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International Criminal Law Sources in the Jurisprudence of the Inter-American Court of Human Rights
Some Comparative Considerations

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I. INTRODUCTION

The Latin-American scenario was characterized by the presence of several protracted and intense internal armed conflicts as well as widespread and systematic human rights violations committed by dictatorships in peace time. Even though democratically elected governments have replaced those dictatorial regimes and the internal armed conflicts -with the exception of the Colombian case- came to an end, various Latin-American countries are still dealing with long-term processes of transitional justice. In any case, the role played by the Inter-American Court of Human Rights ("Court" or "Inter-Am. Ct. H.R.") has been particularly relevant since most of the grave violations have come from *de iure* or *de facto* State agents.

Accordingly, in the first part of this paper, the analysis will concern the manner in which the Court has used the sources of international criminal law i.e. treaty law, customary law and general principles of law in order to interpret the provisions of the regional human rights instruments when dealing with cases of serious violations of human rights that took place in the context of internal armed conflicts or peace time. This approach is most pertinent considering that those grave violations have been qualified as war crimes, crimes against humanity and genocide. The second part is devoted to a comparative approach between the jurisprudence of the Court and the developments of other internationalized courts and tribunals. The objective of this second point is to assess, on the one hand, how the Court's remarks have been taken into account beyond the regional scope and, on the other hand, the incorporation of the relevant case-law of other internationalized tribunals and courts in the Court's legal fundaments when deciding cases.

II. DEALING WITH INTERNATIONAL CRIMINAL LAW

Almonacid Arellano v. Chile provides a good example of how the Court has been using the sources of international criminal law to interpret the articles of the American Convention on Human Rights (ACHR)[1] when dealing with serious human rights violations. At this point, it is pertinent to mention that there was not an internal armed conflict in the Chilean case. However, the Court findings, based on international criminal law sources, are of the utmost importance insofar as international crimes have been committed in the numerous internal armed conflicts in the region. Thus, in that judgment, the Court analyzed, as a crime against humanity, the extrajudicial execution

of Mr. Arellano which took place within a widespread and systematic pattern of human rights violations against the civilian population, committed during the Pinochet's dictatorship by Chilean State agents.[2] Through the assessment of the evidence presented, the Court considered that the first five months of the *de facto* government were the most repressive, as approximately fifty seven percent of all deaths and enforced disappearances happened over that period, including the specific case of Mr. Arellano.[3]

After evaluating the case law of international criminal tribunals and other sources such as treaties and resolutions of international organizations that have characterized the objective and subjective elements of the crime against humanity since the end of the Second World War,[4] the Court concluded that:

[….] there is sufficient evidence to conclude that in 1973, the year in which Mr. Almonacid-Arellano died, the commission of crimes against humanity, including murder committed in the course of a generalized or systematic attack against certain sectors of the civil population, was in violation of a binding rule of international law. Said prohibition to commit crimes against humanity is a *ius cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law.[5]

With regard to the atrocities committed during the internal armed conflict in Guatemala and specifically genocide, *Plan de Sánchez v. Guatemala*[6] shed light on the use of international criminal law by the Court when interpreting violations of the ACHR. Thus, it is important to remember, as the Historical Clarification Commission of Guatemala found, that acts of genocide took place against members of the *Maya-Ixil*, *Maya-Achi*, *Maya-k'iche'*, *Maya-Chuj* and *Maya-q'anjob'al* peoples especially from 1981 to 1983 as part of a State policy.[7] Therefore, the issue of genocide was mentioned both by the Inter-American Commission on Human Rights and by the representatives of the victims and their next of relatives in the above-mentioned case. Nevertheless, the Court reminded them that it has only competence to determine violations of the ACHR and of other instruments in force within the Inter-American system for the protection of human rights that provide the Court with the respective jurisdiction. Having said that, however the Court notes:

[…] facts such as those stated, which gravely affected the members of the Maya Achí people in their identity and values and that took place within a pattern of massacres, constitute an aggravated impact that entails international responsibility of the State, which this Court will take into account when it decides on reparations.[8]

In addition, judge Cançado-Trindade in his separate opinion offers a further explanation. Even though Cançado-Trindade also recognizes the lack of jurisdiction of the Court to establish violations of the Convention on the Prevention and Punishment of the Crime of Genocide, he formulates a number of observations. Firstly, he establishes that the jurisdictional issue and the substantive issue of international responsibility are of different nature. Consequently, the lack of competence *ratione materiae* of the Court does not exempt the defendant State from its international responsibility for violating the rights protected by the ACHR and other humanitarian treaties to which Guatemala is a party.[9] Secondly, not only does Cançado-Trindade support his reasoning basing himself on the existence of conventional rules, but he also makes reference to the existence of a principle of humanity.[10] Thus, the universal condemnation of serious violations of human rights which can constitute the categories of genocide, crimes against humanity and war crimes

[…] was already engraved on the human conscience a long time before they were typified or codified at the international level, either in the 1948 Convention on the Prevention and Punishment of Genocide, or in other human rights or international humanitarian law treaties. Nowadays, international crimes are condemned by both general and treaty-based international law.[11]

As the last part of this section, the intense relationship between State responsibility that is determined by the Court, and the international individual responsibility for grave human rights violations will be briefly examined. It is commonly recognized that the latter is one of the core institutions of the field of international criminal law. Whereas the international human rights courts such as the Inter-Am. Ct. H.R are not competent to determine international criminal individual liability, the international criminal tribunals cannot determine State responsibility. In spite of that, there is a complementarity between both types of responsibility that are triggered by the same set of facts.[12] In this scenario, for instance, in *Myrna Mack Chang v. Guatemala*[13] and *Plan de Sánchez v. Guatemala*, the crimes were carried out following a plan that came from the highest level of the State authorities. These authorities used the State structure itself to commit crimes as well as to deny the facts, to obstruct access to justice for victims and hiding the truth, thus generating an aggravated responsibility due to serious breaches of obligations under peremptory norms of general international law.[14]

III. SOME COMPARATIVE CONSIDERATIONS

A. Influence of the Court's jurisprudence beyond the Inter-American System of Protection of Human Rights

Unlike the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), within the framework of the International Criminal Court ("ICC") the victims have the possibility to take part in the proceedings provided that they have been granted with the respective legal status. Thus, the Pre-Trial Chamber I of the ICC, by analyzing the four criteria to grant this status, which are contained in Rule 85 of the Rules of Evidence and Procedure of the Court,[15] has made reference to the relevant findings of the Court.

In principle, when the Pre-Trial Chamber I of the ICC asks itself whether it can allow the participation of the victims in the investigation stage, the Chamber comes to the conclusion that it is possible, based on what the Court decided in *Blake v. Guatemala* in application of article 8 of the ACHR (right to a fair trial), as well as on the jurisprudence of the European Court of Human Rights. As the Pre-Trial Chamber I reminds us, in *Blake*, the Court establishes that victims of human rights violations are entitled to participate in the criminal proceedings, even in the investigation stage and prior to confirmation of the charges.[16] In the identification of the reason behind this statement, the Pre-Trial Chamber I relies on *Villagrán-Morales v. Guatemala* before the Court inasmuch as "[the objective is] to have the facts clarified and the perpetrators prosecuted, and are entitled to request reparations for the harm suffered."[17]

The Pre-Trial Chamber I, in its assessment as to which concepts should be considered as part of the reparations, points out that the Court has repeatedly awarded reparations for harm due to emotional suffering or financial loss.[18] Thus, the Court's judgments in *Aloebotoe v. Suriname*[19] and *Neira Alegría v. Perú*[20] are mentioned as examples of the former whilst the judgment in *El Amparo v. Venezuela*[21] is cited as example of the latter. The Chamber also added that the Court granted reparations for harm due to emotional or physical suffering[22] picking up *Neira Alegría v. Perú*[23] and

Garrido and Baigorria v. Argentina.[24] In addition, paraphrasing the Court's judgment in *Velásquez Rodríguez v. Honduras*, the Pre-Trial Chamber I spells out that prolonged detention in specific circumstances is detrimental to physical and moral integrity, and therefore a form of harm.[25]

The Special Court for Sierra Leone has also made reference to the Court's jurisprudence. Thus, in order to evaluate the legality of the amnesties for perpetrators of war crimes and crimes against humanity, granted thanks to the so-called *Lomé* agreement, the Appeals Chamber of this internationalized tribunal in *Prosecutor v. Moinina Fofana and Allieu Kondewa* cited several sources including cases before the Inter-American Commission of Human Rights related to internal armed conflicts in countries such as El Salvador.[26] In the specific context of the Court's case law, the *Barrios Altos* case[27] was mentioned as example of the tendency in international law with regard to the prohibition of (self) amnesty laws concerning core crimes.[28]

Unlike the Court, the Special Court for Sierra Leone, in a decision in *Prosecutor v. Kallon and Kamara,* has considered that there is not yet a crystallized international customary rule which obliges a State to refrain from passing amnesty laws for core international crimes. However, the Special Court for Sierra Leone's approach coincides with the Court's opinion that "the amnesty granted by Sierra Leone cannot cover crimes under international law that are the subject of universal jurisdiction."[29]

It is important to remember that it was within the Inter-American system of protection of human rights that an international treaty on enforced disappearance of persons was created for the first time. The Inter-American Convention on the Forced Disappearance of Persons is a precise reflection of the Court's case law, which was formed through the examination of violations of the relevant provisions contained in the ACHR dealing with the crime of enforced disappearances, a crime that characterized armed conflict situations as well as dictatorial regimes in Latin-America. The seminal case *Velasquez Rodriguez v. Honduras* as well as *La Cantuta v. Peru*, are clear examples of it. A Trial Chamber of the ICTY has made an explicit reference to the above-mentioned cases in its judgment in *Prosecutor v. Kupreskic*[30] in order to interpret the vague clause of "other inhumane acts" contained as part of the catalogue of crimes against humanity in the article 5.i. of its Statute. Consequently, the influence of the Court's case law in this realm has followed a two-step process. First, the findings of the Court were consolidated through the Inter-American convention. Second, not only have international tribunals such as the ICTY, used the sources coming from the Inter-American system of protection, but, at the international level, the U.N. International Convention for the protection of all persons from enforced disappearance and the ICC Statute have been drafted under the influence of this regional system. This last instrument has criminalized the enforced disappearance of persons as a crime against humanity in its article 7.1.i. Therefore, it should be borne in mind that the legal concern with this crime was initiated by the Court's jurisprudence.

Finally, the Inter-American Commission on Human Rights in *Raquel Mejia v. Peru* was the first international body that qualified rape as torture.[31] Two years later, a Trial Chamber of the ICTY in *Prosecutor v. Furundzija* confirmed such conclusion.[32]

B. Influence of the jurisprudence of international courts on the Court's case law

In order to illustrate this point, three cases will be used. Thus, in the already cited case *Almonacid Arellano v. Chile*, when the Court mentions that a single act of murder committed in a context of widespread or systematic attacks against civilians suffices for a crime against humanity to arise,[33] it uses the reasoning put forward by the ICTY in,

inter alia, *Prosecutor v. Tadic.*[34] In the same judgment, the Court based the customary nature of the prohibition of the crimes against humanity and therefore its constitutive elements,[35] on the findings of the International Military Tribunal for the trial of the Major War Criminals of Nuremberg.[36] A similar approach was adopted by taking into consideration the judgment of the European Court of Human Rights in *Kolk and Kislyiy v. Estonia*.[37] Finally, as part of the legal grounds used to deny the possibility to grant amnesty for crimes against humanity, the Court refers to the judgment in *Prosecutor v. Erdemovic* issued by a Trial Chamber of the ICTY.[38]

Secondly, in the judgment of *Plan de Sanchez v. Guatemala*, judge Cançado-Trindade in his separate opinion, so as to identify the victims of genocide, crimes against humanity and war crimes, considers[39] the jurisprudence of the ICTR in *Prosecutor v. Akayesu*,[40] *Prosecutor v. Kambanda*[41] and, *Prosecutor v. Serushago.*[42] Cançado-Trindade in his analysis also refers to the judgment in the so-called *Celebici* case before the ICTY.[43] Using this decision, he emphasizes that both international human rights law and international humanitarian law share a common concern for the safeguard of humanity such that the principle of humanity would imply three dimensions.[44] A first dimension is determined by the underlying principle of the prohibition of inhuman treatment contained in article 3 common to the four 1949 Geneva Conventions.[45] A second dimension involves the humanity as a whole and, a third qualifies a specific quality of humaneness.[46] Once again, this assessment relies on the *Celibi* case [47] and *Prosecutor v. Blaskic*[48] both part of the case law of the ICTY, as Cançado-Trindade points out.[49]

Sexual violence has been used as a weapon during hostilities in the numerous armed conflicts around the world, and Latin-America has not been the exception, as emerged from the jurisprudence of the Court. The Court's judgment in *Miguel Castro-Castro Prison v. Peru,* paraphrased the judgment of the ICTR in *Prosecutor v. Akayesu*[50] to characterize sexual violence as compounded of "actions with a sexual nature committed with a person without their consent, which besides including the physical invasion of the human body, may include acts that do not imply penetration or even any physical contact whatsoever."[51] Having said that, the Court makes it explicit that in line with the legal criterion predominant in international criminal law jurisprudence,[52] rape does not necessarily involve a non-consensual vaginal relationship insofar as that crime can be committed through other ways.[53] Finally, following the findings of the European Court of Human Rights in the judgment in *Aydin v. Turkey*, the Court highlights that the rape of a detainee perpetrated by a State agent is especially gross and reprehensible due to the authority's abuse of power and the victim's vulnerability.[54]

V. FINAL REFLECTION

The Inter-American System of protection of human rights, in general, and the Court, in particular, have been challenged by the commission of serious violations of human rights that fit the categories of war crimes (relation to an armed conflict), crimes against humanity (widespread or systematic attack against civilians) or even genocide (intention to destroy a protected group). The Court has come up with mechanisms and strategies to deal with such a difficult scenario over the last two decades. Although this is a long-term process, the result has so far been positive. Thus, the Court has revisited its conventional human rights provisions in light of international criminal law, generating reciprocal interchange of legal approaches with other international courts. In a nutshell, the Court has evidenced its importance not just dealing with ongoing armed conflicts or dictatorships in peace time, but also in several transitional justice scenarios.

(Footnotes)

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1 *See* ACHR, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, at 1 (Nov. 22, 1969).

2 Almonacid-Arellano et al. v. Chile, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 104 (Sept. 26, 2006) [hereinafter *Almonacid-Arellano case*].

3 *Id.* ¶ 103.

4 *Id.* ¶ ¶ 94-104.

5 *Id.* ¶ 99.

6 Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 105, (April 29, 2004) [hereinafter *Plan de Sánchez Massacre case*].

7 *Id.* ¶ 5 (Separate Opinion of Judge Antonio A. Cançado-Trindade).

8 *See Plan de Sánchez Massacre case*, *supra* note 6, ¶ 51.

9 *Id.* ¶ 7 (Separate Opinion of Judge Antonio A. Cançado-Trindade).

10 *Id*, ¶ ¶ 9-10.

11 *Id*, ¶ 13.

12 For further analysis *see* Antonio A. Cançado-Trindade, *Complementarity between state responsibility and individual responsibility for grave violations of human rights: the crime of state revisited*, *in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 253-269 (Antonio Ragazzi ed., 2005).

13 Myrna Mack-Chang v. Guatemala. Inter-Am. Ct. H.R. (ser. C) No. 105, (Nov. 25, 2003).

14 *See* International Law Commission, *Report of the International Law Commission on the work of its Fifty-Third Session*, May 6-July 26, 2001, U.N.GAOR, 53 th Sess., Supp. No. 10, U.N. Doc. A/51/10 (2001). 2001 Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session, part II, chapter III, articles 40 and 41.

15 Rules of Procedure and Evidence, International Criminal Court, ICC–ASP/1/3, Rule 85.a.

16 Blake v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 97 (Jan. 24, 1998).

17 Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 53, footnote 54 (Jan. 17, 2006), public redacted version *available at* http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf [hereinafter Situation in the Democratic Republic of the Congo]. The ICC Pre-Trial Chamber I makes reference to: Case of the "Street Children" (Villagrán-Morales et al. v. Guatemala), Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 227.

18 Situation in the Democratic Republic of the Congo, *supra* note 17, ¶ 116.

19 Aloeboetoe et al. v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 15, (Sept. 10, 1993). *See Id.* ¶ 52, footnote 53.

20 Neira-Alegría et al. v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 29, (Sept. 19, 1996). *See* Situation in the Democratic Republic of the Congo, *supra* note 17, ¶ 57.

21 El Amparo v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 28, (Sept 14, 1996), ¶¶ 28-63.

22 Situation in the Democratic Republic of the Congo, *supra* note 17, ¶ 146.

23 *Id.* ¶ 56.

24 *Id.* ¶ 49.

25 *Id.* ¶ 146.

26 Prosecutor v. Moinina Fofana and Allieu Kondewa, Cases Nos. SCSL-04-14-T-128-7347, SCSL-04-14-T-128-7363, Decision on lack of jurisdiction / abuse of process: amnesty provided by the Lomé Accord, ¶ ¶ 36-38 (May 25, 2004) [hereinafter Moinina Fofana and Allieu Kondewa case].

27 Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75, (March 14, 2001).

28 *Moinina Fofana and Allieu Kondewa case*, *supra* note 26, ¶ 44.

29 Prosecutor v. Kallon and Kamara, Case No. SCSL-04-16-PT-033, Decision on challenge to jurisdiction: Lomé Accord Amnesty, ¶ 71(Mar. 13, 2004).

30 Prosecutor v. Kupreški et al., Case No. IT-95-16, Sentencing Judgment, ¶ ¶ 563-566 (Jan. 14, 2000).

31 Raquel Martí de Mejía v. Perú, Case 10.970, Inter-Am. C.H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7, at 182-186 (1996).

32 Prosecutor v. Furundžija, Case No. IT-95-17/1, Sentencing Judgment, ¶ 163 (Dec. 10, 1998) [hereinafter Furundžija case].

33 *Almonacid-Arellano case*, *supra* note 2, ¶ 96.

[34] Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 649 (May 7, 1997). This was subsequently confirmed by the same court in Prosecutor v. Kupreskic et al, Case No. IT-95-16-T, Judgment, ¶ 550 (Jan. 14, 2000) and Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgment, ¶ 178 (Feb. 26, 2001).

[35] *Almonacid-Arellano case*, *supra* note 1, ¶ 97.

[36] France et al v. Goering et al, International Military Tribunal for the trial of the Major War Criminals of Nuremberg, Judgment, at 218 (Sep. 30-Oct. 1 1946).

[37] Kolk and Kislyiy v. Estonia, Apps. No. 23052/04 and No. 24018/04, Judgment, (Jan 17, 2006).

[38] Prosecutor v. Erdemovic, Case No. IT-96-22-T, Sentencing Judgment, ¶ 28 (Nov. 29, 1996).

[39] *Plan de Sánchez Massacre case*, *supra* note 6, ¶ 12 (Separate Opinion of Judge Antonio A. Cançado Trindade).

[40] Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4, Sentencing Judgment, ¶ 565 (Sept. 2, 1998) [hereinafter *Akayesu case*].

[41] Prosecutor v. Jean Kambanda, Case No. ICTR-97-23, Judgment, ¶¶ 15-16 (Sept. 4, 1998).

[42] Prosecutor v. Serushago, Case No. ICTR-98-39, Judgment, ¶ 15 (Sept. 5, 1999).

[43] Prosecutor v. Mucic et al, Case No. IT-95-17/1, Judgment, ¶ 149 (Nov. 16, 1998).

[44] *Plan de Sánchez Massacre case*, *supra* note 5, ¶ 19 (Separate Opinion of Judge Antonio A. Cançado-Trindade).

[45] *Id.* ¶ 20.

[46] *Id.*

[47] Prosecutor v. Mucic et al, Case No. IT-95-17/1, Judgment, ¶ 154 (Nov. 16, 1998).

[48] Prosecutor v. Blaški, Case No. IT-95-14, Judgment, ¶ 543 (Mar, 3, 2000).

[49] *Plan de Sánchez Massacre*, *supra* note 5, ¶ 20 (Separate Opinion of Judge Antonio A. Cançado-Trindade).

[50] *Akayesu case*, *supra* note 41, ¶ 688.

[51] Miguel Castro-Castro Prison v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 306 (Nov. 25, 2006) [hereinafter *Miguel Castro-Castro Prison case*].

[52] Although the IACHR did not mention a specific reference, cfr. *Furundžija case*, *supra* note 33, ¶ ¶ 174 et seq.

[53] *Miguel Castro-Castro Prison case*, *supra* note 52, ¶ 310.

[54] *Id.* ¶ 311.