, gives way to the fact that, politically the issue is of capital importance: the consideration by some that the application of IHL would grant armed groups facing off against the State which has legitimacy of origin regarding the use of violence within its jurisdiction: the strong, albeit rebuttable presumption of legality with respect to such use- a legitimacy that would not exist without its application. However, this consideration is purely political, not legal, as Additional Protocol II of the Geneva Convention clearly establishes in Article 3, both internally and externally:

> "1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate

8 Among the extensive bibliography on the concept of armed conflict in IHL, *vid.* L.R. Blank and G. P. Noone, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War* (Wolters Kluwer, 2nd ed., 2019), especially Chapter IV, pp. 233-304; A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press, 2010); G. D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2022), especially Chapter 5, pp. 129-166; S. Vite, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations', 91 *International Review of the Red Cross* (2009) 69-94.

9 On the relationship between IHL and ILHR see *Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), par. 106.

10 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Article 1.2.

> means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
>
> 2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs."

And the last paragraph of common Article 3 of the Fourth Geneva Convention:

> "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

As indicated in the Commentary on the Additional Protocols to the Geneva Convention of 1949 from the International Committee of the Red Cross (ICRC), "such a clause is already contained in common Article 3, and therefore retains its full validity with regard to Protocol II. Thus it is perfectly clear that the application of international humanitarian law in situations of non-international armed conflict has no effect whatever on the qualification of relations between the parties."[11] As it is well known, the primary objective of IHL is the protection of human dignity in armed conflicts. Therefore, when an armed conflict exists existence being based on IHL legal considerations and requirements it must necessarily be applied beyond all other considerations.

Furthermore, a group's political and legal legitimacy in the use of force depends on other, quite different political and legal variables: politically, its legitimacy as a group armed against the established government of a State will depend on other factors, such as its domestic support among the population of the country, together with the international support from third countries and public opinion; legal legitimacy, meanwhile, results from the application of international law which, in relation to the use of force, will be determined by *ius ad bellum* rules articles 2.4, 51 and Chapter VII of the UN Charter-.

Therefore, to determine whether the Colombia case is an 'armed conflict' in the international legal sense, we must refer to the provisions of Protocol II, Article 1 of which describes its material field of application:

> "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and *which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*"[12]

The above Article establishes two different types of requirements for the Protocol's application: one negative requirement and a series of positive requirements that must concur simultaneously. The negative requirement holds that it be an armed conflict to

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11 ICRC, *Commentary on the Additional Protocols to the Geneva Convention of 1949*, par. 4499.

12 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Article 1. Emphasis added.

which Protocol I does not apply, in other words, a non-international armed conflict, meaning those "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups", provided the latter meet each of the following positive requirements – which are those of interest to us here, as they define when we encounter an armed conflict-: that they be 'under responsible command', that they "exercise such control over a part of its territory', and that such control 'enable[s] them to carry out sustained and concerted military operations and to implement this Protocol."

Thus, the issue is to determine whether, in Colombia – where Protocol I does not apply, since it is clearly not an international armed conflict (another issue is to determine whether we are facing an exclusively internal or internal-international conflict,[13] an interesting question in itself, but one that does not affect the application of IHL rules) the "dissident armed forces or other organized armed groups" meet these requirements in order to determine if Protocol II applies. If the answer is yes, we would undoubtedly be looking at an armed conflict.

For its part, the International Criminal Court, which must determine the existence of armed conflicts in specific situations to establish whether war crimes have been committed, as required by the nature of such crimes under Article 8 of the Rome Statute, has already established in its case law that, "an armed conflict exists whenever there is a resort to armed force between States or *protracted violence between governmental authorities and organized armed groups or between such groups within a State*",[14] thus synthesizing into two the elements necessary for an armed conflict to exist: the existence of prolonged violence and organized armed groups, which is where the Court subsumes the three requirements cited in Protocol II, as we will see.

With regard to the first element, the Court has established:

> "(A)n 'armed conflict not of an international character' is characterized by the outbreak of armed hostilities of a certain level of intensity, exceeding that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar, nature, and which takes place within the confines of a State territory."[15]

Consequently, it is the intensity of the confrontation that distinguishes an internal armed conflict from situations of internal disturbances and tensions that do not reach the level of violence required for consideration as an armed conflict, intensity that "may be shown by factual indicators such as the scale, seriousness and increase of the attacks;

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13 For an analysis of this issue, see F. Vacas Fernández, *El conflicto de Colombia en perspectiva internacional. Evolución, procesos de paz y derechos de las víctimas a la luz del Derecho y las Relaciones Internacionales* (Doctrina & Ley ed., Bogotá, Colombia, 2017), pp. 217-237.

14 *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment pursuant to Article 74 of the Statute: Situation in the Democratic Republic of the Congo,' 14 March 2012, ICC-01/04-01/06-2842, par. 533. Emphasis added. Definition that is based on the *Tadic* case. See *Prosecutor v. Tadic*, 'Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995, International Criminal Tribunal for the former Yugoslavia (ICTY), Case no. IT-94-1, par. 70.

15 *Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,' ICC-01/05-01/08-424, 15 June 2009, par. 231.

type of operations; the mobilization and distribution of weapons; length of time of combat operations; geographical expansion as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed[16]."[17]

With regard to the second, the requirement pertaining to the "organization of armed groups", this must be sufficient enough so "as to enable them to carry out sustained and concerted military operations and to implement this Protocol", a determination of which requires the examination of "the force or group's internal hierarchy; the command structure and rules; the extent to which military equipment is available; the ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement[18]", [19] among other factors.

That the National Liberation Army *(Ejército de Liberación Nacional*, "ELN") *has* or, in the case of the FARC-EP, had, "responsible command leadership" over its units or groups in arms, there is no doubt; nor that they effectively *control* — or, prior to the implementation of the Final Agreement for the FARC-EP, controlled part of Colombian territory, as the Colombian government has officially recognized even during the presidential terms of Álvaro Uribe Vélez.[20] Nor is there any doubt that this control allows, or allowed, these groups "to carry out sustained and concerted military operations", and "to implement this Protocol."

It is also important to note that, after much criticism of the position defended here and official denials of the existence of an armed conflict in Colombia, the fact remains that, on the one hand, the Colombian State has never endorsed that political position[21] and, on the other, President Santos amended his stance, officially recognizing the

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16 See *Prosecutor v. Thomas Lubanga Dyilo*, *supra* n. 12, par. 538; based on ICTY, *Prosecutor v. Mrkšić et al.*, Case no. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, par. 407.

17 ICC. The Office of the Prosecutor. *Situation in Colombia. Interim Report,* November 2012, par. 126.

18 See *Prosecutor v. Thomas Lubanga Dyilo*, *supra* n. 12, par. 536-537.

19 ICC. The Office of the Prosecutor. *Situation in Colombia. Interim Report,* November 2012. par 127.

20 Thus, for example, in the document establishing the *Democratic Security and Defense Policy*, the first of the strategic objectives indicated is the "consolidation of state control throughout the territory" (par. 57), which entails a cycle of "recovery and consolidation":
"Consolidating state control over the country will be a gradual but continuous process of containing, dismantling and deterring the illegal armed groups, protecting the population and re-establishing the authority of democratic institutions. The idea is to create a virtuous circle of long-term recovery and consolidation which will gradually restore an atmosphere of security throughout the country.
The Government will gradually restore state presence and the authority of state institutions, starting in strategically important areas. Once the intelligence services have identified and located a threat the Armed Forces and the National Police will begin the recovery process with an offensive operation. Reinforcements will be provided when necessary." Presidency of the Republic Ministry of Defense, *Democratic Security and Defense Policy*, 2003, par. 87 and 88.

21 Thus, for example, the *Santa Fe de Ralito* Accord of July 2003, between the government of Uribe Vélez and the paramilitary leaders, states that, among others, its purpose is "the establishment of national peace." *Santa Fe de Ralito* Accord to contribute to peace in Colombia, 15 July 2003, pt. 1.
Meanwhile, the "specific objective" of the Agreement with the OAS to accompany the peace process is to establish a Mission to support the Peace Process in Colombia ("MAPP/OAS" or the "Mission") and verify the peace process, cease fire, and demobilization, disarmament and reintegration initiatives established by the government in the Peace Process. *The Agreement between the Government of Colombia and the General Secretariat of the OAS for Monitoring of the Peace Process in Colombia*, 23 January 2004, doc. CP/INF.4934/04, 4 February 2004, Article 1.2.

existence of the armed conflict, thus finally aligning Colombia's official position in a legal and political sense. This is expressly cited in Article 3 of the Victims and Land Restitution Act (*Ley de Víctimas y Restitución de Tierras*, "Law 1448"):

> "For the purposes of this Act, victims are considered those persons who, individually or collectively, have suffered damage due to events occurring on or after 1 January 1985, as a result of *violations of international humanitarian law*, or serious and manifest violations of international human rights standards that occurred on the occasion of the *internal armed conflict*."[22]

Ultimately, as the Office of the Prosecutor for the International Criminal Court clearly established in the *Interim Report on the Situation in Colombia* from November 2012:

> "During the time period over which the Court has jurisdiction over war crimes, i.e. since 1 November 2009, *an armed conflict of a non-international character has been taking place in the territory of Colombia between armed groups*, i.e. FARC and ELN, *and the Government of Colombia*. *Both the FARC and the ELN exhibit a sufficient degree of organization, and have engaged in sustained military hostilities against the Colombian government of sufficient intensity to meet the threshold requirements for the existence of a non-international armed conflict*."[23]

(C) ON THE CONSIDERATION OF ACTS OF TERROR AS WAR CRIMES

The classification of the Colombian conflict as "armed conflict" and the subsequent application of IHL, coupled with the qualification of rebels in arms against the State as "combatants", have nothing to do with confirming the illegality of acts that imply violations of the applicable IHL, which, in the case of gross violations, should be classified as war crimes. In this context, neither is it a hindrance *to consider a grossly violent act intentionally directed against the civilian population with the aim of creating extreme fear or panic*, whomever the perpetrator — the State's military, the police, paramilitary groups, or guerrillas —, as a terrorist act that would constitute a war crime or, in the strictly legal sense, as a war crime consisting of one or more acts of terror against the civilian population.

In fact, IHL is not alien to the identification of terrorism as a prohibited method of using force, at least not since the Interwar period. As the ICRC asserts, "in situations of armed conflict, be they international or non-international, international humanitarian law has a clear answer to terrorism, in that it unconditionally prohibits terrorist acts and provides for their repression."[24] Nevertheless, as we will see, it is no less true that the issue of terrorism requires prior reflection in the context of armed conflicts.

According to GASSER: "Violence against persons and destruction of property are inherent in warfare. The use of deadly force against persons and objects is contrary to

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[22] Law 1448, of 10 June 2011, on *Victims and Land Restitution*, Article 3. UNESCO translation: https://en.unesco.org/creativity/sites/creativity/files/law1448v18jun20.pdf. Emphasis added. (For all web pages quoted, last visit 4th May 2022).

[23] ICC, *Situation in Colombia. Interim Report. November 2012, op. cit.*, par. 128. (Emphasis added.)

[24] United Nations, General Assembly, Working Group established pursuant to GA Res 51/210, *Statement by the International Committee of the Red Cross*, p. 1.

international humanitarian law only if such acts transgress the limits established by the international rules. Violence is also one of the salient features of terrorism. International law must therefore draw a line to distinguish the violence which is legitimate in war from acts of terrorism, i.e. illicit recourse to violence. How is this distinction achieved?"

GASSER himself responds: "To resort to illegal methods and means violates the legal order and, in aggravated circumstances, can be prosecuted as a crime under domestic law or as a war crime. Consequently, members of armed forces, though entitled to commit acts of violence, may be held responsible for violations of rules protecting persons or civilian property. In other words, officers and ordinary soldiers may (or must) be prosecuted at the domestic or international level and punished for terrorist acts they are found to have committed."[25]

Such was the case very early in the IHL formation process. As PÉREZ GONZÁLEZ points out: "The condemnation of resorting to terrorist tactics in wartime is firmly rooted in customary international law through rules aimed at preventing excess or superfluous harm or unnecessary suffering and prohibiting attacks against those who are not (or are no longer) participating in the hostilities."[26] Moreover, since the Interwar period, we have seen the inclusion of prohibitions against terrorist acts in IHL conventions, in response to new methods of waging war put into practice during WWI, including so-called *total war*; according to which the morale of the civilian population is considered particularly relevant to the ultimate outcome. Thus, in an attempt to undermine morale through terror, civilians became the direct targets of attack.

Thus, at the end of the Great War, the Paris Peace Conference established the *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, with a mandate to investigate violations of law and customs of war by the defeated powers. In its 1919 report, the Commission identified 32 categories of war crimes, beginning with "murders and massacres", and followed, very significantly, by "systematic terrorism" against the civilian population, thus demonstrating the gravity of such occurrences in the context of armed conflict.

Consequently, the Commission of Jurists, created by the 1922 Washington Conference on the Limitation of Armament, presented *The 1923 Hague Rules of Air Warfare*, which expressly prohibit "aerial bombardment for the purpose of terrorizing the civilian population." The States did not adopt the bill, however, in part because they did not agree with prohibiting such a valuable method of warfare,[27] the efficacy of which would unfortunately soon become manifest in the Spanish Civil War and WWII, among others.

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25 H. Gasser, 'Acts of terror, "terrorism" and international humanitarian law', 84 *International Review of the Red Cross* 547 (2002), at 554-555.

26 M. Pérez González, 'Terrorismo y conflictos armados. La prohibición de los actos terroristas por el Derecho Internacional Humanitario', in *Lucha contra el terrorismo y Derecho Internacional* (Cuadernos de Estrategia, no. 133, Ministry of Defense, Madrid, 2006), at 91.

27 As Saul recalls, "Some States did not want to fetter their freedom of action to bomb civilians if necessary. In 1926, the US Air Service Tactical School stated that 'bombardment is an efficient weapon to […] weaken the morale of the enemy people by attacks on centres of population, though only in reprisal. France expressed similar sentiments." B. SAUL, *Defining terrorism in international law* (Oxford University Press, Oxford, 2006), at 275.

The bombing of Guernica during the Spanish Civil War[28] marks a milestone in the crystallization of a customary rule prohibiting the intentional bombardment of civilians, as recognized by the International Criminal Tribunal for the former Yugoslavia in the *Tadic* case,[29] by moving the Council of the League of Nations to condemn "methods contrary to the law of nations and the bombing of open cities."[30] In spite of this, the League of Nations did not expressly declare such bombardment contrary to international law and prohibit them, nor were the States willing to accept as much, as would become evident in their practice by all opposing parties in the Second World War.

As after the First World War, post-WWII, the United Nations War Crimes Commission, tasked with investigating these crimes, recommended in May 1945 "to seek out the leading criminals responsible for the organization of criminal enterprises including *systematic terrorism*, planned looting and the general policy of atrocities against the peoples of the occupied States, in order to punish all the organizers of such crimes."[31] The Nuremberg Trials, meanwhile, made countless references to what they termed "Nazi terrorism."

In addition to the above practice, and in light of the absence of references to (at least conventional) terrorism in IHL applicable during the Interwar period, after WWII several provisions were added to the Geneva Convention of 1949 and its Additional Protocols of 1977, in which express mention is made to it; plus many further rules that doctrine cites as provisions that contain implicit references to terrorism.[32]

Firstly, Article 33.1 of the Fourth Geneva Convention establishes:

> "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise *all measures* of intimidation or *of terrorism are prohibited*."[33]

It is a specific prohibition in relation to a general prohibition, proclaimed in Article 27 of the Convention, to perpetrate acts of violence and inhuman treatment against civilians, as protected people, thus implying a certain gravity in the behavior already prohibited in the above Article of using violence against civilians as protected people, that cannot but consist of the volitional or teleological element special *mens rea* of aiming to spread terror among the population through these acts of violence, which is particularly grave.

The 1977 Protocols Additional to the Fourth Geneva Convention, however, contain more precise rules in this regard. Firstly, Article 51.2 of Protocol I and Article 13.2 of Protocol II contain the same provision:

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28 *Vid.* C. Fernández Liesa, *La guerra civil española y el orden jurídico internacional* (Civitas-Thomson-Reuters, Navarra, 2014).

29 *Tadic (Interlocutory Appeal)* ICTY-94-1, 2 October 1995, par. 100.

30 Council of the League of Nations, *Resolution on Spain's Appeal Against Foreign Intervention*, 29 May 1937.

31 UN War Crimes Commission, *History of the United Nations War Crimes Commissions and the Development of the Laws of War*, HMSO, London, 1948, p. 43.

32 *Vid.* J. Alcaide Fernández, *Las actividades terroristas entre el Derecho internacional contemporáneo* (Tecnos, Madrid, 2000), at 32.

33 IV Geneva Convention, *relative to the Protection of Civilian Persons in Time of War*, 12 August 1949. Emphasis added.

> "The civilian population as such, as well as individual civilians, shall not be the object of attack. *Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited*."[34]

Again, but with much greater clarity, after establishing a general prohibition against attacking the civilian population, a specific prohibition is established, which specifies the general prohibition contained in the first parenthetical remark of that same paragraph. As stated by the Criminal Tribunal for the former Yugoslavia in the *Galic* case — the first instance in which an international court applied the type of terrorism as a war crime[35] — "the prohibition against terror is a specific prohibition within the general prohibition of attack on civilians."[36]

In addition, the prohibition in Article 51.2 of Protocol I and Article 13.2 of Protocol II is much broader than that of Article 33.1 of the Fourth Geneva Convention, given that it not only refers to "attacks", but also "acts of violence", and prohibits not only their commission, but also the threat of their commission. Finally, it expressly establishes the element that specifies the prohibition or special *mens rea*: "the primary purpose of which is to spread terror among the civilian population."

While it is true that, as the ICRC Commentary recognizes, all acts of violence within the context of an armed conflict "almost always give rise to some degree of terror among the population and sometimes also among the armed forces", and especially among the latter because "attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender",[37] it is not less true that not all means and methods of waging war are legal, and that is the crux of IHL. In this respect, the prohibition against terrorizing the civilian population is not aimed at prohibiting acts of violence in armed conflicts, but, as GASSER notes, "acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage."[38]

Furthermore, what we have cited as the constituent element of this specific type — 'the primary purpose of which is to spread terror among the civilian population' — continues to pose challenges since it entails proving the intent to commit acts of violence, which is not always evident. As SAUL explains: "In some cases, evidence of the subjective purpose behind violent acts may be hard to discover, especially where motives are undeclared, or where practice departs from declared motives. Where mixed purposes underlie violence, it may be difficult to weigh those to uncover which is *primary*."[39] In any case, the term

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34 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* of 8 June 1977, Article 51.2; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* of 8 June 1977, Article 13.2. Emphasis added.

35 As the Court stressed: "The charge, as such, of terror against the civilian population is one that until now has not been considered in a Tribunal judgment, although evidence of terrorization of civilians has been factored into convictions on other charges. This is also the first time an International Tribunal has pronounced on the matter." *Galic*, ICTY-98-29-T, 5 December 2003, par. 66.

36 *Ibid*, par. 98.

37 Sandoz *et al* (eds.), *Commentary on the 1977 Protocols* (International Committee of the Red Cross, Geneva, 1987), par. 1940 (Article 51.2 of Protocol I) and par. 4786 (Article 13.2 of Protocol II).

38 H. Gasser, 'Prohibition of Terrorist Acts in International Humanitarian Law', 253 *IRRC*, 200 (1986).

39 B. Saul, *Defining terrorism…*, *supra* n. 26, at 42.

"primary purpose" allows for a less rigid interpretation by establishing a less exacting standard than, for example, requiring that it be the "sole" purpose of the prohibited act of violence.

Finally, Article 4.2.d) of Protocol II introduces a significant, new prohibition that expressly refers to the commission of terrorist acts, among other serious violations:

> "2. Without prejudice to the generality of the above, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
>
> (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
>
> (b) collective punishments;
>
> (c) taking of hostages;
>
> (d) *acts of terrorism*;
>
> (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
>
> (f) slavery and the slave trade in all their forms;
>
> (g) pillage;
>
> (h) *threats to commit any of the foregoing acts*."[40]

As in the previous case, not only is the commission of the act itself prohibited, the threat of the act is also prohibited. This runs parallel to the prohibition in the Fourth Geneva Convention, as we have seen, but because it appears in Protocol II, it applies to non-international armed conflicts "at all times and places", *ergo* to the Colombian conflict.

The relationship between this prohibition and the one contained in Article 13 of the same Protocol is that of a general rule, Article 4.2.d), versus a specific rule, Article 13. However, it should be noted that the relationship is simultaneously more limited and broader: limited in the sense that it requires that the act actually result in terror (while Article 13 simply prohibits the primary intention of the act to produce terror, regardless of the outcome), and broader in the sense that it does not only refer to the civilian population as passive subjects or victims of the "act of terror", but to all persons, including combatants. Effectively, Article 4.1 refers to "All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted".

We must, therefore, agree with GASSER that: "*The prohibition of recourse to terrorist acts is as firmly anchored in the law applicable in non-international armed conflict as it is in the rules governing international armed conflict. Acts of terrorism are banned, without exception.* This conclusion is important, as non-international armed conflicts are particularly prone to wanton violence."[41] Naturally, this is of special interest to the case at hand the Colombian conflict as we will see in the next section.

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[40] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* of 8 June 1977, Article 4.2. Emphasis added.

[41] H. Gasser, *Acts of terror…*, *supra* n. 24, at 562. Emphasis added.

In another respect, from the perspective of general analysis, we must pose a two-fold question subjectively, or *ratione personae*: first, regarding the definite possibility, admitted by all, that State agents members of the armed forces, police, intelligence services, or political authorities or those acting on its behalf in the context of armed conflicts may commit acts of terrorism that being i) expressly prohibited by IHL and ii) serious violations of it would constitute the commission of war crimes. In this context, it would not be unjustified or legally unfounded to speak of "State-sponsored terrorism", particularly if these acts are neither isolated or spontaneous, but rather systematic operations that correspond to a policy or plan; in Colombia, those known as "false positives" clearly fall into this category.

Second, the question arises of whether only those considered combatants can violate IHL and therefore commit war crimes, or if, on the contrary, non-combatants can also commit them. This general theoretical matter is of special interest in the case of terrorism and in acts of serious violence that meet all the elements which define terrorism, and that are committed by non-combatants within the framework of an armed conflict, given the asymmetrical nature of many such conflicts these days, and throughout the course of the Colombian conflict especially with regard to members of paramilitary groups, hitmen, or so-called "civil third parties" (*terceros civiles*).[42]

The answer, from the point of view of both international case law and doctrine, seems well-established in the sense that non-combatants can commit war crimes and, therefore, the terrorist acts that concern us here. As DAVID concludes: "*Le droit des conflits armés, à l'instar des autres règles du droit international, peut lier tout individu.*"[43] In the same vein, DISTEIN affirms that "[a] war crime is typically committed by members of armed forces, but it can also be perpetrated by civilians".[44] A position already established in jurisprudence at Nuremberg in the *Krupp* case: "*The laws and customs of war are binding no less upon private individuals than upon government officials and military personnel*",[45] and more recently by the Ad Hoc International Criminal Tribunal for Rwanda in the *Akayesu* case: "Thus it is clear from the above that *the laws of war must apply equally to civilians as to combatants in the conventional sense*", so, consequently, "*civilians may be held responsible for violations of international humanitarian law*."[46]

This, therefore, not only has the reading indicated in the application of IHL and the commission of war crimes by civilians, but also, in the perspective of the non-application of international anti-terrorism rules, since it is preferable -legally (*lex specialis*) and politically, to solve the issue of defining "terrorism"- the application of IHL in armed conflicts to everyone, regardless of their classification as combatants or non-combatants. As MARTIN concludes: "[O]utre le 'terrorisme' des forces armées, absolument interdit dans les Conventions de Genève et constitutif d'infractions graves, il ne fait donc aucun

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42 See, for example, International Criminal Court, Office of the Prosecutor, *2019 Report on Preliminary Examination Activities.* Situation in Colombia, 5 December 2019, par. 96.

43 E. David, *Principes de Droit des conflits armés* (Bruylant, Brussels, 1999), at 204.

44 Y. Distein, 'The Distinctions between War Crimes and Crimes Against Peace', in Y. Distein & M. Tabory (dir.), *War Crimes in International Law* (Martinus Nijhoff, The Hague-Boston-London, 1996), at 4.

45 See E. David, *Principes de Droit des conflits…*, *supra* n. 42, at 204. Emphasis added.

46 *Akayesu case*, aff. no. ICTR-96-4-T, Judgment of 2 September 1998, par. 634 and 633, respectively. Emphasis added.

doute que ce que l'on entend par terrorisme en temps de paix, imputable à des non-combattants, est aussi prohibé en situation de conflit armé. S'il existe un lien suffisant entre le conflit armé et les crimes allégués contre des populations civiles, ces actes peuvent constituer des infractions graves au droit international humanitaire, donc des crimes de guerre."[47]

(D) THE COMMISSION OF WAR CRIMES CONSISTING ACTS OF TERROR AGAINST THE CIVILIAN POPULATION IN THE COLOMBIAN CONFLICT

This is precisely the case in the Colombian armed conflict. In our analysis we will first refer to the victims of the conflict, the magnitude and nature of the violation of their rights, and the origin of the perpetrators. From the data cold but critical we can deduce that a significant part of criminal conduct may be classified as terrorist acts targeting a civilian population, in violation of the IHL rules cited in the previous section, which, therefore, must be classified as war crimes. In order to finally delve into an analysis of the legal ramifications to infer from this, especially to avoid impunity in relation to such serious crimes, we will address the role of the International Criminal Court (ICC) by examining the actions of the Office of the Prosecutor in the Preliminary Examination of the Colombian Situation using the principle of positive complementarity.

(1) Victims of war crimes consisting of acts of terror against the civilian population in the Colombian conflict

According to the *General Report of the Historical Memory Group* (probably the most complete in existence to date among those that address the victims of the Colombian armed conflict[48]):

> "Establishing the real extent of the violence produced by the armed conflict is a task with numerous difficulties. On the one hand, collecting and processing the information got a late start in the country due to the lack of a political will to recognize and face up to the problem, and also because the true magnitude of the armed conflict has still not been understood. Further obstacles include the logistical and methodological difficulties of obtaining and recording information, the dynamics of the war itself, such as its length, changes in the mechanisms of violence used by the armed agents and the overlapping of multiple kinds of violence".[49]

Based on this prudence, which likely means underestimating the reality of the conflict and its consequences, let us look at the data, which is absolutely essential in order to understand the matter at hand, to conduct a methodologically suitable analysis (according to the demands of the social sciences in general and the legal sciences in

47 J. C. Martin, *Les règles internationales relatives à la lutte contre le terrorisme* (Bruylant, Brussels, 2006), at 249.

48 The Colombian Truth Comission (*Comisión para el esclarecimiento de la Verdad, la Convivencia y la No Repetición*), established after the Agreement between the Colombian Government and the FARC, and after 4 years of intense work, published on the 28th June 2022, its Final Report called *Hay future si hay verdad*. Visit: https://www.comisiondelaverdad.co/hay-futuro-si-hay-verdad

49 *Basta Ya! Colombia: Memories of War and Dignity*. General Report of the Historical Memory Group, Centro Nacional de Memoria Histórica, July 2013, at 37.

particular), using a methodological division of victim by type. Thus, first and foremost, the deaths caused by the conflict:

> "The extent of lethal violence in Colombia shows that its armed conflict is one of the bloodiest in the modern history of Latin America. Research done by the GMH concludes that this conflict resulted in the death of approximately 220,000 people between January 1, 1958 and December 31, 2012.
>
> […]
>
> Of these deaths, 81.5% correspond to civilians and 18.5% to combatants; that means that approximately eight out of every ten deaths have been civilians, and therefore, they these non-combatant persons are the ones who, according to international humanitarian law, have been most affected by the violence.
>
> These figures show that it is necessary to review the real burden of violence in the armed conflict, in particular when it is compared with other types of violence that affect Colombian society. The data presented refute the assertion that only one in every ten homicides is a result of the armed conflict, since in reality it has caused one out of three violent deaths. Similarly, the notion that the number of civilian and combatant deaths is equal can thus be refuted. On the contrary, civilians have been more affected: for each fallen combatant there have been four civilian casualties".[50]

Secondly, with regard to the disappeared, victims of sexual violence, child soldiers, and internally displaced persons, the known figures of the Colombian conflict are also chilling:

> "[T]he armed conflict's violence has a non-lethal dimension that gives rise to equally serious consequences. By March 31, 2013, the RUV had reported 25,007 missing persons, 1,754 victims of sexual violence, 6,421 children and adolescents recruited by armed groups, and 4,744,046 displaced persons. *Cifras & Conceptos* did a study for the GMH that reported 27,023 kidnappings associated with the armed conflict between 1970 and 2010, while the Presidential Program for Comprehensive Action Against Anti-personnel Mines *(Programa Presidencial de Atención Integral contra Minas Antipersonal,* "PAICMA") reported 10,189 victims of anti-personnel mines between 1982 and 2012.
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> […]
>
> Taking into account that official records only began to be kept in 1997, the number of displaced persons could be even higher, since this type of violence has a long and complex history in the Colombian conflict. In fact, projections from the estimates for 1985-1995 undertaken by the Consultancy on Human Rights and Displacement *(Consultoría para los Derechos Humanos y el Desplazamiento,* "CODHES") indicate that 819,510 persons were displaced as a consequence of the armed conflict. This suggests that the number of displaced persons could be close to 5,700,000 people, which would be equal to about 15% of the total Colombian population".[51]

Last but not least, for clarification, it is important to understand the data concerning the victims and crimes perpetrated within the context of the Colombian conflict as it relates to the groups that committed them:

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[50] *Ibid*, at 37-38.
[51] *Ibid*, at 39-40.

> "Of the 1,982 massacre documented by the GMH between 198 paramilitary groups perpetrated 1,166 or 58.9%. Guerrilla groups were responsible for 343 and the Security Forces 158, which amount to 17.3% and 7.9% respectively. Furthermore, 295 massacres, equivalent to 14.8% of the total, were perpetrated by armed groups whose identity could not be determined. The remaining twenty massacres corresponded to joint actions of paramilitary groups and members of the Security Forces or acts perpetrated by other armed groups (foreign agents or popular militias). In approximate terms, this means that for each massacre perpetrated by guerrilla groups, paramilitary groups were responsible for three.
>
> […]
>
> The tendency remains the same for the documented selective assassinations. Between 1981 and 2012, 16,346 acts of selective assassination claimed 23,161 victims. Of that total, 8,903 people were selectively assassinated by paramilitary groups, which corresponds to 38.4%; un-identified armed groups assassinated 6,406 victims, or 27.7%; 3,899, or 16.8%, were victims of guerrilla groups; and 2,339, or 10.1% of the total number of selective assassinations, were caused by members of the Security Forces; 1,511, or 6.5%, of the victims were assassinated by unidentified persons, 83 assassinations, or 0.4% of the total amount, were the result of joint actions by paramilitary groups and members of the Security Forces; and, finally, 13 assassinations were perpetrated by other groups.
>
> Of the 27,023 kidnappings reported between 1970 and 2010, guerrilla groups were responsible for 24,482, or 90.6%. Paramilitary groups were responsible for 2,541 kidnappings, which correspond to 9.4%. The above means that for every ten kidnappings, guerrilla groups were responsible for approximately nine and paramilitary groups one.
>
> Information about the perpetrators of forced disappearances is notoriously scarce. However, according to denouncements from human rights organizations and the relatives of disappeared persons, the alleged perpetrators of these acts were mostly members of the Security Forces and paramilitary groups. Of the 5,106 cases documented by the above- mentioned organizations, the alleged perpetrators were only identified in 689 cases. Of this total, 290 disappeared at the hands of members of the Security Forces, which corresponds to 42.1%; 246 by paramilitary groups, or 41.8%; 137 disappearances, or 19.9%, were attributed to other armed groups; and finally 16, or 2.3% of the total amount, were attributed to guerrilla groups".[52]

To this we must add the murder of thousands of civilians since 2013 as part of the still-ongoing armed conflict, the number of which increases year after year (in an escalation of violence that began following the entry into force of Law 1448 in 2011) and has accelerated exponentially in recent years since the signing of the Final Agreement with the FARC. Defenders of human rights, victims and their lawyers, political leaders, trade unionists, indigenous and Afro-descendent communities are once again threatened, persecuted, and attacked in an effort to inflict terror for political gain. These are acts of terror against the civilian population committed within the framework of an ongoing armed conflict, perpetrated overwhelmingly by those classified by the Colombian government as BACRIM (criminal gangs), which are essentially the remnants of not fully dismantled paramilitary groups that have re-emerged with considerable virulence in this second decade of the 21st century.[53]

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[52] *Ibid*, at 36-37.

[53] See among many other official sources, *Report of the UN High Commissioner for Human Rights on the situation of human rights in Colombia*; *Inter-American Commission report on Human Rights in Colombia*; and MAPP/OAS re-

Beyond the figures, these data are chilling in their magnitude, given the reality of what they represent, and enormously significant in what they reveal about the breadth, depth, and complexity of the armed conflict in Colombia. They show the crude simplicity of certain legal arguments and political narratives elaborated by some, and highlight the potential for classifying many acts as war crimes that consist of terrorizing the civilian population in violation of Articles 4.2.d) and 13.2 del Protocol II.

Above all, they speak to the need, from a point of view of both Peace and Justice, for Colombia, and all parties to the conflict, to face this situation, recognize it, and honor the victims' rights to truth, justice, and reparations. In this respect, it is worth referencing the work underway by the Special Jurisdiction for Peace (*Justicia Especial para la Paz*, "SJP") in a political context that is not at all favorable. This chamber has already issued major rulings on the matter, including SJP Order no. 19 of 26 January 2021, to determine the facts and conduct attributable to the former members of the FARC-EP Secretariat for hostage-taking and other severe deprivations of freedom,[54] and Order no. 33 of 12 February 2021, to make public the internal prioritization of Case no. 3, addressing 'deaths unlawfully presented as casualties by State agents',[55] in addition to the progress of Case no. 6 on the 'victimization of members of the patriotic union.'[56]

(2) The ICC Office of the Prosecutor's action against impunity for the commission of war crimes consisting of acts of terror against the civilian population in the Colombian conflict

With regard to justice, and therefore, the fight against impunity for the perpetrators of these acts, their classification as war crimes or crimes against humanity — as international core crimes — is essential because it assumes that, in the new paradigm of relations between Justice and Peace, such conducts thus typified can no longer be pardoned nor

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ports since 2010; specifically, the *Seventeenth Quarterly Report of the Secretary General to the Permanent Council on the Mission to Support the Peace Process in Colombia* (MAPP/OAS), doc. CP/doc.4823/13, of 19 February 2013, at 8 and 9; and *Twenty-First Semi-Annual Report of the Secretary General to the Permanent Council on the Mission to Support the Peace Process in Colombia* (MAPP/OAS), CP/doc.5194/16, of 27 May 2016, at 7 and 33.
For an analysis of this issue, see: S. Granada, J. A. Restrepo & A. Tobón García, "Neoparamilitarismo en Colombia: una herramienta conceptual para la interpretación de dinámicas recientes del conflicto armado colombiano", en *Guerra y violencias en Colombia. Herramientas e interpretaciones*, J. A. Restrepo & D. Aponte (ed.), Pontifica universidad Javeriana, Bogotá, 2009; M. Romero (ed.), *Parapolítica. La ruta de la expansión paramilitar y los acuerdos políticos*, Corporación Nuevo Arco Iris, Bogotá, 2007; M. Romero & A. Arias, "Bandas criminales, seguridad democrática y corrupción", 14 *Arcanos* 40-51 (diciembre 2008); K. Theidon, "Transitional Subjects: The Disarmament, Demobilization and Reintegration of Former Combatants in Colombia", 1 *The International Journal of Transitional Justice* 66-90 (2007); F. Vacas Fernández, *El conflicto de Colombia en perspectiva internacional…*, *supra* n. 13, pp. 168-182.

54 SJP, Chamber for the Recognition of Truth, Responsibility, Determination of Facts and Conduct: *Order no. 19 of 26 January 2021, Case no. 1 'Hostage-taking and other severe deprivations of liberty committed by the FARC-EP'*, a matter relating to determining the facts and conduct attributable to former members of the FARC-EP Secretariat.

55 SJP, Chamber for the Recognition of Truth, Responsibility, Determination of Facts and Conduct: *Order no. 033 of 12 February 2021, Case no. 3 To make public the internal prioritization of Case 03 addressing 'Deaths unlawfully presented as casualties by State agents'*.

56 SJP, Chamber for the Recognition of Truth, Responsibility, Determination of Facts and Conduct: *Order no. 27 of 26 February 2019, Case opening*.

statutes of limitation applied; hence, the relevance of classifying them as such, and, as it concerns us here — besides the very much relevant issue of potentially qualifying certain terrorist acts as crimes against humanity, which transcends the framework of our current analysis focused on IHL[57] —, of identifying which conducts can be defined as acts of terror against the civilian population in the context of an armed conflict and, consequently, for the reasons specified in the previous section, qualifying them as war crimes.

As explained in the *Interim Reports on the Situation in Colombia*, on the one hand, the Office of the Prosecutor of the ICC notes that, in relation to State forces — police and the military-, after referring to so-called 'false positives', there is sufficient grounds to believe that war crimes have been committed, an affirmation further confirmed by the rulings of the SJP:

> "The available information further provides a reasonable basis to believe that in the period from 1 November 2009 to date, members of State forces have committed at a minimum the following acts constituting war crimes: murder pursuant to article 8(2)(c)(i) and attacking civilians pursuant to article 8(2)(e)(i); torture and cruel treatment pursuant to article 8(2)(c)(i) and outrages upon personal dignity pursuant to article 8(2)(c)(ii); rape and other forms of sexual violence pursuant to article 8(2)(e)(vi)[58]".

On the other hand, with regard to alleged war crimes committed by non-State actors, the Office of the Prosecutor concludes:

> "There is also a reasonable basis to believe that from 1 November 2009 to date, at a minimum the following acts constituting war crimes have been committed by the FARC and the ELN: murder pursuant to article 8(2)(c)(i) and attacking civilians pursuant to article 8(2)(e)(i); torture and cruel treatment pursuant to article 8(2)(c)(i) and outrages upon personal dignity pursuant to article 8(2)(c)(ii); taking of hostages pursuant to article 8(2)(c)(iii); rape and other forms of sexual violence pursuant to article 8(2)(e)(vi); conscripting, enlisting and using children to participate actively in hostilities pursuant to article 8(2)(e)(vii)."[59]
>
> Therefore, in the words of the Office of the Prosecutor:
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> "The foregoing analysis indicates that the required contextual elements and underlying acts are met for conduct by each of the aforementioned parties to qualify as crimes against humanity or war crimes. The Office has therefore concluded that

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[57] For an analysis of the qualification of certain terrorist acts as crimes against humanity, see: M. C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, The Hague, 2ª ed., 1999; A. Cassese, "Terrorism as an International Crime", in *Enforcing International Law Norms Against Terrorism*, A. Bianchi (ed.), Oxford, Hart, 2004, pp. 213-225; A. Gioia, "Terrorismo internazionale, crimini di guerra e crimini contro l'umanitá", *Revista di Diritto Internazionale*, 1/2004, pp. 5-69; Y. Jurovics, *Réflexions sur la spécificité du crime contre l'humanité*, LGDJ, Paris, 2002 ; Ph. Kirch, "Terrorisme, crimes contre l'humanité et Court pénale internationale", en *Terrorisme et responsabilité pénale internationale*, Livre Noir, Paris, 2002, pp. 111-123; M. M. Martín Martínez, "La configuración del principio de legalidad penal en el Derecho Internacional contemporáneo", in *Nuevos desafíos del Derecho Penal Internacional. Terrorismo, crímenes internacionales y derechos fundamentales*, A. Cuerda Riezu, & F. Jiménez García (coord.), Tecnos, Madrid, 2009, pp. 371-390; F. Pignatelli y Meca, "El terrorismo como crimen de lesa humanidad y crimen de guerra en el Estatuto de Roma de la Corte Penal Internacional", in *Lucha contra el terrorismo y Derecho Internacional*, Cuadernos de Estrategia, nº 133, Ministerio de Defensa, Madrid, 2006, pp. 207-249; F. Vacas Fernández, *El terrorismo como crimen internacional…*, *supra* n. 5, pp. 221-228.

[58] ICC, Office of the Prosecutor. *Situation in Colombia. Interim Report,* November 2012, par. 10.

[59] *Ibid*, par. 6. See, for an in-depth analysis, par. 132-147.

> there is a reasonable basis to believe that crimes against humanity and war crimes have been committed within the context of the situation."[60]

In this respect, we must make the following considerations, in reference to, respectively, the temporal and material jurisdiction of the Court, on one hand, and the issue of authorship of the alleged war crimes committed during the Colombian armed conflict, on the other.

Regarding jurisdiction *ratione temporis*, the Rome Statute was adopted on 17 July 1998. Only months later, on 10 December 1998, Colombian president, Andrés Pastrana, signed it, and it was ratified on 5 August 2002, just two months after its general entry into force[61] and only two days before Álvaro Uribe Vélez assumed the office of the President; thus, it entered into force in Colombia on 1 November 2002. Along with the importance of this last date, in applying the principle of criminal non-retroactivity contained in Article 11 (points 1 and 2),[62] it is important to determine the Court's temporal jurisdiction in relation to Colombia in order to indicate that, in accordance with Article 124 of the Rome Statute,[63] it declared, when granting consent, to be bound by the treaty though, for a period of seven years (the maximum permitted by this article), it would not accept the jurisdiction of the Court with respect to war crimes.

Beyond the significance of the content of that declaration[64] political significance, undoubtedly, but also legal significance as regards the debate about conceptualizing the situation in Colombia as an armed conflict and thus applying IHL what is relevant here is the fact that the ICC will only have temporary jurisdiction over Colombia in relation to the war crimes that may have been committed from 1 November 2009.

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60 *Ibid*, par. 152.

61 Previously, in accordance with the Colombian constitutional system, the National Congress approved it with Law 742 of 5 June 2002 and the Constitutional Court endorsed its constitutionality with ruling C-578/02, of 30 July 2002.

62 According to article 11, paragraph 2:
"If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3."

63 The article establishes:
"Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 (war crimes) when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1."

64 Especially if i) Colombia's entire declaration, which contains six sections, is considered (Article 124 is referred to in the fifth section), and ii) if the provisions of the first paragraph are read:
"None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia."
As an Amnesty International report pointed out, '[I]t appears that the Colombian government is seeking to ensure that the Prosecutor of the Court does not interfere with its decision to grant impunity to human rights violators by presenting their crimes as political in nature and, therefore, outside of the Prosecutor's competence. However, as these crimes constitute war crimes and crimes against humanity, labeling them as political crimes will not exempt them from international criminal responsibility." Amnesty International, *ICC: Declarations amounting to prohibited reservations to the Rome Statute*, AI: IOR 40/032/2005, 2005, at 20.

As regards jurisdiction *ratione materie*, the Office of the Prosecutor of the ICC considers that "in the context of the non-international armed conflict in Colombia, pursuant to Article 8 of the Statute", there is reasonable basis to believe that the following war crimes have been committed:

> "[M]urder under article 8(2)(c)(i);
>
> attacks against civilians under article 8(2)(e)(i);
>
> torture and cruel treatment under article 8(2)(c)(i);
>
> outrages upon personal dignity under article 8(2)(c))(ii);
>
> taking of hostages under article 8(2)(c)(iii);
>
> rape and other forms of sexual violence under article 8(2)(e)(vi);
>
> and conscripting, enlisting and using children to participate actively in hostilities under article 8(2)(e)(vii) of the Statute."[65]

At least the first six involve the commission of acts of violence that, if committed with "the primary purpose of [...spreading] terror among the civilian population", we may conclude that, as argued in the previous section, they can be classified as war crimes consisting of terrorist acts, as established by Article 13.2 of Protocol II of the Geneva Conventions, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes", as cited in Article 8.1 of the Rome Statute. This issue, when examining victims' data referred to in the *General Report of the Historical Memory Group,* becomes more than evident.

Finally, with regard to the alleged authorship, it is important to note that the Office of the Prosecutor's 2012 report discussed the commission of alleged war crimes by members of the police and the military, on the one hand, and by the FARC and ELN guerilla groups, on the other, but not by paramilitaries, because as of 1 November 2009, the date from which the Court has jurisdiction to prosecute these types of crimes in Colombia, the paramilitary groups, as party to the armed conflict, had been demobilized as a result of their agreements with the Uribe government.

However, as we know, this has never implied their disappearance, far from it. The Office of the Prosecutor itself maintained in its 2012 report that it continues to analyze whether "paramilitary successor groups' or 'new illegal armed groups" would qualify as organized armed groups that are party to the armed conflict or if they meet the necessary policy requirements for an organization to commit crimes against humanity.[66] Finally, in its 2019 report it dedicated a substantial section specifically to "Proceedings relating to the promotion and expansion of paramilitary groups", which states:

> "The information made available to the Office indicates that, until October 2019, the AGO was conducting a total of 2,047 cases against civilians or State agents not members of the public forces for crimes related to the promotion, support or

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65 ICC, The Office of the Prosecutor, *Report on Preliminary Examination Activities (2019), Situation in Colombia*, 5 December 2019, par. 91.
For an in-depth analysis of each, see ICC, *Situation in Colombia. Interim Report, 2012...*, *supra* n. 15, par. 132-153.

66 See *ibid*, par. 129-131.

> financing of illegal armed groups. Of these, 1,253 cases reportedly relate to crimes allegedly committed by civilians or businessmen ('civil third parties') and 794 to State agents non-combatants".[67]

FINAL CONSIDERATIONS

As we have seen, the relationship between terrorism and IHL is broad and complex, both theoretically and practically when applied to a specific situation. Nevertheless, analyzing the subject from an IHL perspective helps us resolve some of the more delicate issues resulting from the absence of a definition for "terrorism" in international law. It allows us to extract the matter of the States' discretionality, if not arbitrariness, when applying the political opportunity principle, to situate it on a legal plane under the application of the legality and more specifically, the criminal legality principle, with all that implies from the point of view of legal certainty and respect for the most basic human rights of both the alleged perpetrators and the victims.

If this is so in general theory, it is even more so in its application to specific armed conflicts and, particularly in Colombia. The scope, severity, and extent of the violence carried out by all parties to the conflict, the number of victims (especially civilians) and the violence of the methods applied extreme, widespread, and part of a plan or policy to achieve ends prohibited by IHL, namely, terrorizing the civilian population leave no doubt that in the Colombian conflict widespread and systematic acts of terror have been committed against the civilian population by all parties State forces, paramilitaries, and guerillas constituting the commission of war crimes under the terms of conventional IHL (to wit, Protocol II of the Geneva Convention) and the Rome Statute of the International Criminal Court, as we have seen.

Now then, international law is also tasked with delimiting with legal certainty the path to peace, legitimizing actions that are in accordance with the law and delegitimizing acts that contravene it and those who perpetrate them. Therefore, the new legal-political paradigm that stems from the establishment of a constructive relationship based on the complementarity of the goals of Justice and Peace, and shifting focus to the victims, endowing them with true legal status the content of which are rights that involve the corresponding legal obligations for the States[68] , necessarily restricts the parties' room to maneuver in the negotiation of any peace process that leads to a transitional period, now one of transitional justice in the proper sense.

Doubtless this implies limiting the discretionality of power through law, not only through the confrontation of the different powers struggling to reach a new political equilibrium, characteristic of *Realpolitik* logic, wherein justice and the victims (the

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67 ICC, The Office of the Prosecutor, *Report on Preliminary Examination Activities (2019)…*, *supra* n. 64, par. 96.

68 See, among others, M. Ch. Bassiouni, "International Recognition of Victims' Rights", 6 *Human Rights Law Review* 203-279 (2006); J. Doak, *Victim's Rights, Human Rights and Criminal Justice. Reconceiving the Role of Third Parties*, Hart Publishing, Oxford and Portland, 2008; J. Dorado Porras (ed.), *Terrorismo, Justicia Transicional y Grupos Vulnerables*, Dykinson, Madrid, 2014; F. Vacas Fernández, *El conflicto de Colombia en perspectiva internacional …*, *supra* n. 11; specifically Chapter 7: 'La Situación actual en Derecho Internacional de las relaciones entre Justicia y Paz y los derechos de las víctimas', pp. 351-390.

latter as a fundamental part of the former) were simply ignored, when not sacrificed. It also implies recognizing that in transitional justice, we are invariably faced with a complex problem, wherein instead a scenario of all or nothing, and the exclusion of Justice and victims' rights- balance and complementarity between Peace and Justice must prevail to arrive at an equally complex answer that is never theoretical or general, but specific for each concrete case. As the Secretary General asserts, "The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law."[69]

Achieving complementarity in a specific case by balancing interests, objectives, and principles involves negotiating and comparing the positions and degrees of power of those who are party to the conflict. All of this is situated in the realm of politics, of political bargaining, and therefore, necessitates room to manoeuver and no small measure of discretionality. Of course, today that political playing field is not an anarchic society *state of nature*- subject to the mandates of the mightiest; rather, it is necessarily delimited by the legal framework that imposes the principle of legality, both internationally and domestically.

This legal framework, which is based on the acceptance of and respect for the general limits imposed by the very concept of transitional justice and victims' rights, is specified in the minimum essential content of the rights to truth, justice, and reparations, without which all would be devoid of content. As Deputy Prosecutor of the ICC, James STEWART, noted on a visit to Colombia:

> "[T]he relationship between peace and justice is a settled issue under the Rome Statute.
>
> Once a State joins the Rome Statute system, it accepts that justice is an integral part of conflict resolution and the creation of a sustainable peace.
>
> The issue for the ICC Prosecutor, but most importantly for State Parties to the Rome Statute, is how to meet the requirements of justice under the Statute while achieving lasting peace and stability."[70]

The Special Jurisdiction for Peace seems to strike a balance within the legal framework established by international law. As stated in the latest *Report on Preliminary Examination Activities*, "restating the Prosecutor's support for the SJP, as a key transitional justice mechanism adopted to ensure accountability as part of the implementation of the peace agreement."[71]

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69 Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616, 3 August 2004, par. 25.

70 J. STEWART, *Transitional Justice in Colombia and the Role of the International Criminal Court*, ICC, The Office of the Prosecutor, Bogotá, 13 May 2015, at 1. Emphasis added.

71 ICC, The Office of the Prosecutor, *Report on Preliminary Examination Activities (2019)…*, *supra* n. 64, par. 130.